A NEW
PANDECT
OF
Roman CIVIL LAW,
AS

Anciently eſtabliſhed in that EMPIRE; and now received and practiſed in moſt *European* Nations:

WITH

Many uſeful OBSERVATIONS thereon; ſhewing, Wherein that Law differs from the *Municipal Laws* of GREAT-BRITAIN, from the *Canon Law* in general, and from that Part of it now in Uſe here with us in ENGLAND.

Whereunto is prefix'd,

By Way of INTRODUCTION,

A

PRELIMINARY DISCOURSE, touching the Riſe and Progreſs of the CIVIL LAW, from the moſt early Times of the *Roman* Empire: Wherein is alſo comprized a particular Account of the *Books* themſelves containing this Law, the Names of the *Authors* and *Compilers* of them, the ſeveral *Editions*, and the beſt *Commentators* thereon.

By JOHN AYLIFFE, *LL. D.*
late Fellow of New College, OXON.

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M.DCC.XXXIV.

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MVSEVM
BRITANNICVM

To the Right Honourable

PHILIP

Earl of *CHESTERFIELD*,

Baron *STANHOPE* of *SHELFORD*,

One of His Majeſty's moſt Honourable PRIVY COUNCIL,

AND

Knight of the moſt Noble Order of the GARTER.

My LORD,

AFTER upwards of Thirty Years Study, and a painful Induſtry, in compiling A NEW PANDECT or *Complete Body* of the *Roman* CIVIL LAW; the Firſt Volume of this Undertaking craves Leave to appear in the World under the Patronage and Protection of your Lordſhip, who in your late Honourable Employment, as His Majeſty's Ambaſſador Extraordinary to the *States General* of the *United Provinces*, have gain'd ſo much Glory to your Self, and done ſo much Honour to your Country, that your Lordſhip, in the Age whereof you are ſo great an Ornament, has very few of your Country-men to vie with you, in the Character of a conſummate Miniſter.

Nor was it poſſible that your Lordſhip ſhould be able, notwithſtanding your Knowledge of Men and Letters, and your extraordinary natural Talents, to make ſo ſhining a Figure Abroad, or perform, to ſo much Advantage, the Functions of your honourable Employment, had you not ſuperadded to your other great Endowments a thorough Application to the Study of

the *Civil Law*; which, at the ſame time that it enabled your Lordſhip to excell all your Compatriots, ſet you on a Foot, in Foreign Courts, with the ableſt Miniſters of Princes, whoſe Glory and Advantage it is to form themſelves on the Precepts of this renowned Law.

Your Lordſhip need not be told, That a Perſon, who, by his Birth and Fortune, is plac'd in ſuch a high Point of Light, as makes him born, as one may ſay, to fill the principal Poſts of the Commonwealth, muſt not content himſelf with barely knowing the Laws of *his own Country:* He ought likewiſe to make himſelf acquainted with the *Laws of Nations*, with which he may expect often to have to do, in a Publick Station, whether his Employment falls in the Buſineſs of Treaties and Alliances Abroad, or in the Adminiſtration of Affairs at Home, and this whether in Times of Peace, or in War. This Knowledge the Books of the *Roman* Law convey to his Mind: For tho' the *Roman* Law was, at firſt, only peculiar to that People, as having then almoſt the Empire of the whole World; yet they had framed ſuch wiſe Rules and politick Inſtitutions to themſelves, partly borrow'd from the *Grecians*, and partly deduc'd from right Reaſon, and the general Conſent of Mankind, that much of that Law has ſince bore the Name of *The Law of Nations.*

It contains both a *Publick* and *Private* Law: The firſt chiefly relates to their own Forms of Government, as then very neceſſary to be obſerv'd; tho' in many reſpects it ſavour'd too much of an arbitrary Power, as being fram'd for Conqueſt and Enlarging, and to reſtrain the unruly Paſſions of their firſt Citizens. But ſince Chriſtianity has brought to Light a far better Diſpenſation, with regard to this Part, I ſhall no farther inſiſt upon it.

That Part of it, which now, under your Lordſhip's Protection, recommends itſelf to the World, tho' it is call'd a *Private* Law, carries along with it much of the *Law of Nations*; becauſe it has more of natural Equity and pure Reaſon in it, than all other Laws of Men.

And ſurely, if the wiſe and impartial Diſpenſation of Juſtice, be a principal Means of making a State great and glorious, this Law muſt needs ſurpaſs in Excellency all other Laws, by how much the *Roman* Empire, which was all along conducted by this Law, did in Greatneſs exceed, and in Splendor outſhine, all other States that have been ſince: For it is well known, that that State was eſteem'd the common Country of all Men, and the Centre of the whole Earth. It maintained Intercourſe of

Trade,

Trade, and held Correſpondence with all other Nations, of what Sort, Conſtitution, and Language ſoever. It was, as BODIN notes, the Common Judge and Umpire, to arbitrate the Differences of other Princes and People: It was the Seat of Learning, and Receptacle of all learned Men: It continued flouriſhing ſeveral hundred Years, and, during this Time, dealt in Affairs of the greateſt Conſequence and Variety: And whatever was curious and exquiſite in any kind, in other Parts of the Earth, was brought thither.

It is not therefore to be wonder'd at, that TULLY, contemplating the *Laws* of *Rome*, as well as their *Riches*, declares, That they ſhew'd as great Wiſdom in framing their *Laws*, as they did in accumulating the infinite *Wealth* their State enjoy'd at that Time.

And it is alſo well obſerv'd by many later Writers, that, in the *Roman* Empire, its Grandeur is rather to be imputed to the Wiſdom of their *Laws* and *Government*, than to their *Arms* and *Valour*: And tho', in the Opinion of VEGELIUS, their ſtrict adhering to the Rules of martial Diſcipline, made the *Romans* Maſters of the World, yet the Poet SULPITIUS will not aſcribe it to that alone; for ſays he,

——— *Duo ſunt quibus extulit ingens*
Roma caput, Virtus Belli, & Sapientia Pacis.

It was their wiſe Government in *Peace*, as well as their Succeſs in *War*, that ſo highly advanced this City: For what Provinces they *got* by the *Strength* of their *Arms*, they *retain'd* by the *Equity* of their *Laws*, according to FLORUS.

St. AUSTIN brings in CATO ſpeaking to the *Romans* of his own Time, that had much degenerated from their Anceſtors: "Think not, *ſays he*, that our Anceſtry brought the City to "this Height by their Arms; for we have at this Time more "Confederates, and greater Power, than they, both as to Men "and Arms, and alſo Horſes: No, *They* had other Means, "which *We* want; INDUSTRY at *Home*, EQUITY *Abroad*; "FREEDOM in their *Conſultations*; PURITY of Minds in "all Men, free from Luſt and Enormity. But in the Place of "theſe, we have gotten *Riot* and *Avarice*; *Private Wealth* "and *Publick Beggary*; *Riches* we prize, and *Sloth* we "follow: *Good* and *Bad* are now undiſtinguiſhed; *Ambition* "devouring all Rewards due to *Vertue* and *Merit*. And do "not wonder at it, that each Man patches up a *private Eſtate* "out of the *Publick*, when you ſerve your Luſts at *Home*, and "your Profit and Partiality in the *Senate*. It is this that lays

" the

" the State open to the Incurſions of others. " — Thus CATO, in his gentle manner, reprehended the wicked Manners of his Time: But for the Corruptions of the preſent Age, I fear, we want a JUVENAL, or ſuch another ſtinging Satiriſt.

But I will not purſue a Reflexion ſo very obvious, and at the ſame time ſo very diſagreeable: But, begging your Lordſhip's Pardon for thus treſpaſſing on your Indulgence, haſten to conclude this long Epiſtle.

Nor will I, after the Example of moſt Dedicators, invade your Lordſhip's Modeſty, by attempting to expatiate on your ſhining Qualities, which, however juſtly done, would be unpleaſing to your Lordſhip, and the more unneceſſary, not to ſay impertinent, as they are ſo univerſally known.

None but weak Minds drink, or at leaſt drink deep, of the intoxicating Draught of *Flattery:* And none but ſuch, however humbly circumſtanc'd, are capable of offering the poiſonous Potion. 'Tis for Perſons of low or contemptible Talents only, to be caught by its deteſtable Faſcination; and, indeed, ſuch generally want thoſe gilded Helps, which a Character, illuſtrious as that of the Earl of CHESTERFIELD, muſt always diſdain.

I ſhall therefore only add my earneſt Prayers, which, at the ſame time, are thoſe of all good *Engliſhmen,* That your Lordſhip may always continue, what you have hitherto been, The Delight of Mankind, and The Ornament of *Great-Britain*; and be long bleſs'd with Health and Power anſwerable to your Inclinations, to promote the *True* Service of your PRINCE, and the *True* Intereſt of your COUNTRY. I am,

May it Pleaſe Your LORDSHIP,

Your LORDSHIP's *moſt Devoted*

and moſt Obedient Humble Servant,

JOHN AYLIFFE.

A Preliminary Diſcourſe

TOUCHING THE

RISE and PROGRESS

OF THE

Roman *CIVIL LAW.*

HAVING for ſome Years paſs'd promiſed the learned World a complete Body or Syſtem of the *Roman* Civil Law, as anciently eſtabliſh'd in that Empire, and as at this Day received and practiſed in all foreign Countries, where-ever the *Roman* Arms extended their Conqueſts; I now proceed to the Publication of this Work in the *Engliſh* Tongue, with a Deſign of inviting all ſuch Perſons to the Study of this Law, as are little acquainted with the *Roman* Language, or elſe have not ſufficient Leiſure on their Hands to read it (as they ſhould do) in the original Text: And as this Undertaking has been the Care and Labour of the greateſt Part of my Life, I hope it will meet with a proper Encouragement from all ſuch Perſons as are Friends to Letters, and deſire to attain the Knowledge of ſo uſeful a Part of Learning. The Reader will here find a Table of Laws, not only of a vaſt Extent for the Number of Caſes therein comprehended, but of ſuch ſuperior Excellence beyond all other human Laws yet in Being, for its known Wiſdom, Juſtice, Candor, and Equity in the Deciſion of all Controverſies between one Man and another, that I cannot ſufficiently extol and magnify the Glory of the *Roman* Law.

It would be too tedious to relate all the high Titles and Commendations that have been given to this *Law of Laws*, by all ſuch Perſons as have had any Inſight into this Volume of Wiſdom: But it is enough, I think, to recommend the Study of it to curious Men, that it is now read in all the Univerſities of *Europe*, and practis'd in moſt of the Courts of Judicature in all civiliz'd Nations; that it extended itſelf to Countries which were never ſubued by the *Roman* Eagles; and it now remains amongſt thoſe People who have long ſince ſhaken off the Power that firſt impoſed it. It was from this Source of Knowledge, that the ſeveral Writers on the Laws of Nature and

of Nations have borrow'd their Materials to raiſe thoſe immortal Works, which have adorned the Commonwealth of Learning ever ſince the firſt Eſtabliſhment of this Law: And even the greateſt Stateſmen in all Ages have not thought it below their high Honour and Dignity to acknowledge themſelves indebted to this Treaſure of human Policy, which has given them ſo much Aſſiſtance in all the Affairs of their Adminiſtration, and whereby they have acquir'd to themſelves ſo great a Name and Reputation for Buſineſs. And as the Lawyer at the Bar may, in our Courts of Equity, draw from hence an inexhauſtible Fund of topical Arguments to ground ſound Reaſoning and good Pleading on; ſo may the Judge himſelf, on the Bench, here meet with an implicit Equity, ſufficient to guide and govern him in all his Determinations. I need not tell the World, that in all foreign Countries moſt of the Gentry, even thoſe of the higheſt Rank, and greateſt Eſtates, ſtudy (at leaſt) the Elements of the *Civil* Law, and the Law of Nations, to qualify them for their Travels into other Countries, that they may appear there with Honour and Reſpect; and likewiſe for the Management of publick Embaſſies, and national Treaties, wherein they find the Knowledge of this Law to be of great Uſe and Service to them.

But here in *England* (I know not for what Reaſons) great Diſcouragement has been given to the Profeſſion hereof, for almoſt an hundred and fifty Years together, (I mean, from the latter End of Queen *Elizabeth*'s Reign down to the preſent Age we now live in); which has made it not only the Wonder of all our Neighbours, how this Nation has been able to ſupport itſelf in that Grandeur it has appear'd during this Period of Time: but it has more than a little ſurpriz'd ſome of them to ſee it ſubſiſt at all under any Figure and Dominion abroad, in point of National Intereſt, being overmatch'd in Dexterity of Wit and Cunning by ſome of them, in the Art of forming Leagues and Alliances; in the deep Skill and Knowledge of foreign Traffick by others, whilſt we would ſettle Tariffs, and other Pacts of Commerce with them; and, laſtly, (what is a ſad Truth to own) excelled in human Wiſdom and Policy by all with whom we have had to do in the laborious and myſtical Part of negotiating Treaties of Peace, and concluding other Differences (upon Arbitration) referred to us, between Nation and Nation, concerning the Right to Kingdoms and Principalities, transferred either by Donation, Succeſſion, or Laſt Will and Teſtament, *&c.*

But theſe are not the only Political Tranſactions of Importance treated of in the Books of the *Civil* Law, and which often happen between us and other Nations with whom we have to do; for there are ſeveral other Cauſes and Dealings which we may frequently have with them, of equal Conſequence to the Welfare and Proſperity of the Publick. As for Inſtance; "The Community and Property of the Sea, and the Rights of Fiſhing "therein, and Trading thereupon; Freedom from Cuſtoms, and other "Immunities granted to foreign Merchants, in reſpect of their Perſons; "Promiſes of Aid and Protection againſt Enemies; the Harbouring and "Entertaining of Rebels and Traitors, both againſt the State and Perſon "of the Prince; the Interpretation of publick Leagues and national Con-"tracts, and of their Force and Duration, *viz.* whether they oblige the "Succeſſor, or die with the Prince that made them." Again: In our Books of the *Civil* Law, we have ſeveral Titles relating to the "grand Affair of "War, and the Rights which are incident thereunto; touching the "Buſineſs of ſending Supplies to our Enemies, and the Oppreſſing of our "Allies and Confederates; and of Neutralities," *&c.* *Thirdly*, There are other Titles, which concern "the Latitude of Territory and Juriſdiction "either upon Land or Sea; Imbargoes laid on Shipping, and the Seizing "of Merchants Goods at Land, and Contraband Goods at Sea," *&c.* And,

Laſtly,

Laſtly, 'Tis in the Volumes of this moſt excellent Law alone, that we find recorded, " The Rights and Privileges given to Ambaſſadors, and other " publick foreign Miniſters (*a*) reſiding here among us, what Names or " Diſtinctions ſoever they bear; with an Account of the Nature of their " Office, their Admiſſion or Non-Admiſſion by Princes and other Poten- " tates; their reſpective Precedency had of each other, after they are " received; the Right of detaining and impriſoning them for publick " Crimes committed againſt the Sovereign Majeſty of the Prince or State " unto which they are ſent." Together, with many other Matters of the foregoing Kind, relating to their Perſons, Characters and Functions; which, with above two Hundred and fifty other Titles of a publick and private Nature, ſhall be the Subject of the enſuing Work.

And therefore, without a perfect Knowledge of the Law of Nations touching theſe and the like Matters, which is no-where to be found, or (at leaſt) ſo well collected and laid together as in the Writings of the *Civil* Law, we ſhall find our Men of Buſineſs wretchedly deceiv'd and at a Loſs in all their foreign Dealings and Tranſactions, how big ſoever we may plume and look upon ourſelves with the good Genius and Diſpoſition of the Municipal Law of *England:* For other Nations abroad knowing almoſt no other Rule or Common Law, beſides that of the *Roman* Empire, will be ſure to encounter us with this kind of Reaſon, as an univerſal Weapon, in all their Diſputes and Controverſies held with us, though (perhaps) ſome of our great Stateſmen ſhould maintain an ignoble Contempt of that Law, and the Profeſſion itſelf.

But it not being my principal Deſign in theſe Sheets to give large *Encomiums* on the Uſefulneſs and Excellency of the *Roman* Civil Law, or to ſhew the Neceſſity of ſome Encouragement of it here among us, I ſhall quit theſe Heads, and entirely apply myſelf to the main Subject in Hand: Having only ſaid ſo much as I thought neceſſary to recommend the preſent Undertaking, and to evince the Folly of ſuch as contemn the learning of the *Civil* Law. And herein I ſhall endeavour to clear up Matters in ſuch a Manner, as to render the Knowledge of this Law eaſy to all Sorts of Perſons, and to raiſe my Subject to ſuch a Pitch, that it may not be too irkſome and inſipid to pleaſe Gentlemen, nor too mean and trifling to entertain Scholars. For my full Aim has been in the compiling this Work to deliver Things in a plain and eaſy Manner, without the Diſguiſe of Terms and hard Words, with which our Books of the Common Law are largely filled, to the great Diſcouragement of young Students: And this I have done, that I may induce the young Nobility and Gentry of this Kingdom, for whoſe Service and Entertainment theſe Sheets are chiefly written, to take a Delight in reading the ſame, whereby they may qualify themſelves for the higheſt Matters in Civil Government, and improve thoſe Hours, which are too often, in this Age, conſum'd in Riots and vain Pleaſures.

And to the End that the Reader may have a thorough and perfect Knowledge in this Law, I will here, by way of Preface or Introduction thereunto, *Firſt*, Give ſome brief and hiſtorical Account of the Riſe and Progreſs thereof, from the moſt early Times of the *Roman* Empire, (for almoſt thither we muſt go back, if we would be fully inſtructed in the Order and Method wherein the Books of this Law (now in Uſe among us) were written): And from hence I ſhall deduce the original Pedigree of the ſaid Law, according to that Courſe and Order of Time wherein it was eſtabliſh'd. *Secondly*, I ſhall endeavour to inform the Reader, in the Detail of this Preface, with the Time and Reaſon of its Declenſion in this Weſtern Part of the World: And this I ſhall do to obviate the ſenſeleſs Objections,

(*a*) D. 50, 7. per tot. Tit. C. 10. 63. per tot.

which

which ſome noiſy and ignorant Perſons have been pleaſed to make againſt the Study and Practice of it. And then I ſhall advance to ſhew how it reviv'd again by a new Reſource, after it had lain dead and bury'd (as it were) under the Rubbiſh that overwhelmed the *Roman* Empire for almoſt five hundred Years together, through the Ruins and Devaſtations brought thereon by the Incurſions of the *Goths* and *Vandals*, and other barbarous Nations invading *Italy*, and traverſing the Dominions of the *Roman* People. And, *Laſtly*, I ſhall herein attempt to give a particular Account of the Books themſelves, wherein this Law was written, with the Names of the Authors and Compilers of them, the reſpective Times wherein they were compiled, and the beſt Commentators thereon. This being my chief Deſign in this Introduction, I ſhall proceed firſt to declare what I mean by the *Roman* Civil Law; and then I ſhall go on to ſpeak of the Riſe and Progreſs of it, as I have already promiſed to do.

Now, by the *Roman* Civil Law, I mean that Law which the *Roman* State or Commonwealth ordain'd for its own peculiar Uſe and Service, and for the Government of all ſuch Perſons as were ſubject to the *Roman* Empire: For ſuch Civil Laws as are made and conſtituted by other private Cities or Princes in their own Territories, are vulgarly called *Statute-Laws*, every State or City having Power of making Laws for its own Government. Moreover, it is to be remarked, that the *Roman* Civil Law is divided into two particular Branches or *Species*; the one ſtiled the *written*, and the other the *unwritten* Law of *Romulus*. The firſt of theſe is properly term'd a *Law*; and the ſecond uſually goes by the Name of *Cuſtom*. And having thus premiſed what I intend by the *Roman* Civil Law, I ſhall next conſider its Original, which was twofold, *viz.* The firſt being *Natural*, and the other *Civil* and *Hiſtorical*, as deriving its Beginning from the very Foundation of the *Roman* State itſelf, and from the Time of building the City.

For when the City of *Rome* was firſt built, the *Romans* had no ſuch Thing as written Laws, but were entirely govern'd (as ſome will have it) by the arbitrary Diſcretion of their Kings: And thus they continued under the deſpotick Rule and Power of *Romulus* and other ſucceeding Kings, according to theſe Authors, for the Space of two hundred forty five Years after the building of the City; and were govern'd *Manu Regiâ*, or, in other Terms, by the Will and Pleaſure of their Kings. Thus *Tacitus* aſſures us (*b*), that *Romulus* ruled this State according to his own Will and Pleaſure, and *Numa Pompilius* only eſtabliſh'd a Form of divine Worſhip, and ſome Religious Ceremonies, without enacting any Laws relating to Civil Polity: And the Lawyer *Pomponius* herein agrees with *Tacitus*. For, in treating of the Riſe and Progreſs of the *Roman* Law, he begins with ſuch Laws as were enacted by their Kings, ſaying, "That, in the Infancy "of the *Roman* State, all Things were govern'd and adminiſter'd *Manu* "*Regiâ* (*c*); the People having no certain Laws to ſteer their Actions by." Indeed, it is to be noted, that *Tullus* and *Ancus* made ſome certain Laws, well knowing that Monarchy was the beſt Form of Government, if limited by wiſe and wholſome Inſtitutions; but the worſt State of Dominion in the World, when ſubject to an Abſolute and Deſpotick Power. When I ſay, that all Things were govern'd *Manu Regiâ*, I would not be thought to infer from hence, that the *Romans* lived entirely without any Laws, *viz.* on the ſole Will and Pleaſure of their Kings, but rather that they directed themſelves by the Inſtitutions of the ancient Inhabitants of *Latium* or *Italy*, and made uſe of their Cuſtoms and Uſages; leaving the Power of Judicial Matters to be determin'd by the arbitrary Sentences of their Kings.

(*b*) Lib. 3. An. (*c*) D. 1. 2. 2. 1.

After

After *Romulus* had ſettled the Worſhip of the Gods and ſome other Matters, he gave ſome Laws unto his People; and, if we may credit *Dionyſius Halicarn.* (*d*), he took on himſelf the outward Splendor of Sovereign Majeſty. For though *Juſtinian* and others ſtick not to affirm, that *Romulus* was only the Founder of this new City, and that *Numa Pompilius* was the firſt Author of the *Roman* Laws; yet, I can hardly perſwade myſelf to think, that this new Commonwealth could long ſubſiſt without ſome Laws, at leaſt ſuch as ancient Writers aſcribe to *Romulus* and his Royal Succeſſors. But theſe Laws being partly written, and many of them not committed to Writing at all, were Laws chiefly relating to Things honeſt and profitable, and which, in a particular Manner, explain'd and determin'd the Laws of Nature. Such, I mean, as conduced to Matrimony and a conjugal Society of Life: From whence aroſe the Laws concerning Paternal Power, and the Education of Children. And hence 'tis, that *Romulus* only aſſign'd two Employments to Gentlemen, *viz.* The Study of Military Affairs, and that of Husbandry; the People living in a rude and military State of Life at the building of the City, and for ſome Time afterwards: For he, in a particular Manner, ſlighted and neglected the Encouragement of Mechanick Arts and the like, as being the great Inciters of Avarice and other filthy Deſires.

But though the *Dernier* Reſort and laſt Proceedings at Law were lodg'd in the Power of the Kings (as aforeſaid,) according to the firſt Conſtitution of the State; yet no ſooner had *Romulus* choſen the Fathers, and created them into a Senate, but that he granted them this Power and Authority; and thus the Senate came to have Cognizance of all ſuch Matters as the King referr'd to their Conſideration; and hereupon they uſually made Decrees by a general Suffrage or a Majority of Voices. And therefore afterwards, when the King came to make ſeveral Decrees without conſulting the Fathers, and to exerciſe abſolute Power, he was ſaid to be rent and torn out of the Hands of the Fathers (*e*): For ſo great a Hatred and Averſion had that wiſe People, ſoon after the Foundation of the City, to an abſolute and deſpotick Government in the Prince.

Numa Pompilius and his Succeſſors much advanced the Work which *Romulus* had begun, but leaving the Laws of *Romulus* juſt as he found them: For hereunto he added ſeveral Things, which *Romulus* had omitted and paſſed by (*f*). And then it was that *Numa* publiſh'd that Law which the *Romans* ſtiled *Jus Pontificium*, or the Law of the Prieſthood: Wherein he enacted ſeveral Things relating to Religion, Things Sacred, and the Ceremonies of Religious Worſhip, hereby laying a Foundation for the ſeveral Degrees and Claſſes of the Prieſthood. And this Law was in *Latin* ſtiled *Jus Pontificium*, becauſe it was under the Direction and Adminiſtration of the High-Prieſts, in that Language called *Summi Pontifices.* Beſides theſe, he moreover eſtabliſh'd other Laws for the Government of the *Roman* State, which chiefly depended on the Laws of Nations (*g*). For to prevent the undertaking of Wars upon unjuſt Grounds, he created Heralds at Arms, in *Latin* ſtiled *Feciales:* And that the *Roman* Citizens might be contented with their own, without coveting other Mens Lands, he made a Law for the meting and bounding of Eſtates. And furthermore, he alſo made a Law to reſtrain and prohibit the great Expences of Funerals; and enacted ſeveral other eminent Laws (*h*), too many here to enumerate. And, to procure the greater Authority and Veneration for his Laws, he pretended to have frequent Meetings and Correſpondences with the goddeſs *Egeria* (*i*).

(*d*) Lib. 4. (*e*) Dion. Hal. lib. 2. Liv. lib. 1. c. 16. (*f*) Tac. An. lib. 3. c. 26. (*g*) Dion. Hal. lib. 2. (*h*) Dion. Hal. lib. 2. (*i*) Dion. Hal. ut ſupra.

Ancient Writers aſſure us, That *Tullus Hoſtilius*, the third King of the *Romans*, gave alſo ſome Laws to that People, though *Livy* (*k*) makes him to be of a much more fierce and ſavage Nature than *Romulus*: And particularly that Law of his is mention'd, whereby he commands, That whenever a Parent ſhall have three Children at a Birth, they ſhall all be maintain'd at the publick Charge, till they arrive at the Age of Puberty (*l*.) *Ancus Marcus* reviv'd ſeveral of his Grandfather *Numa*'s Laws and Inſtitutions, by bringing them into Uſe again (*m*). Touching *Tarquinius Priſcus*, Writers are in a manner ſilent; though 'tis ſtrange to think, that he ſhould make no Laws, upon enlarging the City ſo much. Yea, a Law is aſcribed to him, which was made by the Conſent of the People, *touching the Golden Crown, Scepter, and Ivory Chair, the* Toga Picta, Tunicata, Palmata, Paludamentum, *the* Trabea Curulis, *Rings, &c.* And alſo *touching the* Faſces, *or Twelve Bundles of Rods*, which were given to the Kings, in reſpect of the Number of Cities then ſubject to *Rome* (*n*). But the chief Law-giver among their Kings was *Servius Tullius*, whoſe Laws even Kings themſelves were bound to obey (*o*), as being temper'd with ſo much Juſtice and Equity, and made with ſuch a Regard to the Good of the Commonweal. He not only reviv'd all the Laws of *Romulus* and *Numa Pompilius*, which were grown obſolete by a long Courſe of Years, bringing the ſame into play again, but he alſo made ſome other Laws. In particular, he made the State or Commonwealth of *Rome* a Partner with himſelf in point of Juriſdiction: And though he reſerv'd to himſelf the Cognizance of all publick Crimes; yet he delegated the Hearing and Examination of private Cauſes to other Judges. And moreover, he likewiſe made Laws, which Perſons were obliged to follow in Judicial Matters, as a Rule of Practice (*p*). But the Law which he made, obliging the *Patricians* or Nobility not to circumvent the *Plebeians* or Commonalty in Matters of Contract, was diſannulled and taken away by *Tarquinius Superbus* (*q*). The Laws of *Servius Tullius*, in particular, were ſuch as follow, *viz.* The Law touching the *Paganalia*, and the yearly Regiſtering the Number of the *Roman* Citizens; and that concerning Uſury, and Childrens beating their Parents (*r*); the Law touching the Liberty and Freedom of Citizens; the Laws relating to Contracts and private Injuries, *&c.* Hence it is rightly ſaid, That *Romulus* ordain'd ſuch Laws as reſpected the Law of Nature; that *Numa*'s Inſtitutions concerned thoſe Things which depend on the Law of Nations; and that the Ordinances of *Servius Tullius* had only a Regard to ſuch Things as depend on the Civil Law (*s*).

Now theſe Laws of the Kings, which the *Romans* firſt made uſe of, were collected and laid together by the Induſtry of *Sextus Papirius*, the firſt Perſon among the *Romans* remarkable for his great Knowledge and Proficiency in the Laws; and as he reduced theſe Laws into one Volume or Body of Law, after he had digeſted the ſame into their proper Order, this Body or Fund of Laws was from him ſtiled the *Papirian* Civil Law. For this Book is called the *Papirian* Civil Law, not that *Papirius* added any Thing of his own hereunto, but becauſe he compiled and reduced thoſe Laws into Order, which, after their Eſtabliſhment, lay ſcatter'd up and down without any certain Method (*t*). Now this Man ſeems to be that *Papirius*, unleſs I am much miſtaken, who in his Childhood was wont ſometimes to come with his Father and ſometimes with his Mother into the Senate, and enquire what was done therein, *&c.* But ſee the whole Ac-

(*k*) Lib. 1. c. 22. (*l*) Dion. Hal. lib. 3. (*m*) Liv. lib. 1. c. 32. (*n*) Dion. Hal. lib. 3. (*o*) Tac. An. lib. 3. 26. (*p*) Dion. Hal. lib. 4. (*q*) Dion. Hal. lib. 5. (*r*) Dion. Hal. lib. 2 & 4. (*s*) Tac. An. lib. 3. c. 26. (*t*) D. 1. 2. 2. 2.

count hereof in *Macrobius*. Wherefore 'tis not amiſs in the Text to read *Prætextatus Papirius*, unleſs (perhaps) you had rather read *Pætus*, which, according to *Cicero* in his Epiſtles, was the *Prænomen Gentilitium* of the *Papirian* Family. And here, ſpeaking of this Man, I cannot but remark the great Parſimony of the ancient *Romans*: *Papirius* thinking the Vow of a ſmall Cup of Wine to *Jupiter* to be a ſufficient Sacrifice of Thankſgiving for a Victory over the *Samnites* (*u*).

The Lawyer *Paulus* (*x*) ſays, That the Lawyer *Gran. Flaccus Licinianus* wrote a Book of Commentaries on the *Papirian* Law; and both *Feſtus* and *Arnobius* do each of them quote this *Granius Flaccus*; and ſo likewiſe does *Macrobius* in his *Saturnalia* (*y*), who has given us an entire Text out of the *Papirian* Law. We have ſome Fragments of theſe Kingly Laws remaining, which *Anton. Auguſtinus*, *Contius*, *Baldwin*, *Fulvius Urſinus*, *Pandulphus*, *Prateius*, *Manutius*, and others, have collected partly in the very Words of thoſe Laws themſelves. But as the Number of theſe Laws was but ſmall and inconſiderable, ſo they loſt the Force and Effect of Laws from their being repealed and abrogated on the Expulſion of their Kings; and none of them now remain at this Day in the Books of the *Roman* Law. But *Baldwin*, an eminent Lawyer, in his Comment on the *Roman* Law, out of his great Confidence, ſcruples not to affirm, That he had taken eighteen of *Romulus*'s Laws from a certain Pillar heretofore erected in the Capitol at *Rome*, which he reckons up: But theſe Laws are not ſo far proved to be genuine, as to gain the Credit of learned Men; *Cujacius* affirming them not to be ſuch. The Treatiſe of *Granius Flaccus*, wherein he explain'd and gave us the Laws of *Romulus*, *Numa*, and the other Kings, is now loſt through the Injury of Time.

But 'tis to be obſerved, that ſeveral of the Laws which are ſtiled the Laws of the Kings, were not made by the Authority of the Kings alone, but they had alſo the Conſent and Concurrence of the People to ratify and confirm them. For when *Romulus* had divided the People, on the great Increaſe of the City, into Tribes and Wards, and *Serv. Tullius* into Centuries; they had, according to this Diviſion, their Aſſemblies of Wards and Centuries, ſtiled *Comitia Curiata*, and *Centuriata*. *Serv. Tullius* very much leſſen'd the Power of the former, in *Engliſh* called the *Ward-motes*; and in their Room he introduc'd the *Comitia Centuriata*, which were chiefly employed either in chuſing Magiſtrates; or elſe in making and abrogating of Laws; or laſtly, in the Buſineſs of Peace and War, and the like. But the *Comitia Tributa* were inſtituted and ſettled by *Pub. Volero*, a Tribune of the People for the ſake of the *Ward-motes*. Now the Difference between theſe two Aſſemblies conſiſted herein, *viz.* The latter confirm'd ſuch Matters as had been firſt debated in the Senate, and approv'd of by the Voice of the People in their Wards, if they came recommended to them by divine Tokens, or other happy Influences. But in the former, Things were there tranſacted in one Day, without any previous Decree of the Senate, and without the Recommendation of divine Tokens or other Auſpicious Omens.

But though the Laws made by Royal Authority were entirely aboliſh'd with Kingly Power; yet not only the *Leges Centuriatæ* ſtill remain'd in Force, but even thoſe Laws which *Numa* made relating to divine Worſhip, and ſuch as concern'd the Magiſtrates and the Rights of the People; which being at length confirm'd by the Decrees of the Senate and the Ordinances of the People, were all of them laid together, and made one Volume, by the aforeſaid *Papirius* the High-Prieſt; who lived ſoon after the Expulſion

(*u*) Plin. Hiſt. lib. 14. (*x*) In L. 144. D. 50. 16. (*y*) Lib. 3. c. 11.

of

of the Kings, and was one of the principal Men in *Rome* for Learning and true Knowledge in Civil Affairs. I have mention'd theſe Laws of the Kings, not only to ſhew how much they conduce to the Knowledge of Antiquity, but likewiſe becauſe they make very much for the Illuſtration of the *Juſtinian* Law itſelf: And ſo much the more, ſince frequent Appeals are made hereunto in the *Roman* Civil Law, theſe Laws being often cited therein: And moreover, becauſe they make one of the four great Periods of the *Roman* Law itſelf, being ſtiled the firſt *Fund* of that Law. For the firſt Period was under the Government of their Kings: The ſecond, under that of their *Decemviri*: The third, under that of the Conſuls: And the fourth, under that of the Emperors.

Beſides ſuch Laws as are left by the Kings, and ſuch as were term'd *Leges Curiatæ*, the Conſuls had likewiſe the Power of Legiſlature transferr'd on them. For, immediately after the aforeſaid Expulſion, a Conteſt aroſe between the *Patricians* and *Plebeians*, (with us call'd the Lords and Commons) debating among themſelves, whether it were more adviſeable, in this new State of the Commonwealth, to live under the arbitrary Power of Magiſtrates, or under the Direction and Guidance of ſome known Laws. The Patricians or Nobility, indeed, who, by their Birth and Wealth, were moſt likely to have the greateſt Share (if not the entire Poſſeſſion) of this abſolute Power lodged with them, thought the arbitrary Will and Command of the Magiſtrate to be the better Form of Government, (as Hiſtorians aſſure us (*z*): And thus they carry'd it, in a manner, againſt the Plebeians or Commonalty, for almoſt twenty Years after the aforeſaid *Æra* of the Kings Expulſion: All their Laws (ſome few excepted) being in Part repealed by the Law of the *Tribunus Celerum*; and ſome of them becoming obſolete, they afterwards grew into Diſuſe: And thus were the *Romans*, for almoſt twenty Years together, rather govern'd by Cuſtom, than any certain Law. Hereupon, the new Conſuls made ſeveral Laws; and *C. Junius Brutus* and *Pub. Valerius Publicola*, being Conſuls, firſt endeavour'd to take Care and preſerve the Liberty of the *Roman* People, not only by reſtoring their former Laws which *Tarquin* took from them, but even by making ſeveral other Laws (*a*). This laſt Perſon was, by way of Eminence (*b*), call'd the *Popular* Legiſlator, from a particular Law which he made, and which, from him, was termed the *Valerian* Law; allowing Appeals to be made from the Conſuls to the People; and commanding, that no Magiſtrate ſhould be choſen without the Suffrage of the Populace. This Law was again reſtor'd when *Valerius* and *Marcus Horatius* were Conſuls, after it had been ſubverted and laid aſide (*c*) by the Tyranny of the *Decemviri*: And it was, laſtly, eſtabliſh'd a third time in the Conſulſhip of *Marcus Valerius* (*d*).

About ſixteen Years after the Expulſion of the Kings, the Populace, by reaſon of the great Tyranny of the Nobility, retir'd to Mount *Aventine*, and enacted ſome certain Laws for themſelves, in *Latin* ſtiled *Leges Sacratæ & Perpetuæ*, becauſe they were never to be violated; and creating two Tribunes with Conſular Power, for the preſerving of their Liberties: Theſe Tribunes were to defend the People from all Injuries whatever committed by the Nobility (*e*). Theſe Perſons, by a Law ſtiled the *Tribunitian* Law, abrogated the Laws made by the Kings (as already remember'd); ſaving that which related to the Prieſthood, and ſome other Laws very agreeable to the *Roman* State (*f*). After this, in the Year 282, the *Publitian* Law was enacted by *Volero Publitius* above mentioned; ordaining, That the Plebeian Magiſtrates ſhould be choſen and created in the *Comitia*

(*z*) Liv. Hiſt. (*a*) Liv. Hiſt. lib. 2. c. 1. (*b*) Plutarch. Vit. Publ. (*c*) A. U. C. 306.
(*d*) A. U. C. 352. (*e*) Liv. Hiſt. lib 2. c. 32. (*f*) D. 1. 2. 2. 3.

Tributa;

Tributa; whereby the Power and Authority of the Nobility was very much diminiſh'd. For though it was ſtill, at this time, a very great Controverſy, whether the People ſhould be bound by theſe *Plebiſcites*; yet the ſame was at length determined by the *Horatian* Law, as I ſhall ſhew hereafter. But (the Power of the Conſuls being arbitrary, and the Cognizance of the Laws being in the Nobility alone) *Terentillus*, otherwiſe call'd *Terentius Arſa* (*g*), a Tribune of the People, preferr'd a Law, commanding a Creation of five Men to ſet down certain Conditions for limitting the Conſular Authority; and that whatever Power and Commiſſion the People granted over themſelves, the Conſuls ſhould exerciſe the ſame, and no more, and not uſe their own licentious Will in the Place of Law (*h*). The *Lex Terentilla* was made and publiſh'd the following Year, notwithſtanding the great Oppoſition of the Nobility thereunto (*i*). But the Number of the Perſons appointed for recording theſe Laws and Conditions, was ſoon after increaſed another Half; ſo that, inſtead of Five, the Number was now multiply'd to Ten (*k*). And this Inſtitution of the *Decemviri* made the third Period of the old *Roman* Law. But ſeveral Factions and Diſſentions afterwards ariſing in the City, about three hundred Years after the Building of *Rome*, a Decree of the Senate was made, at the Inſtance of *Titus Romilius* (*l*), ordaining, That ten Men ſhould be ſent into *Greece* by publick Authority, in queſt of ſome wholſom Laws and Inſtitutions for the better Government of this new Commonwealth, the People being unwilling to live any longer under this uncertain State; and that they ſhould collect and fetch from ſuch States and Cities there, as were then in the higheſt Vogue and Reputation for their Wiſdom, the beſt and wiſeſt of of their Laws (*m*): And the *Romans* chuſing the beſt out of all theſe, they founded their City upon written Laws; which being engraven on Twelve Braſs Tables (*n*), they became the Fountain or Foundation of the whole *Roman* Law, both for publick and private Matters. This Decree of the Senate, juſt now mention'd, was confirm'd likewiſe by a *Plebiſcite* or Ordinance of the People, through the Means of *Titus Licinius*, then their Tribune. The Perſons ſent to tranſcribe the *Grecian* Laws, were *Spu. Poſthumius Albus*, *Aul. Manlius Vulſo*, and *Serv. Sulpitius Camerinus* (*o*); who having tranſcribed the moſt uſeful Laws of the ſeveral Cities there, eſpecially thoſe of the *Athenians* and *Lacedemonians*, return'd Home and recorded the ſame on twelve Brazen, or (as others ſay) on twelve Ivory Tables: And, theſe Laws being recorded, they call'd them *The Laws of the Twelve Tables*, and were the Groundwork, or *Materia Prima*, as it were, of all the *Roman* Civil Law. For theſe Laws being Abridgments of ſuch Laws as were made by *Solon* at *Athens*, and of ſuch other Laws as were brought out of the Cities of *Greece*, renown'd for their Wiſdom and Knowledge in all Civil and Human Affairs, were added to the ancient Cuſtoms of *Rome*, and became a Law for ſome Time among the *Romans*, 'till a more noble Superſtructure was erected on this Foundation.

And here give me Leave to obſerve with many Writers that have treated of the *Roman* Law, That if there be any Wiſdom in Human Laws and Civil Conſtitutions, we may expect to meet with it in the Books of the *Civil* Law. Wherefore *Cicero*, long ago, under the Perſon of *Craſſus*, pronounced (*p*) theſe Twelve Tables to be of more excellent Uſe and Advantage to Mankind, than all the Writings of the Philoſophers. On the Return of the above-mention'd Perſons out of *Greece*, ſeven more were added (*q*) the following Year to the aforeſaid Number, by a Decree

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(*g*) Dion. Hal. lib. 10. (*h*) Liv. Hiſt. lib. 3. cap. 9. (*i*) A. U. C. 292. (*k*) Dion. Hal. lib. 10. (*l*) A. U. C. 300. (*m*) Dion. Hal. lib. 10. (*n*) A. U. C. 303. (*o*) Dion. ut ſupra. (*p*) De Orat. lib. 1. (*q*) Liv. Hiſt. lib. 3. cap. 32.

of the Senate, for the ſake of Peruſing and Examining theſe Laws ; ſo that now the Number of them was increas'd to ten, as firſt propos'd : The Conſuls and the other Magiſtrates in the mean while ceaſing to act in their Office. And after theſe Laws had been ſufficiently examin'd, they were approv'd, *Nemine Contradicente*, by a Decree of the Senate, touching the ſame ; and were publiſh'd by the *Roſtra*, that they might be the more eaſily underſtood by the People : And this Decree of the Senate was afterwards confirmed in the *Comitia Centuriata* (*r*), or the Grand Aſſembly of the People.

The *Athenians*, at firſt, refuſed theſe Men a Copy of their Laws, 'till they had try'd whether the *Romans* were worthy of receiving them. And to find out this, they ſent a certain wiſe Man of *Greece* (as the Story goes) to *Rome* ; which the *Romans* being apprized of, reſolv'd to laugh at him, and all the *Athenians* that ſent him : Wherefore, on his coming to *Rome*, they pick'd out a certain Fool to diſpute with him, that he might return with Deriſion. But the *Greek* behaved himſelf in ſuch a manner, and was ſo well pleas'd with the Management of the Diſpute, that, on his Return to *Athens*, and reporting the ſame, the *Athenians* granted the Perſons ſent a Copy of their Laws : Who tranſcribing the ſame, (as aforeſaid) carry'd them afterwards to *Rome* for the Uſe of the *Romans*. But I will not warrant for the Truth of this Account, being, probably, the Invention of ſome monkiſh Writer, to eſtabliſh the Senſe the *Greeks* and *Romans* then had of the *Trinity*. Some Perſons indeed ſay, That one *Hermodorus*, an *Epheſian* by Nation, and who indeed, was an Exile in *Italy*, was the Author of bringing theſe Laws to *Rome* out of *Greece*. *Dionyſius Halicarnaſſus*, in his *Roman Antiquities* (*s*), gives a large Account of this Matter, touching the *Romans* borrowing their Laws from the *Greeks* : But both *Cicero* and *Dionyſius* are each of them ſilent as to *Hermodorus* bringing theſe Laws to *Rome*, or being the Author of them ; though *Cicero* reports him to be an *Epheſian*, and baniſh'd the City of *Epheſus* by Oſtraciſm. *Pliny*, in his *Natural Hiſtory* (*t*) rather makes *Hermodorus* to be an Interpreter of the *Greek* Laws, than any thing elſe, ſaying, That *Hermodorus* had his Statue in the great Hall of Juſtice at *Rome*, being the Interpreter of thoſe Laws which were written and ſettled by the *Decemviri*. The *Decemviri* had alſo a Sovereign Power given them by the *Roman* People, not only to correct and interpret the ſaid Laws, upon Occaſion, but likewiſe to add thereunto, or diminiſh the ſame, as they thought fit ; and that no Appeal ſhould lie from them, as from other Magiſtrates. Wherefore, finding ſome Defect in theſe Laws, they did (*u*), in Virtue of the aforeſaid Power given them, add Two other Tables in Writing, to the Ten which they brought with them out of *Greece* ; and thus, by Accident, they were call'd *The Laws of the Twelve Tables* ; this Addition of Two Tables more being made by *Appius Claudius* and his Collegues the Year following. And as the ancient *Roman* Law had its Denomination from hence ; ſo this Law of the Twelve Tables was the Foundation of the Written *Civil* Law, which we uſe at this Day, and by which the *Roman* People began to live.

Theſe Laws of the Twelve Tables were made firſt to contain many Titles. The firſt Table or Title treats of Citations. The ſecond of Judgments and Theſts. The third of Things credited ; that is to ſay, of Debtor and Creditor. The fourth treats of the Right of Fatherhood and of Wedlock. The fifth, of Inheritances and Guardianſhip. The ſixth, of Property and Poſſeſſion. The ſeventh, of Treſpaſſes and Offences. The eighth, of Predial Rights. The ninth handles the Buſineſs of publick Laws. The

(*r*) Liv. Hiſt. lib. 3. c. 34. (*s*) Lib. 10. (*t*) Lib. 34. (*u*) A. U. C. 303.

tenth

tenth ſpeaks of the *Jus Sacrum*, and of the Laws relating to Sepulchres, Ceremonies, and Oaths. The eleventh forbids the Patricians or Nobility to intermarry with the Plebeians or Commons. And the twelfth is a Supplement to all the foregoing Tables. Thus theſe Tables included a threefold Law, which was in common, *viz.* The *Jus Sacrum*, the *Jus Privatum*, and the *Jus Publicum*. On this ſecond Fund or Body of the *Roman* Law, which immediately follow'd the *Papyrian* Law, the old Lawyers, at different Times, wrote ſeveral Gloſſes and Commentaries, by explaining theſe Laws of the Twelve Tables. Among theſe Interpreters of the Law we meet with *Sextus Ælius*, *L. Acilius*, *Lælius*, *Valerius Meſſala*, *Q. Antiſtius Labeo*, and *Gaius*, the laſt of all theſe, who lived under the Emperor *Marcus Antoninus*. Several Perſons have employed their Time in collecting theſe Laws of the Twelve Tables: As *Aymarius*, *Rivallius*, *Oldenderp*, *Anton. Auguſtinus*, *Baldwin*, *Contius*, *Hotoman*, *Rævardus*, *Criſpinus*, *Calcagninus*, *Pighius*, *Marcilius*, *Lipſius*, *Dennis Gothofred*, and *Fran. Pithou*, *&c.* and in methodizing theſe Laws, they have almoſt all of them purſued a different Order: But, among theſe, *Fran. Pithou* ſeems to have reduced them to the beſt Method.

It has been already obſerved, That in the *Roman* Law, thoſe Laws which were made by their Kings had the firſt Place, and then came the Laws of the Twelve Tables under the *Decemviri*. Having therefore before treated of both theſe Funds of Laws, I ſhall next conſider the third Body of the *Roman* Law under their Conſuls. For after the introducing the Laws of the Twelve Tables, a new Caſe ſometimes happen'd, which was not found to be decided by any Law of thoſe Tables: And hence it being neceſſary to make a Law on that Caſe, the *Romans* hereupon, after the Expulſion of their Kings, created certain Officers or Magiſtrates, which were called *Conſuls*, becauſe their Duty was to conſult and take Care of the Commonwealth (*x*). The Conſuls, for the Time being, cauſed the People to be aſſembled together, and inform'd them, that ſuch a Caſe had happen'd, for which the Laws in being had made no Proviſion: Whereupon the *Roman* People, at the Interrogation of the Conſul, decided that Caſe according to the Rules of Equity, as the Matter appear'd to them; and this Deciſion being made, was ever afterwards in the like Caſes obſerv'd as a Law. And in concluding of this Law, there was the Intervention of the whole People of *Rome*, reckoning the Nobility and Commonalty together. And this was what we call a *Law*, in the ſtrict and proper Signification of the Word *Lex*: For the *Latin* Word *Lex* comprehends not only all the ſix Parts of the *Roman* written Law, but alſo this firſt Part thereof *eſpecially* ſo called; thoſe being properly ſtiled *Leges*, which were enacted by the *Roman* People collectively. For, after the Expulſion of the Kings, the Legiſlature was lodged with the People, this being reckon'd by all Men as the *primum Caput* of Sovereign Power or Majeſty, which was then in the People.

After an Accommodation was made of the Diſſention that happen'd between the Senate and the People, the *Plebiſcita* or Ordinances of the People came in Play (*y*), which we may, in ſtrictneſs, reckon the ſecond Part of the *Roman* written Law: And by the *Hortenſian* Law, the ſame Authority was given to theſe Ordinances as to other written Laws, after the Time that the Populace retir'd from Mount *Janiculus* in Diſguſt. For in Proceſs of Time, on the Increaſe of the *Roman* People, a new Diſſention aroſe between the Nobility and Commonalty, through the Weakneſs, Inſolence, and Injuſtice of the *Decemviri* (*z*). To which we may add the

(*x*) D. 1. 2. 2. 16. (*y*) D. 1. 2. 2. 8. (*z*) D. 1. 2. 2. 24.

Caſe

Caſe of *Appius Claudius*, who falling in Love with the beautiful Daughter of *Virginius Miles*, then Marriageable, and betrothed to *Icilus*, a Perſon of *Tribunitian* Authority, and not ſucceeding in his Amours either by Love or Money, at length hired *Claudius*, a Plebeian and one of his Clients, by ſtealth to carry her into Servitude, believing this to be the only way to procure the Enjoyment of her (*a*). This Matter was heard before the Judge: And when Nothing would do, her Father was by her Friends ſent for out of the Camp, being then at War againſt the Enemy at *Algidum*. But *Virginius* perceiving that nothing would avail, he killed his Daughter with a Butcher's Knife, after *Appius* had declar'd her to be *Claudius*'s Bondwoman or Handmaid. This Act coming to the Soldiers Knowledge, occaſion'd them to retire to Mount *Aventine*, and to overthrow the Power of the *Decemviri* (*b*). Whereupon the whole Commonalty of *Rome* aſſembled and betook themſelves to the ſaid Mountain, and thus dividing themſelves from the Nobility, they remain'd here with great Obſtinacy, creating to themſelves a protecting Officer, called a *Tribune* (*c*). And having thus aboliſh'd the Arbitrary and Tyrannical Government of the *Decemviri*, *Lucius Valerius* and *Marcus Horatius* were created Conſuls (*d*), who exerciſed a popular Conſulſhip without Offence or Injury done to the Rights of the Fathers. At this Time (it being in ſome meaſure a Moot-Point in Law, whether the *Fathers* were bound by the Ordinances of the People) the firſt of theſe Perſons made a Law, ordaining, Whatever the Commonalty commanded in the Tribes, ſhould oblige the whole *Roman* People (*e*), as already related. This Law, called the *Horatian* Law, was afterwards confirm'd (*f*) by the Dictator *Quint. Publilius*; and from him ſtiled the *Publilian* Law. But it being reviv'd by the Dictator *Quint. Hortenſius*, when the Commons, by a third Mutiny, retir'd to Mount *Janiculus* (*g*), it was from him term'd the *Hortenſian* Law. But though the Power of the *Decemviri* was taken away, as above hinted; yet the Conſuls, before they went out of the City to wage War againſt the *Æqui* and *Volſci*, propounded the Laws of the Twelve Tables a ſecond Time for their Acceptance (*h*). And no ſooner were they engraven in Braſs, but they were immediately hung up and expos'd to publick View; though the Authority of theſe Laws was much diminiſh'd (as I ſhall obſerve by and by) by the *Arbutian* Law (*i*). When any Caſe emerg'd, which was not decided by the Laws of the Twelve Tables, this Tribune, aſſembling the whole Commonalty together, propounded the ſaid Caſe to them for their Determination. And this Sentence, being made a Law among themſelves, was called a *Plebiſcite* (*k*). And thus the Commonalty remain'd for a certain Number of Years in a State of Separation from the Nobility. But in Proceſs of Time the ſaid *Hortenſius* not only compos'd theſe Differences; but recalling the Commons from Mount *Aventine* and re-uniting them with the Nobility, enacted the *Hortenſian* Law, ordaining, That theſe *Plebiſcites* ſhould have the Force of a general Law, as aforeſaid: And, being thus incorporated into the *Roman* Law, they were reduc'd into a *Compendium* of other Civil Laws.

But, on the daily Increaſe of the *Roman* State, it appearing almoſt impoſſible to aſſemble the whole Body of the People, or (at leaſt) to come together about the Affair of making Laws, without ſome Tumult and Commotion; it was therefore thought expedient, whenever any new Caſe aroſe, to truſt the Senate with this Power in the Place of the People, and as their Repreſentatives (*l*). Whereupon the City conſtituted an Hundred

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(*a*) D. 1. 2. 2. 24. (*b*) Dion. Hal. Liv. &c. (*c*) D. 1. 2. 2. 24. (*d*) A. U. C 306.
(*e*) Aul. Gel. lib. 15. c. 27. (*f*) A. U. C. 414. (*g*) A. U. C. 466. (*h*) Liv. Hiſt. lib. 8. c. 12.
(*i*) Liv. Hiſt. lib. 3. c. 57. (*k*) D. 1. 2. 2. 8. (*l*) D. 1. 2. 2. 9.

Men,

Men, committing the Government of the State to them, as their Deputies or Repreſentatives: And theſe, being a Hundred in Number, were called *Senators*, from their great Wiſdom and Age. And when any new Law was to be made, theſe Hundred Senators were only aſſembled upon a Deciſion of the Caſe then propounded to them: And this Deciſion of theirs becoming a Law, it was in *Latin* ſtiled *Senatuſconſultum* (*m*), or, in *Engliſh*, a Decree of the Senate; and was in the like manner as a *Plebiſcite* aforeſaid, incorporated into the Body of the *Roman* Civil Law. The Decrees of the Senate, therefore, were thoſe Laws which were made either in ſuch Matters as were left to the Authority of the Senate, or elſe in ſuch as became a Law as ſoon as they were confirm'd by the People. Theſe Decrees were made on a Day certain, which was not a Comitial Day, (on which, by the *Papian* Law, the Senate could not be aſſembled,) after they had firſt offer'd up Sacrifices, and perform'd other divine Offices, and conſulted the *Auſpicia* (*n*). They were always propoſed by the Conſul in a full Senate, held in ſome auguſt Place or other, as in ſome Temple or Court, *&c.* or elſe by ſuch Magiſtrate as could call the Senate together: And they were decreed in the Senate by a Majority of Voices, and this either by *Rogation* or *Relation* (*o*). And thus the Decrees of the Senate, which was another Part of the *Roman* Law, had the Authority of Laws from that Power which remain'd in the Senate during the Time of the Emperors: For *Ulpian* obſerves, that the Emperors communicated this Ray of their Power to the Senate.

Afterwards, when the Conſuls were frequently hinder'd from meeting the People, through the great Wars they made with their Neighbours and other Nations, being forced to abſent themſelves often upon this Account, the City was by this Means left without any Governors or others to adminiſter Juſtice: Wherefore, that the City might not be without ſuch Adminiſtration, the People created for themſelves two Officers, commonly called *Prætors*. The one was ſtiled *Prætor Urbanus*, and the other *Prætor Peregrinus* (*p*): The firſt having the Cognizance and Determination of all ſuch Cauſes as were commenced by the *Roman* Citizens, as the other had the Cognizance and Deciſion of ſuch Cauſes as were commenced by Strangers and Foreigners. Theſe *Prætors* (according to *Papinian*) had a Power given them of adding to, or ſupplying and correcting the *Civil* Law of the Twelve Tables (*q*), and were wont to propound ſome certain Edicts, either to be kept in the publick Regiſtry, or elſe in their own Palaces, touching the Conſervation of Juſtice: As the Edicts of *Pacta Servabo*, or *Quod metûs cauſâ factum eſt, ratum non habebo*, and the like. Theſe Edicts being afterwards approved of by the People, were incorporated into the *Civil* Law, and were called the *Pretorian* Law: And thus theſe Edicts having the Authority of Law, made the fourth Part of the *Roman* written Law, after they were propounded by the *Pretorian* Magiſtrates, with whom Juriſdiction was lodged, that the People might know by what Law they were govern'd; and, in Honour of the Magiſtrate, they were ſometimes in *Latin* called the *Jus Honorarium* (*r*). But as the *Roman* Magiſtrates were only Annual (*s*), ſo were their Edicts and Laws only ſtiled *Annual* before the *Cornelian* Law (*t*), which made the ſame perpetual. The Edicts of the *Prætors* were compiled and reduced into Order by *Salvius Julianus*, under the Reign of *Adrian* the Emperor, as I ſhall remember hereafter.

(*m*) I. 1. 2. 5. (*n*) Liv. Hiſt. lib. 22. c. 11. Idem lib. 31. c. 23. (*o*) Liv. Hiſt. lib. 9. c. 8. Idem lib. 22. c. 60. (*p*) D. 1. 2. 2. 27. (*q*) D. 1. 1. 7. 1. (*r*) D. 1. 1. 7. 1. (*s*) I. 4. 12. 1. (*t*) A.U.C. 686.

But to return a little to the Laws of the Twelve Tables, which through the Brevity in which they were written, were not ſufficient for the Determination of all Controverſial Matters which might happen: And as theſe Laws ſometimes ſtood in need of an Expoſition, the Interpretation of the Lawyers was neceſſarily admitted, and became a Part of the old *Roman* Law. Hereupon began what we call the *Diſputatio Fori* (*u*), and the Interpretation of the old Lawyers, fam'd for their great Learning and Prudence: The Laws being ſo few in Number and ſo general, that they could not be applied to all particular Caſes, as aforeſaid. Wherefore the Lawyers and Patrons of Cauſes endeavour'd to decide ſuch a Variety of Caſes by Pleadings at the Bar, and by their own Interpretations: And though theſe Determinations were not at firſt reduc'd into Writing, but depended on Tradition and Cuſtom alone; yet they were of ſo great Weight and Authority, that the *Romans* referr'd themſelves to theſe Deciſions or Precedents as to a written Law (*x*). And by a common Name it was ſtiled the *Civil* Law, or in *Latin* called *Media Juris-Prudentia*; becauſe it came in the Middle, between the Laws of the Twelve Tables and the *Imperial* Conſtitutions (*y*). The firſt of theſe Perſons that expounded the Laws of the Twelve Tables, and adapted them to the Uſe of the *Forum*, was *Tiberius Coruncanus*: Then ſucceeded *Pub. Papinius*, *Scipio Naſica*, *Quint. Mutius*, and ſeveral others reckon'd up by *Pomponius* (*z*). Almoſt all theſe were Perſons of the higheſt Rank and Diſtinction in the State, to whom the Care and Education of the young Nobility and Gentry was committed, and of ſuch as ſought after high Offices and Honours in the Commonwealth; and many of them were of the College of High-Prieſts; the *Romans* eſteeming the Knowledge of the Law to be a Thing ſacred. And herein they excelled the *Greeks*; becauſe, among the *Romans*, only Perſons of the higheſt Birth and Fortune in the State became Interpreters of the Law, not thinking it beneath them to purchaſe new Glory and Honour by the Profeſſion thereof, after they had commanded Armies, and acquir'd great Renown by their victorious Triumphs over the *Roman* Enemies: Whereas among the *Greeks*, only Men of mean and obſcure Condition profeſs'd the Knowledge of the Law. Now among the *Romans*, this Interpretation of their *Prudentes* or wiſe Men, was looked on as an unwritten Law; and was by *Juſtinian* himſelf called *Media Juris-Prudentia* (*a*). It was collected by *Pub. Mucius* into ten Books, by *Brutus* into ſeven, and by *M. Manilius* brought into three. The High-Prieſt *Quint. Mutius Scævola* firſt collected it into one Body, by reducing it to eighteen Books, upon which *Pomponius* afterwards wrote a Comment in thirty nine Books. But theſe Law-Diſputations or Pleading at the Bar, introduced much Confuſion and Uncertainty into the Law. For the *Civil* Law was ſo divided, that it partly conſiſted of Actions of Law, partly of the Interpretation of the *Decemviral* Laws, and partly of the *New Law* which was added to the Twelve Tables by way of *Appendix*. Now Actions of Law were nothing elſe but the Rites and Forms of all direct Actions, as they were preſcribed by the Interpreters of the Law, and made uſe of in the Proſecution of every Man's Right (*b*). And theſe Actions the Ancients would have to be ſolemn and certain, that the People might not commence what Action they pleaſed (*c*). And theſe were the ſeveral Parts of the *Roman* Civil Law, whilſt the Commonwealth continued a free State. But,

At length, when the Empire was conferr'd upon the Prince or Emperor *Auguſtus* by the *Lex Regia*, two other Parts were added thereunto; *viz.* the *Imperial* Conſtitutions, and the Anſwers of the Lawyers, in *Latin* call'd

(*u*) D. 1. 2. 2. 5. (*x*) I. 1. 2. 3 & 8. (*y*) I. 3. 2. 3. Circ. Med. (*z*) D. 1. 2. 2. 37, 38, 39, &c. (*a*) I. 3. 2. 3. (*b*) I. 4. 6. pr. (*c*) D. 1, 2. 2. 6.

Reſponſa

Reſponſa Prudentum. For after the People had by the ſaid Law given the Empire to *Auguſtus*, it came to paſs, that whatever the Prince ordained, either by his Letter, or commanded by Proclamation, in other Terms ſtiled an *Edict*, or decreed on the Cognizance of any Matter, had the Force of a Law, under the Stile and Title of an *Imperial* Conſtitution (*d*). And theſe Conſtitutions are in our Books call'd *Placita Principum*; becauſe they were ſuch as the Prince or Emperor was pleaſed to ordain according to his Will and Pleaſure, in a diſcretionary way; by the *Lex Regia* the Prince alone being enabled to make Laws without the Concurrence of the People. And though the Prince himſelf (according to this Law) was exempt from all Civil Laws of this kind, ſince he could not be bound by the ſame Laws as private Subjects and Citizens were, according to that Maxim, *viz. Imperans & parens ſimul eſſe non poteſt*; yet the Prince or Emperor was bound by the Laws of God, by the Law of Nature, and the fundamental Laws of his own Kingdom. But thoſe Interpreters of the Law are not well agreed among themſelves, whether the *Lex Regia* by *Romulus*, or by the *Romans* under the Reign of *Auguſtus*, or that of *Veſpaſian* according to the Authority of *Dionyſius Caſſius*; yet it was eſtabliſh'd at the earneſt Requeſt of the *Roman* People, and had its Beginning (I conceive) at that Time when *Auguſtus* would ſeem to decline the Empire: And herein ſeveral Perſons agree with me, ſuppoſing this Law to have its firſt Exiſtence under his Reign, and not under that of *Veſpaſian*. And, according to the Form of the *Lex Regia*, that Law was fram'd, which was invented in the Council of *Lateran* under Pope *Gregory* XIII. And herein is the Error of *Zazius* and *Salmonius* refuted, ſaying, The *Lex Regia* had its Riſe in *Veſpaſian*'s Reign, ſince the Lawyer *Paulus* ſtiles this the Law of *Auguſtus*. Indeed, we meet not with the Name of the *Lex Regia* before *Veſpaſian*'s Reign; for then we have a Fragment of this Law, whereby the *Roman* Empire was given to *Veſpaſian*. Among the *Imperial* Conſtitutions, ſome are *Univerſal* (*e*) and are ſuch as do bind the whole Body of the People to live in Subjection to the Prince. Others are *Perſonal*, and theſe only reſpect ſome particular Perſons (*f*): As for Example, when the Prince or Emperor (perhaps in regard to ſome particular Men) grants a Privilege or Indulgence to them, either as Individuals, or elſe a Body Politick: Or, *ſecondly*, when he inflicts a particular Penalty, or the like: Or, *thirdly*, when he ſhews Mercy to ſome particular Men, *ſine Exemplo* (*g*); as by a Charter of Pardon, or ſome other Act of Grace, extended to a Malefactor condemn'd to ſome ſpecial Puniſhment: For theſe Things are not to be drawn into a Precedent, nor do they reach beyond the Perſon himſelf to whom ſuch Favour or Indulgence is granted: And therefore, I have ſaid *ſine Exemplo*.

It has been already hinted, That an *Imperial* Conſtitution is threefold; *viz.* a Conſtitution properly ſo called; a Privilege; and a Reſcript. A Conſtitution was ſometimes made in a Judicial manner; as when the Prince himſelf ſate in Judgment, and paſſed Sentence in Perſon (*h*): And ſometimes it was Extrajudicial; *viz.* when any Thing was ordain'd by way of Edict or Proclamation (as aforeſaid), and this was done with the Advice of his Nobles or Privy Council. A Privilege, is the Right of a private Perſon or Thing: And if it reſpects a Perſon, it is a *Perſonal* Privilege; but if it regards a Thing, it is then ſtiled a *Real* Privilege. Of *Real* Privileges, we have many Examples in the Privileges of Cities and Corporations: And touching *Perſonal* Privileges, the Reader may inſpect the *Code* (*i*). Reſcripts relate to Judicial Matters, and only concern the

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(*d*) I. 1. 2. 6. (*e*) Ibid. (*f*) Ibid. (*g*) Ibid. (*h*) C. 1. 14. 11. 1. (*i*) C. 10. 31. 61.

Admini-

Adminiſtration of Juſtice: And then they have not the Force of a Law, unleſs it be in the very Caſe wherein the Reſcript is ſent: Yet, generally ſpeaking, they are taken for all *Indulto's* of Princes whatſoever (*k*). Now the Laws of the Prince do obtain the Force of a written Law ſeveral ways. For if a Conſtitution be included in the Body of the Law, it always makes a general Law: But if it be not receiv'd into the Body of the Law; then, if it be emitted by an Interlocutory, or if the Prince ſhall give a definitive Sentence, or, without Cognizance had of the Cauſe, with the Aſſiſtance of his Nobles Palatines, it only makes a Law to the Party, but not a general Law; and ſuch a Conſtitution ſhall only have Operation among the Perſons between whom it was made; for the Prince is not preſumed to take away the Laws (*l*). But the Power of the Perſon making a Conſtitution ſhall not be queſtion'd; and whoever does it, incurs the Crime of Sacrilege (*m*). But we may diſpute about the Prince's Will, *viz.* whether he deſign'd it, or not, or whether ſuch Conſtitution was not procured from him by Obreption and Surprize. For a Prince is always preſum'd to deſign that which is juſt, equitable, and conformable to the Laws. But if a Prince ordains or decrees any thing *ex certa Scientiâ*, *proprio motu*, and *de Plenitudine poteſtatis*, it takes away all Obreption and Surreption.

— I have before hinted, That by a Change of Circumſtances, the ancient Laws becoming obſolete, new Laws were introduced; and that thoſe which were properly ſtiled *Roman* Laws, were ſuch as were enacted by the whole collective Body of the *Roman* People, at the Interrogation of a Senatorian Magiſtrate; as were the Conſul, Prætor, Dictator, and the like. Theſe Laws being approved of in their Aſſemblies, on their Promulgation, obtain'd the Name of the Perſon that preferr'd the ſame: And Writers have diſtinguiſh'd them either *ſecundùm Gentes*, or elſe according to the Subject Matter they treat of. Thus the *Horatian* Law was made by *M. Horatius Barbatus* in his Conſulſhip; and the *Hortenſian* Law by *Quint. Hortenſius* in his Dictatorſhip, as already remember'd: And hence the *Calpurnian*, *Julian*, and *Licinian* Laws had their ſeveral Names; and ſo of other Laws. But in giving a Denomination to the *Roman* Laws, a due Regard was had to the *Gens*, and not to the Family.

But no ſooner had the *Roman* Commonwealth changed its ancient Form of Conſular Government, as it did under the Reign of *Julius Cæſar*, but that the *Roman* Law alſo put on a new Face, and became quite another Creature. For, as ſoon as *Julius Cæſar* had laid the Foundation of the *Roman* Empire, which his Succeſſor entirely finiſh'd, all the Power which was uſually granted by the *Lex Curiata* to the Conſuls, *&c.* during the free State of the Commonwealth, as aforeſaid, was now transferr'd and ſettled on him by the *Lex Regia.* Indeed, it has been diſputed, who was the Founder of the *Roman* Monarchy; ſome aſcribing it to *Julius*, and others to *Auguſtus.* But touching this Matter, it may be obſerv'd, as *Juſtinian* himſelf remarks, in his Preface to the 47th *Novel Conſtitution*, That this may well enough be aſcribed to both of them. For though *Cæſar* may be ſaid to have laid the Foundation of this Monarchy after *Pompey's* Overthrow at the Battle of *Pharſalia*; yet it met with ſome Interruption after *Cæſar's* Death, from the Triumvirate of *Lepidus*, *Mark Anthony*, and *Auguſtus*, and was not entirely confirm'd and eſtabliſh'd 'till it devolv'd on the Perſon of *Octavianus*, commonly call'd *Auguſtus.* *Appian* (*n*), ſpeaking of *Julius Cæſar*, writes thus, *viz.* " That *Octavius*, " his adopted Son, changed his Name, and (following *Cæſar's* Steps)

(*k*) C. 1, 19. (*l*) C. 3. 28. 35. (*m*) C. 1. 14. 11. C. 9. 29. 2 Gloſſ. ibid. (*n*) Lib. 2. de Bell. Civ.

" took

" took upon himſelf the Government of the State, and ſtrengthen'd the " Monarchy, of which *Julius Cæſar* had laid the Foundation." But *Xiphilin*, not without Reaſon, refers the Beginning of this Monarchy to the Time of the Battle fought on the Nones of *September* (*o*). But *Auguſtus* only left the Shadow of Liberty to the Commonwealth, though he would have been thought to have govern'd the ſame under the ſpecious Name and Title of a *Conſul*, *Cenſor*, *Tribune*, and the like, by which the State was heretofore guided and directed in the Time of its Liberty.

Yet notwithſtanding this new Change of Affairs, the Reaſon and Authority of the ancient *Roman* Law ſtill continued under the Reign of the firſt Emperors. Indeed, it firſt enter'd into *Cicero*'s Thoughts to compile and make a new Syſtem of Law, and accordingly he promiſed the World a Book concerning the ſame; though *Pompey* had attempted this Work with much Authority and Succeſs before him, but fail'd in the Undertaking, through the War which happen'd between him and *Cæſar*. *Julius Cæſar* had alſo a Deſign of reducing the *Civil* Law to ſome certain Standard and Meaſure; and out of that immenſe Heap of Laws which lay ſcatter'd up and down without any Order or Method, to draw up into a narrow Compaſs the beſt and moſt uſeful Laws, and to compriſe them in a few Books; but herein he was prevented by an untimely Death, whilſt he was debating with himſelf on theſe Matters. *Auguſtus Cæſar* left the Commonwealth to be govern'd by the Decrees of the Senate, or, rather, by his own *Imperial* Conſtitutions, and alſo by their own Laws: And herein he was follow'd even by his Succeſſors. And hence it is that we have ſo many *Julian* Laws, which were partly made by *Julius*, and partly by *Auguſtus Cæſar*. The Emperor *Veſpaſian* collected all the Decrees of the Senate and Ordinances of the People, which had been made from the Beginning of the City, and digeſted them into one Body of Laws. And the Emperor *Adrian*, through a Deſire of eſtabliſhing the Imperial Sovereignty, introduced a new Method of Law, by cauſing the Edicts of the *Prætors*, that were yearly propounded, to be epitomiz'd by the Induſtry of the Author *Julianus*, as above related; who, though he lopp'd off ſome, yet he added other Edicts or Laws of his own making. And this Edict was term'd *The Perpetual Edict*, becauſe it was not ſubject to Change and Alteration; receiving a Validity for the Time to come, not from any Law of the *Prætor*, but from the Authority of the Emperor himſelf. And though the entire Edict be not now extant, yet ſome Perſons have collected Fragments thereof from the *Pandects* and Commentaries of the Lawyers. Hence it came to paſs, that the Laws properly ſo called, and the Decrees of the Senate, ſurceas'd under the ſaid Emperor, and the *Imperial* Conſtitutions had their Riſe from him, and were the only Part of the *Roman* Law in Force; though the Diſagreements among the Lawyers did not then ſee an end. The *Prætors* every Year choſe certain Judges upon Oath; which Judges were diſtinguiſh'd into ten Decuries. In the Beginning, I confeſs, Matters of Judicature only belong'd to the Senate, and thirty Men were every Year deputed by them for this End and Purpoſe: But *Caius Gracchus*, by a Law call'd the *Sempronian* Law (*p*), transferr'd this Power of Judicature from the Senate to the *Equeſtrian* Order. And the Conſul *Quint. Servilius Cæpio*, by a Law enacted afterwards (*q*), would have all Matters of Judicature to be in Common between the Senate and the *Equeſtrian* Order, though it appears not in what manner they were in Common. *Marcus Livius*, a Tribune of the People, made a Law (*r*), from him call'd the *Livian* Law, commanding, That all Matters of Judicature ſhould be equally lodged in the Hands of

(*o*) Sept. 15th, A.U.C. 721. (*p*) A.U.C. 631. (*q*) A.U.C. 647. (*r*) A.U.C. 663.

the Senate and the *Equeſtrian* Order, commonly call'd, with us, the *Gentry*; and that three hundred Men choſen out of this Order ſhould be added to the Number of Senators; and each of the Senators ſhould in his Turn (Man by Man) chuſe a Knight unto himſelf; and that out of all theſe, two Decuries ſhould at length be choſen. But *Sylla*, by the *Cornelian* Law (*s*), brought back all Matters again into the Senate. Afterwards, theſe Matters were ſettled (*t*) on the *Roman* Knights or Gentry, by the Prætor *Aurelius Cotta*; they being given then to the Senate in Common, as above mention'd. But whereas the *Prætors* uſually changed their yearly Edicts either on the ſcore of their own private Advantage, or elſe in favour of ſome particular Perſons, a Decree of the Senate was therefore, at length, made (*u*), obliging the *Prætors* to pronounce Sentence or Judgment according to their *Perpetual* Edicts: And this was confirm'd by a Law made (*x*) by *Caius Cornelius* a Tribune of the People. So that it was not thenceforward lawful for the *Prætors*, during the whole Year of their Office, to recede from that Law, which they had declared to the Citizens they would make uſe of, when they enter'd upon their Truſt. And hence the Edicts of the *Prætors* were ſaid to be *perpetual*, though indeed they were only *annual*.

There are ſeveral Perſons, at this Day, that either compiled the Edicts of the *Prætors*, or elſe have commented on them; and among theſe was *Aulus Ofilius* a *Roman* Knight of an intimate Familiarity and Acquaintance with *Cæſar* (*y*): He left behind him ſeveral Books touching the *Civil* Law. For he firſt wrote a Book touching the Laws of the *Viceſima*, and concerning Juriſdiction; and, ſecondly, he was the firſt Perſon that compiled the *Edictum Prætoris*. For, before him, *Servius* only left two Books written to *Brutus*, in a very conciſe manner, on the Edict of the *Prætor* (*z*): But ſome imagine this to be the Work of *Adrian*, that he might ſeem to act contrary to *Trajan*, whoſe Glory and Reputation *Adrian* much envied, and was not able to bear. Therefore, when all theſe Laws were reduced to this *Perpetual Edict*, and to the Form of *Imperial* Conſtitutions, Commentaries were not only made on the *Perpetual Edict*, but the Lawyer *Titus*, who was *Julianus*'s Scholar, did even compile four Books of *Inſtitutions*, under the Reigns of *Adrian* and *Antoninus Pius*, wherein is briefly compriſed the whole Body of the *Civil* Law, as well as the *Perpetual Edict*; who, in delivering theſe *Inſtitutions*, follow'd the Order and Method of the *Perpetual Edict*. *Anianus* a Privy Counſellor to *Alarick* King of the *Goths*, has given us a very depraved *Epitome* of theſe *Inſtitutions*. *Ælius Marcianus*, who lived under the Reign of the Emperor *Severus*, and wrote ſixteen Books, ſucceeded *Anianus* in this Undertaking. *Florentinus* wrote eleven Books of *Inſtitutions*; and three are aſcribed to *Calliſtratus*. We owe five Books of *The Received Opinions* to *Julius Paulus*, and two Books of *Inſtitutions* likewiſe to him. *Domitius Ulpian*, beſides two Books of *Inſtitutions*, wrote a particular Book of *Rules* and *Maxims* in the Law, from whence we have ſtill ſome extant Titles, which are often cited out of the *Ulpian* Code or Body of Law.

But to paſs by ſeveral other ancient principal Lawyers that have wrote Books of *Queſtions*, *Anſwers*, and the like, the Name of *Papinian* was in high Eſteem under the Reign of *Septimius Severus*, who (notwithſtanding his great Fame for Learning) was put to Death by this Emperor, for refuſing to approve of *Caracalla*'s Paricide committed on the Body of his Brother *Geta* (*a*). The Age in which the Emperor *Alexander Severus*

(*s*) A. U. C. 672. (*t*) A. U. C. 683. (*u*) A. U. C. 585. (*x*) A. U. C. 686. (*y*) D. 1. 2. 2. 44. (*z*) Ibid. (*a*) Spartian. c. 21.

lived,

lived, produc'd many Eminent Lawyers. For in this Age (beſides *Ulpian*, who was killed by a Military Tribune (*b*), there flouriſhed *Pomponius*, *Julius Paulus*, *Celſus*, *Calliſtratus*, *Marcianus*, *Modeſtinus*, *Proculus*, *Venuleius*, and others (*c*): From whoſe Writings *Tribonian* tranſcrib'd and inſerted many Things in his own Works. And, moreover, 'tis to be obſerv'd, that the Fragments of theſe Authors have been collected by ſeveral Hands, as appears from the Proem to *Juſtinian*'s Inſtitutions. But the ancient Lawyers were not only employed about framing Inſtitutions of Law, but alſo about the Books of the *Civil* Law and the *Digeſts* themſelves, by laying together therein all the Decrees and Conſtitutions of the Law. *Ulpian* wrote a ſingle Book of the *Digeſts* (*d*): And his Scholar *Herennius Modeſtinus*, after his Example, compiled twelve Books more, which he called the *Digeſts*. *Salvius Julianus* compiled ninety Books, which he ſtiled the *Pandects*. *Alfenus Varus* wrote forty Books of *Digeſts*, which the Lawyer *Paulus* abridg'd. *Juvencius*, the Son of *Celſus*, wrote thirty nine Books; and *Marcellus* wrote the like Number. *Quint. Certidius Scævola* wrote forty Books of *Digeſts*; and *Maſurius Sabinus* compoſed three Books of the *Civil* Law. See the Preface to the *Digeſts*, touching theſe and ſeveral other Writers of *Maxims, Sentences* of Law, and other Matters of this Nature, (which I ſhall here omit;) out of whoſe Writings were afterwards compiled what we now call the *Digeſts* or *Pandects*. Beſides theſe *Inſtitutions* and *Digeſts* compiled by private Hands, there were ſome Perſons that collected the ſcatter'd Conſtitutions of the Emperors: And the Conſtitutions of particular Emperors were firſt collected by particular Men. After this *Julius Paulus* compiled ſix Books of *Imperial Sentences* (*e*) pronounced on the Cognizance of ſeveral Cauſes. *Lactantius* obſerves of one *Domitius*, that he digeſted and laid together ſeveral Reſcripts of the *Roman* Emperors, made and publiſh'd by them againſt the Chriſtians; ſaying, in his Divine Inſtitutions (*f*), That *Domitius* in his ſeven Books, *Touching the Pro-conſul's Office*, has collected all the nefarious Reſcripts of the Emperors, in order to ſhew how ſuch Perſons ought to be puniſh'd, as acknowledge themſelves to be Worſhippers of the true God. And though ſeveral Perſons will have this to be ſpoken of *Domitius Ulpian*; yet *Grotius* (*g*) will have it to be meant of another *Domitius* a Lawyer. *Papirius Juſtus* wrote twenty Books of Conſtitutions, as we may read in the *Index* prefix'd to the *Digeſts*: And out of the firſt Book of theſe Conſtitutions is taken the Law (*h*) *Touching Services in the City*; and out of the ſecond Book is taken the Law here quoted (*i*), which mentions the Reſcript that the Emperor *Antoninus* ſent to *Avidius Caſſius*, which, according to Hiſtory, muſt be underſtood of *Antoninus* the Philoſopher. And hence I infer, that this ſame *Papirius* flouriſh'd under the Reign of the Imperial Brothers, *Antoninus Pius* and *Marcus Antoninus*; and made a Collection of their Reſcripts. And *Grotius* (*k*) obſerves, that this was the Opinion of *Anton. Auguſtinus* as well as *Bertrand*'s Thoughts.

But theſe *Imperial* Conſtitutions in the Space of five hundred Years, *viz.* from the Reign of *Auguſtus* to that of the Emperor *Juſtinian*, grew to ſo vaſt a Bulk, and became ſo numerous, that from hence the Lawyer *Gregorius* thought fit to make a Collection of all the Imperial Conſtitutions from the Time of *Adrian*, or (as others ſay) of *Auguſtus*, even down to the Reign of the Emperor *Diocleſian*; and this he did by his own private Authority alone: And about the Year 296, they were reduced under certain Titles; and from him the *Gregorian* Code had its Original. For

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(*b*) Zozim. Hiſt. lib. 1. c. 11. (*c*) D. 1. 2. 2. Lamp. Vit. Alex. Sev. c. 68. (*d*) D. 12. 1. 24 D. 40. 12. 34. (*e*) D. 35. 1. 13. (*f*) Lib. 5. c. 6. (*g*) Lib. 2. c. 8. (*h*) D. 8. 2. 14. (*i*) D. 2. 14. 37. (*k*) Lib. 2. cap. 8.

this

this Code is ſo called from the Name of a Student in the Law, that aſſiſted in the compiling thereof, according to the Opinion of ſeveral Perſons. But though all Writers almoſt are ſilent about this *Gregorius*, the Author of the aforeſaid Code: Yet *Juſtinian* himſelf, in making a new Code, appeals to the *Gregorian* Code; and *James Gothofred*, in his *Prologomena* to the *Theodoſian* Code, thinks this *Gregory* was a *Pretorian Præfect*, living in the Reign of *Conſtantine* the Great (*l*); becauſe the third Law of the *Theodoſian* Code, *De Annonâ & Tributis*, and the ſecond Law of the ſame Code, *About Contracts of Bargain and Sale*, do mention him; and ſo likewiſe does *Optatus Milevitanus* (*m*). But *Anton. Schuzlingius*, in his Notes on the *Gregorian* Code (*n*), conceives his Name rather to be *Gregorianus*; St. *Auſtin* ſaying to *Pollentia* thus, *viz. Legi apud Gregorianum*, or, I have read in *Gregorianus*, *&c.* And the Author of the Compariſon between the *Moſaick* and the *Roman* Law, ſays, *Gregorianus Codem Libro & titulo tale Reſcriptum dedit.* And 'tis ſaid in the ſixth Title, that *Gregorianus* has inſerted even this Conſtitution *De Nuptiis*. *Pancirollus* (*o*) maintains the ſame Reading with theſe Men, and calls him *Gregorianus.*

The ſecond Code we read of was that which was compiled by the Lawyer *Hermogianus*, who lived in the Time of the *Conſtantines*, and was the Author of this Edition, wherein are compriz'd all the Imperial Conſtitutions of *Claudius*, *Aurelian*, *Probus*, *Carus*, *Curinus*, and that vaſt Number of Conſtitutions made by *Diocleſian* and *Maximian.* But though theſe Collectors lived under Chriſtian Emperors; yet they were themſelves Heathens, and ſeem to have collected theſe *Imperial* Conſtitutions with no other View, but only to prevent the ſame from being loſt and aboliſh'd by the Conſtitutions of Chriſtian Emperors. But there remains nothing now of theſe Collections beſides ſome Fragments thereof: For the Emperor *Opilius Macrinus* earneſtly endeavour'd to aboliſh the *Imperial* Reſcripts, through a Deſire that the Empire ſhould have nothing to do with the ancient Law (*p*); looking upon it as a Crime, that the arbitrary Wills of *Comodus*, *Caracalla*, and other Monſters, ſhould have the Appearance of Law in the Empire. *Conſtantine* the Great and his Children, introduced a new Method of Law: For after he had plainly changed the State of Religion and Government in the Empire, he publiſh'd ſeveral Laws touching the Immunity of Churches, Eccleſiaſtical Eſtates, Juriſdiction of Biſhops (*q*), Church-Revenues, and the like (*r*): For, upon his Converſion to Chriſtianity, he became much devoted to the Clergy, and, by his Weakneſs and Bigottry to Religion, he advanced the Power of the Prieſthood above what was conſiſtent with the Policy of a wiſe Emperor; and therefore no wonder the Clergy ſhould retain ſuch a Veneration for his Memory. He abrogated the ancient Law, and made ſeveral new ones, by ſubſtituting Chriſtian Conſtitutions (*s*) in the Place of ſuch as were made by Heathen Emperors heretofore in uſe; changing ſeveral Matters *in reſpect of Teſtaments* (*t*) *and other Things* (*u*): And though he might do ſome Good to the Chriſtian Religion by his Laws for the Support of it; yet he did no Service to the State, when he aggrandiz'd Biſhops ſo much. But his Son *Conſtantine* took away all thoſe boaſted Forms of Law, that carried ſo many Charms along with them; and thoſe *Aucupia Verborum* (*x*) which pleaſed the Lawyers ſo much. The younger *Theodoſius* not only confirm'd this by a new Law which he publiſh'd (*y*), aboliſhing all Formalities and Chicaneries of Pleading: But that he might in ſome meaſure deſtroy the Uncertainty of the

(*l*) A.D. 336. (*m*) Lib. 3. p. 32. (*n*) Ad. Tit. 1. (*o*) De Clar. LL. Int. lib. 1. cap. 61. (*p*) Jul. Capit. Hiſt. c. 13. De Vit. Macr. (*q*) C. 1. 4. per tot. (*r*) C. 1. 3. 1 & 2. (*s*) Euſeb. de Vit. Conſ. (*t*) C. 1. 2. 1. (*u*) C. 11. 47. 1 & 2. C. 8. 17. 1. C. 5. 13. 24. (*x*) C. 2. 58. 1. (*y*) C. Theod. l. 1. De om. Act. impetr.

ancient

ancient Law, he even order'd the Writings of ſome certain Lawyers to be only valid, *viz.* thoſe of *Papinian*, *Sabinus*, *Julian*, and *Marcellinus* (*z*), *&c.* But the Emperor *Juſtinian* afterwards repealed (*a*) this laſt Part of the *Theodoſian* Law.

The next Code I ſhall here diſcourſe of was the *Theodoſian* Code, which *Theodoſius* the Younger cauſed to be compiled and collected (*b*) after the Model of the foregoing Codes, that the Lawyers might no longer abuſe him for a Prince of Severity, as they pretended (*c*). The eight Perſons made uſe of by *Theodoſius* to aſſiſt him in the finiſhing of this Work, were *Antiochus*, the Conſul; *Maximin*, who had been Chancellor or Treaſurer to the Houſhold; Count *Martyrius* the *Quæſtor*; *Sperantius*, *Apollodorus*, and *Theodorus*, Counts of the Sacred Conſiſtory; *Epigonius*, Count and Remembrancer to the Prince; and *Procopius*, another Count or Judge of the Empire; for the Word *Comes* anciently ſignify'd a Judge. After theſe Perſons had, by Imperial Authority, collected this Code into ſixteen Books, partly by abridging the *Imperial* Conſtitutions, and by reducing them under certain Heads and Titles, the Emperor by a *Novel* Conſtitution confirm'd the ſame (*d*). This Code, therefore, contain'd the Conſtitutions of the Chriſtian Emperors from the Time of *Conſtantine* even down to his own Reign: And this Body of Laws was from him called the *Theodoſian* Code. But in theſe ſeveral Codes, the *Imperial* Conſtitutions were found ſo repugnant to each other, and ſome of them ſuperfluous, inſomuch that the *Juſtinian* Code (of which by and by) was afterwards thought very neceſſary. But to proceed on the *Theodoſian* Code: It ſufficiently appears from the ſame, how careful that wiſe Emperor was in preſerving the *Roman* Laws: Being eſteem'd by all Perſons to be one of the wiſeſt of all the *Roman* Emperors. But in theſe *Imperial* Conſtitutions, the Wiſdom and Goodneſs of God is very evidently ſeen, in giving to Mankind the moſt juſt and equitable Laws, by the Means of ſeveral of the moſt wicked Emperors: For *Nero*, *Domitian*, *Commodus*, *Heliogabalus*, and others, may be deem'd Beaſts and Monſters under human Shape. But the Conſtitutions of *Trajan*, *Valens*, *Decius*, *Gallienus*, *Diocleſian*, and others, do carry along with them great Juſtice and Prudence; and in their Reſcripts we may diſcover ſuch a religious Concern for adjuſting Civil Controverſies among Men, that all Nations in the World ſtill admire them. And though many of theſe Emperors were Aliens and Strangers to Chriſtianity; yet they often lent the Secular Arm in Defence of the Authority of lawful Councils and Epiſcopal Decrees. Now all Things (next to the Mercy of God) ought to be attributed to the Wiſdom and Goodneſs of ſuch Lawyers as had the Adminiſtration of publick Affairs under thoſe ſeveral Emperors, and whoſe Writings we have now extant in the Books of the *Roman* Law.

Beſides, for the Honour of the *Roman* Name, it may be obſerv'd in the *Imperial* Conſtitutions, That before *Conſtantine*'s Time, whilſt the Imperial Reſidence was at *Rome*, the Imperial Reſcripts were conciſe, and wrote in the moſt elegant and nervous Stile imaginable; as may be ſeen from the Writings of ſuch Lawyers as are recorded in the *Digeſts*. But after the Tranſlation of the Imperial Seat to *Conſtantinople*, they became turgid, prolix, and fitter for the Mouth of an Orator than the Pen of a Prince or Legiſlator, as appears in the Conſtitutions of *Martian*, *Zeno*, *Anaſtaſius*, *Juſtin*, and *Juſtinian*, which we may read in his Code: Being in no wiſe to be compar'd with the Laws of former Emperors, in Point of Prudence, Gravity, or Clearneſs of Stile. And 'tis, moreover, to be noted (*e*), That

(*z*) C. Theod. L. 1. De Reſponſ. Prudent. (*a*) C. 1. 17. 1. 5 & 6. (*b*) A. D. 438. (*c*) Nov. Theod. (*d*) A. D. 438. (*e*) Matt. de Afflict.

theſe Conſtitutions publiſh'd at *Conſtantinople*, did, through a Defect of Power in the Emperors, loſe much of their Authority after *Conſtantine*'s Time, becauſe they were enacted after the pretended Donation which *Conſtantine* made of the Empire: Of which hereafter.

Laſtly, From theſe three Codes of the *Imperial* Conſtitutions, and alſo from the *Novels* made and publiſh'd by *Theodoſius* himſelf, and from ſuch other *Imperial* Laws as were enacted after the compiling of the *Theodoſian* Code, the Emperor *Juſtinian*, being in a particular Manner ſpurred on with a Deſire of Glory, order'd a new Code to be compiled, which, from his own Name, he ſtiled the *Juſtinian* Code. For the Emperor perceiving, that the Knowledge of the Law began to grow very difficult and painful unto Perſons, by reaſon of the infinite Number of Expoſitions and Commentaries thereon, did therefore, in the ſeventh Year of his Reign (*f*), reſolve to apply ſome Remedy to the immenſe Labour of this Study, which *Julius Cæſar* and *Pompey* the Great had long before thought on, (as already hinted,) and had compleated too, if the Civil Wars wherein they were engag'd had not prevented them. And whereas the Laws of thoſe Emperors, eſpecially them that reign'd from the Time of *Adrian* and *Antoninus Pius* to the Time of his own Reign, lay ſcatter'd up and down without any Method in the three Codes above-remember'd: And whereas theſe Laws, by an intolerable Diſſimilitude, were found repugnant unto themſelves, and many of them grown obſolete: Therefore *Juſtinian* did (by lopping off ſome, and adding other neceſſary Laws of his own) cauſe thoſe Laws, which he conceiv'd uſeful, to be digeſted into one Body or Volume of Laws, and called the ſame by the Name of the *Juſtinian* Code, as aforeſaid. And this Work he undertook and finiſh'd by the Aſſiſtance of *Tribonian*, *Dorotheus*, *Theophilus*, and ſeveral other Perſons learned in the *Civil* Law; commanding them to cut off all the ſuperfluous Prefaces made to the Imperial Conſtitutions: Though he himſelf has uſed theſe or the like Prefaces in his *Novels*. But theſe Compilers could not perform this Work in every Point, either in the *Code* or *Digeſts*, the Law being ſo prolix and difficult a Science. This Code the Emperor confirm'd and publiſh'd in the third, or (as others ſay) in the ſecond Year of his Reign (*g*), on the ſeventh of the Ides of *April* (*h*), by a particular Conſtitution, as it was preſented to him by the Compilers thereof; aboliſhing all former Codes; and, commanding this to be the only Book which ſhould have the Force and Authority of Law in Matters relating to Judicature, he requir'd all Lawyers and Advocates to uſe the ſame in Pleadings and Determinations of Law-Suits, repealing all other Conſtitutions, in ſuch a Manner, that whoſoever ſhould quote or make uſe of them, ſhould incur the Pain of the Crime of Forgery. But this Code is not now extant among us.

Then, about five Years after the compiling this Code, *viz.* in the 12th Indiction (*i*), he order'd the Writings of an infinite Number of Lawyers to be abridged; which conſiſting of thirty thouſand Verſes or Sentences, were diſtributed into two thouſand Books: Theſe he cauſed to be reduced (*k*) into fifty Books, and gave them the Name of the *Digeſts* or *Pandects* (*l*), for the Reaſon hereafter to be remember'd. This is the beſt and moſt profitable Part of the *Roman* Law, as being full of very uſeful Knowledge, not only for Lawyers, but even for all Perſons who pretend to any Share of Learning either in the Claſſicks, or in the *Roman* Hiſtorians, *&c.* In reſpect of theſe Writings of the Lawyers, every one ſpeaks of them with the utmoſt Admiration and Eſteem. *Laurentius Valla*,

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(*f*) A.D. 531. C. 1. 17. 3. 1. (*g*) A. D. 529. (*h*) April 9th. (*i*) A.D. 535 (*k*) C. 1. 17. 2. 1. (*l*) C. 1. 17. 2. 1.

the greateſt Critick among all the *Roman* Authors, aſſures us, That he had, with great Pleaſure and Satisfaction, frequently read over the fifty Books of the *Digeſts*, which were extracted from ſeveral Volumes of the old *Roman* Lawyers; and that he knew not whether they excell'd in Gravity, Prudence, or Equity; or, laſtly, in Accuracy and Dignity of Stile; each Book being ſo perfect and renown'd for each of theſe Things, that a Man would be at a Loſs, to know which of them ſhould be preferr'd herein. For in reſpect of Elegance of Stile and Pureneſs of Latin, without which, all Learning (eſpecially in the *Civil* Law) is dark and obſcure, nothing can be added or taken from the *Digeſts*, without rendring the ſame imperfect. And indeed, all the Interpreters of the *Civil* Law do ſo highly extol the Perfections which we meet with in theſe *Digeſts*, that they call theſe Books the moſt learned and eloquent Part of the *Civil* Law; the Authors thereof being great Maſters of Eloquence, and ſtored with all other kind of Learning. *Anton. Faber* ſtiles them, The Brighteſt Part of the *Civil* Law; declaring, That as often as he mentions the Names of *Ulpian*, *Paulus*, *Scævola*, *Pomponius*, *Julian*, and *Papinian*, ſo often he is ſtruck with Admiration; deploring his own Ignorance and want of Knowledge, after reading ſo many fine Lucubrations. And ſuch an Eſteem had *Cujacius*, that he pronounces him the moſt skilful Lawyer that ever was, is, or ſhall be hereafter; and that no Man will ever be again a *Papinian* in the Law. And *Baldwin* admoniſhes all Perſons to revere the Divine Providence, for having raiſed a *Joſephus* in *Egypt*, a *Daniel* in *Babylon*, a *Pericles* at *Athens*, and a *Papinian* at *Rome*, for the Light and Splendor of Juſtice, and for the Preſervation of Civil Government. But yet, notwithſtanding what has been ſaid, all Perſons muſt own, that the Compilement of the *Digeſts* was perform'd with too much Haſte, and not manag'd with that Accuracy which an Undertaking of ſuch vaſt Importance ſeem'd to require. For whereas the Books of the Law, in *Juſtinian*'s Time, had been growing up for above a thouſand Years to their immenſe Bulk, and were then ſwoln to that Size, that they conſiſted of no leſs than two thouſand Volumes, as aforeſaid; and, laſtly, were ſo numerous, that they could not eaſily be read over in ſome Years, much leſs collated, digeſted, and reconcil'd within the Term pretended: Yet *Tribonian*, with his Aſſiſtants, conquer'd all theſe Difficulties in ſo ſhort a Time as three Years, wherein the *Digeſts* were begun and finiſh'd, as alſo the firſt Draught or Edition of the *Code*, as well as the *Inſtitutions*. For 'tis ſaid, that *Juſtinian* confirm'd and publiſh'd the *Digeſts* in the ſeventh Year of his Reign, after they had been three Years compiling from the Writings and Anſwers of ſuch *Roman* Lawyers as lived almoſt every one of them under the Emperors.

But no ſooner had the Emperor finiſh'd this Work of the *Digeſts*, but he did (as it were) at the ſame Time cauſe the four Books of his *Inſtitutes* to be compiled from the *Digeſts* or *Pandects*, and likewiſe from his own *Code*, as well as from ſeveral Commentaries of the old Lawyers: Theſe *Inſtitutions* being an Abridgment of the *Digeſts* and the former *Code*, (for the Emperor made another *Code* afterwards), and are, as it were, an Entrance into the Law, for all ſuch Perſons as would come at the Receſſes of this holy Sanctuary, and would fathom the remoteſt Difficulties thereof. The *Inſtitutions* are call'd the Elements and firſt Principles of the Knowledge of the *Civil* Law: Becauſe, as Elements are the firſt Principles of all Things in Natural Philoſophy that admit of Generation and Corruption; ſo are the Books of the *Inſtitutions* the firſt Principles and Elements, in reſpect to the Study of this Law. And in this Senſe is the Law of *Moſes* and all the *Old Teſtament*, by the Apoſtle, call'd an *Element*; becauſe we learn the Knowledge of the divine Law from thence, as it were, from certain

certain Elements and Principles of Religion. And thus ſeveral Authors term Alphabetical Letters by the Name of *Elements*; becauſe they are the Principles or Beginnings of Speech or Words. The Emperor *Juſtinian* begins his *Inſtitutions* with a Conſtitution confirming the ſame, whereby he gives them the Force of a Law. But the *Epigraphe* or Inſcription thereof, *viz. In Dei Nomine, Amen*, is omitted in *Haloander*'s Edition of the *Inſtitutions*, though it be often found in ſeveral Parts of the *Juſtinian Code*. This Book contains the Elements of the *Roman* Law, and it is wrote in a very eaſy, flowing Stile; and, as *Cujacius* obſerves, it is written in the moſt polite and ornamental Stile of all the Books of the *Roman* Law, wanting almoſt no Interpreter. And in this Book this is particular, *viz.* That no *Roman* Lawyer, after the Emperor *Gordian*'s Reign, and the Time of the Lawyer *Modeſtinus*, is quoted therein for their Writings; unleſs it be the Paraphraſe of *Theophilus* on the *Inſtitutions*, whom ſome think to be one of thoſe Perſons whom *Juſtinian* employ'd in compiling the *Roman* Law. Theſe *Inſtitutions* were compiled by *Tribonian*, *Theophilus*, and *Dorotheus*; and were, for the moſt Part of them, taken out of the *Inſtitutions* of *Caius* (*m*), and his Commentaries, as well as from the *Inſtitutions* of other ancient Lawyers. In the *Digeſts* we meet with two of theſe *Caius's*, that are in the *Florentine* Pandects ſtiled *Gaii*: The one was *Caius Caſſius Longinus*, the Author of the *Caſſian* Sect or Faction; and the other was *Titus Caius* the Author of the *Inſtitutions*. *Menage* (*n*) diſtinguiſhes them both very well, ſaying, That the laſt lived in *Adrian*'s Reign, and particularly in that of *Antoninus Pius*. The Emperor *Juſtinian* mentions them both in his Proem to the *Inſtitutions*, and likewiſe in the Proem to the *Digeſts*. The *Inſtitutions*, though an Abridgment of the *Digeſts*, were publiſh'd, notwithſtanding, a Month before the *Digeſts*, *viz.* in the ſeventh Year of *Juſtinian*'s Reign (*o*). Whence ſome Men fancy, that the Law of the *Inſtitutions* in ſome meaſure derogates from the Law of the *Digeſts*, whenever they diſagree in any Point of Law. Again:

Some Time after the publiſhing of the *Digeſts* and the *Juſtinian Inſtitutions*, *viz.* in the 13th Indiction (*p*), the Emperor attempted an Amendment of his former *Code*, and at length publiſh'd a new Edition thereof, with ſeveral Corrections and Amendments by way of a ſecond Edition; adding ſeveral Conſtitutions thereunto entirely new, and which were not to be met with in the former Edition. And as he added ſome, ſo he likewiſe retrench'd and cut off ſeveral other Laws, which were, 'till then, in full Force and Vigour in all the *Roman* Courts of Judicature. And he has, moreover, in this new *Code*, inſerted many Deciſions of his own, as well as of other Men, in ſeveral Points of Law: Of his own Deciſions adding no leſs than fifty in Number, join'd with ſeveral other *Novel* Conſtitutions; and herein reſerving to himſelf a Power of making ſuch other new Conſtitutions as he ſhould think convenient for the publick Welfare, even after the publiſhing this new *Code*. And he afterwards order'd certain Conſtitutions to be enrolled, according to the Emergency of divers Caſes judicially decided, from the eleventh to the fortieth Year of his Reign. And the Arguments and Subjects of theſe new Conſtitutions are brought under the Titles of this new *Code*; and are ſtiled *the Novels*, becauſe they are *de novo* added to the *Imperial* Law. And this is that *Code* which we have extant at this Day, and which we conſtantly make uſe of among the other Books of the *Civil* Law in all the Univerſities and Courts of Judicature among foreign Nations; the former *Code* being entirely antiquated and ſuppreſs'd by the Emperor's own Order (*q*). Hence it is that *Juſtinian* ſometimes

(*m*) Proem. Inſt. §. 6. (*n*) Amœnitat. Jur. (*o*) A. D. 533. (*p*) A. D. 536. (*q*) C. 1. 1. l. un.

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in this *Code* mentions his *Inſtitutions*, or *Inſtitutes* (as they are barbarouſly call'd by illiterate Men), which were compiled after his firſt *Code*, and ſome ſmall Time before the Edition of his ſecond. And, on the other hand, in theſe Books of his *Inſtitutions*, he frequently takes notice of certain Conſtitutions (as he ſays) extant in his former *Code*, whereas they are not now to be found, but are entirely loſt, together with that *Code*. In this new *Code*, which was formed from the firſt *Code*, upon an accurate Review and Examination thereof, (that *Code* being compiled with too much Precipitation) the Emperor has cauſed fifty of his own Deciſions to be therein inſerted, as above hinted, which he had given upon all the Diſputes that had happen'd among the old *Roman* Lawyers, touching the *Roman* Law. And to add a greater Sanction or Authority to this ſecond *Code*, that it might not be thought an apochryphal Book, but a true and genuine *Code*, he has, in the Beginning, premiſed three Sanctions, written to the Senate of *Conſtantinople*. The firſt relates to the making of a new Code (*r*): The ſecond reſpects the Confirmation of it (*s*): And the third concerns the Amendment of the former *Code* (*t*). The Emperor divided this his Code into twelve Books, after the Manner and Example of the Laws of the Twelve Tables, collecting the ſame from the three Codes commonly entitled the *Gregorian*, *Hermogenian*, and *Theodoſian* Codes; and from the *Novel* Conſtitutions of *Theodoſius* the Younger, and other ſucceeding Princes and Emperors; as *Valentinian*, *Martianus*, *Leo*, *Majorianus*, *Severus*, &c. In this Code the Emperor has inſerted all the *Imperial* Conſtitutions from *Adrian* down to *Theodoſius*; cutting off all ſuch Superfluities and Contrarieties as were found therein.

The fourth Book of *Roman* Law now in Uſe, is what we call the *Novels*. For after the Publication of the ſecond Code, by reaſon of the great Variety of Matters, which were either not provided for in the former Books, or elſe wanted ſome Alteration and Amendment, the Emperor publiſh'd a new Law, as he himſelf had promis'd (*u*) to do; and as this new Law has its Riſe from his new Conſtitutions, it was ſtiled the *Novels*. Moſt of theſe *Novels* were publiſh'd in the *Greek* Tongue: For only thoſe were publiſh'd in *Latin* which were to have Force and Authority in the Weſtern Empire (*x*); as the 9th, 11th, 23d, 33d, 34th, 35th, 41ſt, 62d, 65th, 114th, 138th, and the 143d. The Lawyers differ in Opinion about the Number of theſe *Novels*. The Gloſſators on the Law reckon only ninety-eight of them. *Julian*, in his Epitome, will have them to be an hundred twenty-five in Number; but then he only ſeems to have collected thoſe which were made by *Juſtinian*. *Haloander* computes them to be an hundred ſixty-five: Unto which *Gothofred* has added three out of *Cujacius*; ſo that the Number now is one hundred ſixty-eight. This Diverſity of Number ſeems to have its Riſe from hence; *viz.* for that there were ſeveral Novels omitted by future Tranſcribers of them; becauſe they only concern'd the State of certain Perſons and Provinces; and therefore, as they were of no farther Uſe, many of them were neglected in the Schools, and Courts of Law, and only a Gloſs wrote upon ninety-eight of them (*y*). Though all theſe *Novels* go commonly under *Juſtinian*'s Name, yet they are not all his; for ſome are aſcribed to the Emperor *Juſtin*; as the 117th, 140th, 144th, 148th, 149th; and others to the Emperor *Tiberius*, as the 161ſt, 163d, and 164th. Though *Juſtinian* publiſh'd the *Novels* in the *Greek* Tongue, not only for the Uſe of the Eaſtern Empire, but as a more laſting Language; yet it is a great Queſtion, whether thoſe Conſtitutions which are now remaining with us, are genuine.

(*r*) C. 1. 1. 1. (*s*) C. 1. 1. 2. (*t*) C. 1. 1. 3. (*u*) C. 1. 1. l. un. §. 3. (*x*) Nov. 66. c. 1. §. 2.
(*y*) Hagem. de Auth. Jur. Civ. c. 8.

At this Day we make uſe of the *Latin* Verſion of them in our Courts of Law; which Verſion ſome Perſons aſcribe to *Bulgarus*, who lived in the Time of *Irnerius*; and others make *Berguntio*, a *Piſan*, and Contemporary with *Irnerius*, to be the Author thereof (*z*). But it appears more certain to me, that the firſt Verſion of them was made by an ancient uncertain Author, whom *Cujacius* (*a*) thinks to be a *Grecian*, who lived ſoon after *Juſtinian*'s Time, and not long after the Publication of the *Novels*, gave the Weſtern Empire a *Latin* Tranſlation of them, though in a barbarous Stile; but yet, according to *Juſtinian*'s Order, literal and perfect (*b*). This appears from the Epiſtles of *Gregory the Great* (*c*), who lived ſoon after the Reign of *Juſtinian*, and often, in his Letters, quotes the very Words of this Verſion entire. We have this Verſion in the *Corpus Juris* ſubjoin'd to the Code, under the Name *Authentick*, to diſtinguiſh it from that Verſion of *Julian*, who epitomized his Verſion; and it is ſaid to have been receiv'd by *Irnerius* (*d*). About the Year 1140 theſe *Novels* were divided into nine *Collations*; not by the *Greek*, but by *Berguntio*, or ſome other *Latin* Tranſlator of them, without any Regard to the Time in which they were made, or to the Subject Matter of them (*e*). They were call'd *Collations*, *quaſi collatæ ad alias*, as being collated with other Laws; and were propounded either to explain, or elſe to abrogate the Laws of the Code (*f*). In theſe *Novels* we find no ſuch Thing as any Method obſerv'd: For there are ſeveral Heads or Articles inſerted in one and the ſame Conſtitution, different much from each other in the Argument, and one Part thereof ſo contrary unto the other, that the latter Part is derogatory to the former (*g*). Beſides the Prologues and Epilogues thereof are very inept and impertinent: And, in ſhort, there are ſeveral Words therein inſerted, which are obſcure and full of Tautology (*h*). Some will have the firſt *Latin* Verſion of the *Novels* to be that of *Julian*, long after *Juſtinian*'s Time, which all Men commend. The ſecond Verſion is that which *Accurſius* and other Doctors of the Law make uſe of: And though *Alciatus* ſtiles this a *barbarous* Tranſlation; yet *Cujacius* highly extols the Authority thereof, by reaſon of its Antiquity, being made (as *Molinæus* thinks) by ſome uncertain Author not well acquainted, perhaps, with the *Latin* Tongue. But as this Verſion is receiv'd among all Nations, both in their Univerſities and Courts of Law, (as aforeſaid), it has the Authority of Law: And if any Controverſy ſhould ariſe about this Tranſcript, we muſt not always have immediate Recourſe to the *Greek* Original thereof; becauſe this Verſion was made from a more perfect Copy of the *Novels* in the *Greek* Tongue, than we have now extant. The chief Editions of the *Novels* in *Greek* are two: The firſt being that of *Haloander*; and the other that of *Scrimger*. *Agylæus* has ſupply'd and filled up the *Lacunæ* of *Haloander*'s Edition from *Scrimger*. The *Novels* of *Leo* the Philoſopher were never admitted into Uſe, and therefore I ſhall here ſay nothing of them.

And thus the Books to which *Juſtinian* reduc'd the whole *Roman* Civil Law, are now four in Number; namely, *1ſt*, The *Pandects*, otherwiſe called the *Digeſts*, containing fifty Books, wherein are recorded the Opinions and Sentences of ſeveral Men learned in the *Roman* Law. *2dly*, The *Juſtinian* Code, conſiſting of twelve Books, wherein are comprized the ſeveral Decrees and Conſtitutions of the *Roman* Emperors. *3dly*, The *Novels*, conſiſting of nine Collations, which are no other than a Supple-

(*z*) Alciat. Parerg. lib. 2. c. 47. (*a*) Lib. 3. cap. 36. Lib. 8. obſ. 40. (*b*) Grav. de Ort. & Prog. Jur. 138. (*c*) Lib. 9. Epiſt. 53. 11. 2. 1. 38. (*d*) Alciat. Parerg. lib. 2. c. 47. (*e*) Hagem. de Auth. Jur. Civ. cap. 8. (*f*) Alvaret Proem. Feudal. (*g*) Nov. 127. c. 1. Nov. 115. c. 3. (*h*) Nov. 115. Nov. 118.

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ment to the *Juſtinian* Code. And, *4thly*, The *Imperial* Inſtitutions, conſiſting of four Books. As theſe laſt are uſually bound up with the *Pandects*, and being, for the moſt Part, only an Abridgment of the *Digeſts*, they are a compendious Introduction to young Students and Beginners in the Law. As for the *Feuds*, they are not of *Roman* Extraction, but only *Gothick* Cuſtoms of later Date, reduc'd into Writing by Men of ſucceeding Times. The firſt Part of the Law ſtiled the *Digeſts*, is ſo called from the *Latin* Verb *Digero*, which, according to *Cicero* (*i*), ſignifies *to put in order, by dividing*: And by this Name the Lawyers *Julianus*, *Corbit*, *Scævola*, *Servius*, *Alphenus*, *Celſus*, and *Marcellus* inſcribed their Books. It is alſo ſometimes term'd the *Pandect*, from theſe two *Greek* Words, *viz.* πᾶν, which imports the ſame as *All* or the *Whole*; and the verbal Noun Δέκτος, which is deriv'd from the Verb Δέκομαι, to contain, becauſe it contains all the Deciſions of the Law collected from the Queſtions and Reſolutions of all the ancient *Roman* Lawyers, as they lay ſcatter'd up and down in the Law-Books. And this Title the Lawyers *Ulpian*, *Modeſtinus*, and others frequently made uſe of, according to *Aul. Gellius* (*k*). And in this Senſe of *Aul. Gellius*, the *Pandects* are a Collection of Miſcellaneous Subjects of all Kinds relating to the Law: For, ſays he, there are ſome Perſons that have inſcribed their Books by the Title of the *Pandects*, as being the Repoſitories of all kinds of Knowledge. Thus *Tully*, the Freed-man of *Cicero*, compos'd ſome Books of *Miſcellanea* on various Subjects, which he inſcrib'd by the *Greek* Title of *Pandects*; and in the *Latin* Tongue, according to *Gellius* (*l*), they are ſtiled *Digeſts*. The Civilians ſay, (and all Men that compare the *Pandects* with polite *Roman* Authors in point of Stile, muſt own,) that if the *Roman* Tongue were entirely loſt in every other reſpect, it might be eaſily retriev'd again by the Writings of the *Pandects*; theſe Books being deliver'd in ſo pure and elegant a Stile. And that the greateſt Part of the *Pandects* were written with ſuch a Purity of Language, was owing to the polite and elegant Stile of the Compilers of them, and not to the Age in which they were written: And ſo much is acknowledg'd, even by thoſe Criticks that have been ſo ſevere on the other Volumes or Tomes of the *Civil* Law. Several Perſons reproach *Tribonian* and *Juſtinian* too, who, after the compiling of the *Digeſts*, order'd all the Writings of the Lawyers to be deſtroy'd, and the Laws of the Twelve Tables to be repealed, ſaying, That all Perſons ought to lament this Loſs. For *Alciatus* thinks, that *Accurſius* and the Doctors had labour'd in vain, if all the Books of the Lawyers had continued extant and entire; ſince the Knowledge of the *Civil* Law might then have come to us much more pure and clear from the Fountains themſelves, than we can now draw it from the muddy Streams and confus'd Commentaries of the Interpreters of the Law. *Jaſon* highly complains of *Tribonian*, for huddling up and reducing the *Roman* Law to ſo narrow a Compaſs. But ſome Men have a much better Opinion both of *Juſtinian* and *Tribonian*; rather believing theſe Books of the *Roman* Lawyers were loſt by the Calamity of the Times, and through the Incurſions of barbarous Nations. For among thoſe Cities which in reſpect of all others were the Guardians of the *Roman* Laws, the City of *Berytus* was ſwallow'd up by an Earthquake ſoon after *Juſtinian*'s Death: *Rome* was frequently laid waſte by the *Goths* and other ſavage People, that were profeſs'd Enemies to all human Learning as well as to theſe Books; and the City of *Conſtantinople* itſelf, after it had ſuffer'd ſome other Calamities, was oblig'd to ſubmit to the Outrage and Violence of the *Turks*. But from the Death of *Juſtinian*, (according to the Writings of

(*i*) Lib. 1. de Orat. (*k*) Lib. 13. c. 9. (*l*) Noct. Attic.

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the Fathers and the Hiſtory of thoſe Times,) the whole *Roman* Empire was ſo much haraſs'd by the *Goths* and other *Barbarians*, and underwent ſuch Devaſtations every-where by Fire and other ruinous Diſaſters, that it ought rather to be aſcrib'd to Divine Providence, that we have any Remains of the *Roman* Law left among us, as preſerv'd by the Care of *Juſtinian* in the *Digeſts*; and which, according to the Conjectures of moſt Men, would otherwiſe have periſh'd and been entirely loſt. But *Tribonian* and his Fellow-Aſſiſtants are ſurely blameable in this reſpect, *viz.* That they finiſh'd the *Pandects* in three Years Time, when the Emperor had allow'd them ten Years for the compiling this Work, which he in his *Inſtitutions* (*m*) calls *Opus Deſperatum*, believing this Undertaking could not be well brought to Perfection in leſs Time: For no Time had been too much for turning over ſo many Volumes of important Knowledge as were made uſe of in this Work. And therefore, if any Thing ſeems imperfect, obſcure, or any wiſe contradictory, in the *Digeſts*, it ought to be imputed to the Compilers, and not to the Lawyers from whoſe Writings the *Pandects* were compoſed. The Interpreters of the Law do alſo find Fault with *Tribonian* and his Aſſiſtants on another Account, namely, That the Method wherein the *Digeſts* are form'd, is not conſonant; though (I think) they may be juſtify'd herein: The *Digeſts* being compiled in the ſame Order and Method as the *Perpetual Edict* of *Salvius Julianus* was. For the greateſt Part of the *Roman* Law was taken out of the Commentators thereon, in order to frame this Edict; and this Rule *Tribonian* afterwards follow'd in compiling the *Digeſts*. And *Cujacius*, ſpeaking of the *Digeſts*, ſays thus, *viz.* " That it is not ſo much owing to the Ingenuity of *Tribonian*, as to " that of *Julian*, *Hermogenian*, and the ancient Lawyers, that the *Digeſts* " are compiled with ſuch wonderful Art and Coherence in Point of the " ſeveral Subjects therein treated; *Tribonian* only purſuing the Track they " had chalked out for him: And they that expect any other Method, are " weak and fooliſh in their Deſires, not knowing what Method is, or (at " leaſt) the Method obſerv'd in the *Digeſts*."

What I ſhall further offer touching this Volume of Laws called the *Digeſts*, is, That whereas there are often various Readings, which are complain'd of in this Book, and which cannot otherwiſe happen in tranſcribing from ſo many Copies in the Hands of ſeveral Perſons; ſo it is a Doubt among all Men almoſt from this Diſagreement of Copies, unto what Books they ſhall apply for a true Reading, ſince the *Vulgar* Edition of the *Digeſts* is the moſt corrupted, and differs ſo much from that which the ancient Doctors made uſe of after the Time of *Irnerius*. For there is one Edition of *Haloander*'s which was form'd from the Books of *Politian* and *Bologninus*, who corrected their Copies (as they ſay) by the *Florentine* Original. And this is the next beſt Edition to the *Florentine*, and is commonly called the *Norway* Edition. Thus, beſides the *Vulgar* and *Norway* Editions, there is a third, ſtiled the *Florentine* Edition, extracted from that Book of the *Digeſts* which the People of *Piſa* firſt procur'd, and which afterwards fell into the Hands of *Florence*, and is held in great Eſteem and Veneration among all Men of Letters, as being the beſt Edition. This was formerly term'd the *Piſan* Edition, from the Place where the Manuſcript *Exemplar* was lodged. And though ſome warm Diſputes have been held concerning this Book, not only among Lawyers, but likewiſe among other Men of Learning, whether this ſame Book be the Archetype or Original Book written by *Juſtinian*'s Order, or whether it be only a Copy tranſcrib'd from thence in *Juſtinian's* Life-time, or ſoon after his Death; yet

(*m*) Proem. Inſt. §. 2.

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all Perſons hold it to be very ancient. *Politianus* affirms it to be the Original or Archetype itſelf: But *Anton. Auguſtinus*, *Cujacius*, *Andreas*, *Alciatus*, and others, think it not to be *Juſtinian*'s Archetype, but only a Tranſcript from other Copies ſince the Emperor's Deceaſe; there being ſome Errors to be met with in the *Florentine* Code. Yet 'tis the common Opinion, That all the Books of the *Digeſts* now extant in their Copies, were tranſcrib'd from the *Florentine* Code; and to this Book all Men have Recourſe in Controverſies about the Text itſelf: And thus the more ancient Doctors of *Italy* were wont to decide their Controverſies by appealing to the *Digeſts* at *Piſa*, and conforming themſelves thereunto. Laſtly, *Juſtinian* would have this Book ſtiled the *Digeſts*; becauſe the whole *Roman* Law was therein digeſted into ſeven Tomes or Parts (*n*): Which ſeven Parts made but one Volume ſo long as the *Juſtinian* Conſtitution remain'd in Force, whereby the Emperor forbids any Commentaries to be added to his Laws, leſt a great Error or Confuſion ſhould ariſe from thence. But now, from the Gloſſes of *Accurſius* and other Lawyers, it is ſwoln into three Volumes. The Emperor publiſh'd the *Digeſts* or *Pandects* on the 17th of the Calends of *January*, that is to ſay, on the 18th Day of *December*, according to Modern Computation, *A. D.* 533, or (as others ſay) 534.

The *Code* is among Lawyers reckon'd to be the ſecond Part of the *Roman* Law; and is ſo called, by way of Excellency, from the *Latin* Word *Codex*, which, in *Engliſh*, ſignifies a Book, as the Holy Scripture is among Divines called the *Bible*, from the *Greek* Word Βίβλιον, importing the ſelf-ſame thing: And this *Code* contains the Conſtitutions of the *Roman* Emperors, as they relate to every Part of the Law. The Compilement of the firſt Code was committed to the following Perſons (*o*), *viz.* to *John*, that had been Chancellor or Treaſurer of the Sacred Palace; to *Leontius*, that had been a *Pretorian* Præfect; to *Phocas*, *Magiſter Militum*; to *Baſilides*, who had likewiſe been a *Pretorian* Præfect in the Eaſt; to *Thomas*, Chancellor or Treaſurer of the Sacred Palace; to *Tribonian*, and *Conſtantine* Lord Almoner of the Houſhold; to *Theophilus*, Judge or Count of the Sacred Conſiſtory, (with us called the Lord Chief Juſtice); and to *Dioſcorus* and *Præſentinus*, who were Advocates of the *Pretorian* Court. Their Commiſſion bore Date on the Ides of *February* (*p*), as appears by a particular Conſtitution; and, it being publiſh'd on the 7th of the Ides of *April* (*q*), it was fram'd in little more than a Year's Time, and confirm'd by a particular Conſtitution (*r*), as already related. But as this Code was too haſtily compiled, the Emperor order'd it to be review'd, as aforeſaid; and from thence publiſh'd a new Code, which he, in *Latin*, ſtiled *Codex repetitæ Prælectionis*, or, in *Engliſh*, the ſecond Code. This ſecond Code was publiſh'd on the 16th of the Calends of *December* (*s*), *A. D.* 534.

The *Novels*, or third Part of the Law, are ſo called, not becauſe they are a new Law, and different from the old, as *Cedrenus* would have it, but becauſe they are the new Conſtitutions of the Emperor, which were publiſh'd after the ſecond Edition of the *Juſtinian* Code.

Julian, Chancellor of *Conſtantinople*, about the Year 570, made an Abridgment of the *Novels*; and publiſh'd the ſame in the *Latin* Tongue; cutting off all the Prologues and Epilogues belonging thereunto. This Abridgment contains one hundred twenty-five of the *Novels*, and is divided into two Books, the firſt of which comes down to the ſixty-third, and was by *Irnerius* and other Lawyers of thoſe Times, publiſh'd under the Name

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(*n*) C. 1. 17. 2. 1. (*o*) C. 1. 1. l. un. (*p*) Feb. 15. A. D. 528. (*q*) A. D. 529. (*r*) A. D. Senat. Conſtant. (*s*) Nov. 19. A. D. 534.

of the *Novels*. But this Abridgment, though it was wrote in a more pure and elegant Stile than the old Tranſlation, is not receiv'd in Courts of Law. This Abridgment has been publiſh'd ſeveral Times lately (*t*), and is of ſome Eſteem among learned Men. And thus I have done with the ſeveral Books of the *Roman* Law, as compiled by *Juſtinian*'s Order, and afterwards publiſh'd by him. I ſhall, in the next Place, in purſuance of my Promiſe, conſider how this Law lay almoſt extinguiſh'd with the Author himſelf, according to the Fate of all human Things; and how it reviv'd and came into *Europe* again, after it had lain dead and buried, as it were, for ſome Ages under the Ruins of the *Roman* Empire, together with all other Parts of uſeful Learning.

For we read, that the *Roman* Civil Law met with various Alterations, and experienc'd ſeveral Changes, after *Juſtinian*'s Time, in the Weſtern Empire. For after *Conſtantine* the Great had tranſlated the Seat of that Empire from *Rome* to *Conſtantinople*, the Authority of the *Roman* Law began to decreaſe apace in the Weſt, by growing obſolete and out of uſe in a very ſenſible Manner, eſpecially when *Rome* itſelf became a Prey to the Invaders of *Italy*. In the City of *Conſtantinople* itſelf, it ſcarce maintain'd its Ground forty Years after *Juſtinian*'s Death, from the Sloth of the ſucceeding Emperors, and through their Envy to *Juſtinian*'s Glory: But it came not into *Italy* and the *European* Nations till five hundred Years after *Juſtinian*'s Reign; being ſuppreſs'd by the *Lombards*, *Goths*, *Vandals*, *Franks*, and other barbarous Nations, traverſing the Weſtern Provinces of the *Roman* Empire, who purſu'd the *Roman* Laws as well as all other Learning with an implacable Hatred.

Now it will not be amiſs here, by way of Digreſſion, a little to remark, That the Laws of the *Viſigoths* got an Eſtabliſhment in *Italy* before the Reign of the Emperor *Juſtinian*. For after the *Viſigoths* had by Violence poſſeſs'd themſelves of *Italy*, this looſe and ſavage People began for ſome Time to live at Diſcretion without any Laws at all, till they became a little more civiliz'd, and then they introduced a Set of written Laws; which, according to *Iſidore*, they aſcribe unto *Euricus*. And hence it appears, that though the more civiliz'd among them had Laws, inaſmuch as *Athatulphus* did (*u*) by a particular Edict ordain, That they ſhould obſerve the *Gothick* in Conjunction with the *Roman* Laws; and for that King *Atharick* order'd the ſelf-ſame Law to be common both to the *Goths* and *Romans*: Yet, notwithſtanding all this, it will be eaſily granted, that *Caricus*, who preſided over the *Goths* in *Gallia Narbonenſis* from the Year 465 to the Year 484, collected the ſcatter'd Parts of the *Gothick* Law into one Code or Volume of Laws; and this Code the *Viſigoths* made uſe of. Afterwards, about the Year 580, *Levigildus* much enlarged this Code, by adding to it ſeveral Decrees made by the Succeſſors of *Caricus*; and particularly thoſe of *Chindeſindus* and *Receſwindus*, who were both of them everywhere eſteem'd the Authors of amending the *Gothick* Laws. This Collection was therefore afterwards ſtilled a Collection of the *Gothick* Laws; and among the *Spaniards* entitled *Fuero Juzgo*, or the *Juriſdiction of the Judges*. And this Collection of *Gothick* Laws, which *Pithou* and *Lindinbrogue* have preſerv'd and deliver'd down to us entire, were in Force for ſome Time; yet the Remains of the *Roman* Law did (notwithſtanding) ſtill continue among the *Italians* in ſome meaſure. For theſe Remains were preſerv'd (*x*) even by *Anian* a *Goth*, who, by the Order of *Alarick* the Younger, King of the *Viſigoths*, compiled a Breviary of the *Theodoſian* Code, out of the *Gregorian*, *Hermogenian*, and *Theodoſian* Codes; and out

(*t*) Ven. 1537. 8. Lugd. 1560. 8. Brug. 1565. 4. Baſ. 1567. Fol. (*u*) Circ. An. 412.
(*x*) A.D. 506.

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of the Rules of *Ulpian*, the *Inſtitutions* of *Caius*, and the receiv'd Sentences of the Lawyer *Paulus*. He revis'd and ſubſcrib'd this Breviary, in order to put the obſcure Part of the *Roman* Law into a clearer Light; and that it might be apply'd to the State of thoſe Times. After this Code was made for the *Atures* in *Novempopulania*, in the twenty-ſecond Year of King *Alarick*'s Reign, Copies thereof were tranſmitted to all the *Comites* or Judges of *Alarick*'s Kingdom, for the Determination of all Cauſes according to the Tenor hereof: Nor was there then in *Italy* any other Law, or Form of Law receiv'd. This Collection was in *Latin* intitled *Aniani Brevarium*, or *Corpus Theodoſianum*, *&c.* But though *Alarick* was the Year following killed in Battle, and the Kingdom of *Tholoſana* conquer'd by the *Franks*, who poſſeſs'd themſelves thereof; yet *Theodoric*, King of the *Oſtrogoths*, was admitted to Part of the Kingdom, who reſtor'd it to be govern'd by the *Gothick* Law. And hence it is, that this Body of Law has ſtill retain'd its Force, particularly in *Narbone* and that Part of *France* which was ſubject to the *Goths*, till the uſe of the *Roman* Law was by a Decree of King *Chindiſwind* aboliſh'd under a certain Penalty, and the Code of the *Viſigoth* Laws introduc'd in its ſtead. His Son *Receſwind* confirm'd this Decree, and afterwards King *Egica* committed the Amendment of the *Gothick* Laws to the *Spaniſh* Biſhops, to be modelled according to the Rules of Chriſtianity; the Decrees of *Chindeſwind* only excepted. And thus the Authority of the *Gothick* Laws continu'd in Force throughout all *Spain*, *Italy*, and *France*, till *Sancho Ramirus*, his Succeſſor, in the eleventh Century, introduc'd the *Imperial* Law: From whence *Alphonſo* the Tenth compiled a Book intitled the *Partita*, which was the Foundation of the *Spaniſh* Law. In Imitation of *Anian*, the Referendary of King *Alarick*, (it ſeems) *Papian*, a *Burgundian* by Nation, compiled a Code or Book of the *Anſwers* of the Lawyers, conſiſting of forty ſix Titles, out of the *Roman* Law. This Code he, in ſome meaſure, compiled from the Breviary of *Anian*, the Rules of *Caius*, the Sentences of *Paulus*, and even from the Body of the *Novels* of *Theodoſius*, *Valentinian*, *Majorian*, *Leo*, and *Severus*. Herein he follow'd the Order and Method of the *Burgundian* Laws made by King *Gundenbald* (*y*); and ſeems to have compiled theſe Anſwers for this very End, *viz.* That he might by this Means preſcribe a certain Body of Law after the *Roman* Model, unto all ſuch as were contented to live by the *Roman* Law: And the *Burgundians* and other *German* Nations, that infeſted *Gaul*, granted this Liberty unto their Subjects (*z*).

Touching the Laws of the *Oſtrogoths* in *Italy*, we have nothing certain to depend on. For though *Jornandes* aſſures us, that *Dicenæus*, even in the firſt Century, compell'd the *Goths* to live according to their own proper and municipal Laws; yet this rather ſeems to be meant of the State of the *Getæ*, than of the *Goths*. But 'tis more certain, that *Theodoric* King of the *Oſtrogoths* eſtabliſh'd the Authority of the *Roman* Laws, as appears from the Preamble of the *Theodoric* Edict or Decree, in theſe Words; *viz.* "Several Complaints have been brought before us, That the Laws are "under Foot within ſome of our Provinces, and that the Authority of "the Laws is not ſufficient to keep off Injuſtice: Wherefore, ſtudying "the Peace and Quiet of the Generality of our Subjects, and ſetting "before our Eyes ſuch Things as often happen, and for terminating Caſes "of this Nature, We have order'd the preſent Edict to have Weight: "And ſaving the Reverence due to the Publick, and *all Laws*, to be "devoutly obſerv'd; which Laws the *Romans* and *Barbarians* ought to "follow." Now 'tis certain, that under the Words *all Laws to be ob-*

(*y*) Lindenb. Prologem. Cod. LL. Antiquar. (*z*) Leg. Burg. tit. 60. l. 1.

ſerved,

ſerved, &c. the *Roman* Laws are included. Hence Pope *Gelaſius* alſo ſpeaks thus (*a*) to King *Theodoric*; *viz.* "Certainly your Magnificence approv'd "the Laws of the *Roman* Emperor, which he order'd to be kept in human "Affairs, to be obſerv'd for the Increaſe of his Felicity; and, more- "eſpecially, as they reſpect the Reverence due to St. *Peter* the Apoſtle." But though *Theodoric* and his Succeſſors publiſh'd ſeveral Edicts which were well enough adapted to the State of his Kingdom (*b*), yet they never ſeem to have been collected into any one Body of Laws. But no ſooner had *Juſtinian* poſſeſs'd himſelf of *Italy*, by his Conqueſt of the *Goths*, but the *Juſtinian* Law began to gain Ground even all over *Italy*, though the priſtine Knowledge of the Law among the *Italians*, which conſiſted in the *Ante-Juſtinian* and *Gothick* Law, was not immediately thereupon entirely aboliſh'd. But when the *Lombards*, in the Reign of *Alboinus*, had poſſeſs'd themſelves of *Italy* (*c*), under the Command of their General *Narſetes*, they, after the Cuſtom of other Conquerors, introduced their own *Lombard* Laws: And, about the Year 637, *Rotharis* firſt reduced theſe Laws into Writing (*d*); and *Grimoaldus*, afterwards, by Order of the ſaid *Alboinus*, added ſome new Matters thereunto (*e*). Then, after him, King *Luitprandus* added ſeveral other Laws, which we read in manuſcript Copies, and which are diſtinguiſh'd by Titles or Inſcriptions (*f*). Hereunto were ſubjoin'd the Edicts of *Rachiſus* and *Aiſtulphus*. And the Emperors *Charlemagne*, *Ludovicus Pius*, *Lotharius*, *Pepin*, *Guid. Otto*, *Henry*, and *Conradus* added ſeveral Things, which are inſerted in the *Lombard* Law (*g*). *Lindenbrogue* has inſerted this Body of the *Lombard* Laws in his Code of *Ancient Laws* (*h*), and has divided it into three Books, and diſtinguiſh'd it by ſeveral Titles; prefixing thereunto the Names of the ſeveral Kings and Emperors that were the Authors of theſe *Capitula*. But the Collector of theſe *Capitula* is not certainly known; though 'tis plain from hence, that the Work is not very modern, becauſe this Collection of Laws is not only referr'd to in the Books of the *Feudal* Law, but alſo *Charles Cotta*, a *Sicilian* by Birth, who lived five hundred Years before, has made a Comment thereon. Some will have it, indeed, that this Collection was made by a private Hand, *viz.* by *Peter* Deacon of *Caſſini*, about the Time of the Emperor *Lotharius*'s Reign (*i*); becauſe we meet with no Conſtitution herein more ancient than his Reign. But he ſo blended all Things together, and diſtributed the Chapters thereof in ſuch a manner, that he has ſhewn no Regard to the Times when theſe Conſtitutions were made; though, according to ſome Men, ſeveral other Objections lie againſt this Collection of Laws; yet the ſame has ever been in ſo great Eſteem and Authority, that ſeveral Lawyers have commented on them (*k*). And even hence it is, that the Relicks of the *Lombard* Law do ſtill remain in Force among the *Italians* (*l*). But though the Laws of the *Lombards* did at this Time meet with ſome Eſtabliſhment in the *Roman* Empire; yet the Remains of the *Roman* Law were ſtill preſerv'd, and (in ſome meaſure) obſerv'd as an additional Law unto that of the *Lombards*, whenever Cuſtom, or ſome written Law, did not contradict the ſame: For the Authority of the *Roman* Laws was of no mean and vile Account among the *Lombards* and *Italians*, but only they did not ſo far ſtretch their Power, as to overthrow Uſage and Cuſtom. But the Exarchal Cities of *Italy*, (even after *Ariſtulphus* King of *Lombardy* had, in the eighth Century, put an end to the Exarchate, on the Expulſion of the *Greeks* (*m*), had a

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(*a*) Diſt. 10. lib. 12. (*b*) Lindenbr. Cod. LL. Antiquar. p. 239. (*c*) Plaut. Diacon. de Jeſt. Longobard. lib. 2. c. 5. (*d*) Pau. Diacon. ut ſupra. lib. 4. c. 44. (*e*) Idem lib. 5. c. 33. (*f*) Idem lib. 6. 58. (*g*) Baluc. Col. tom. 1. p. 320. (*h*) Pag. 503. (*i*) Conring. de Orig. Jur. c. 22. (*k*) Lindenbr. Prologom. (*l*) Melch. Gold. Prologom. Coll. Conſ. & Lim. Imp. (*m*) Rub. Hiſt. Raven. lib. 4.

great

great Regard to theſe Remains of the *Roman* Law ; though theſe Cities, by degrees, revolted from the Empire, after this Period of Time : But yet (notwithſtanding all this) they ſay, there ſtill remain'd among the *Romans* ſome Uſe of the *Juſtinian* Law : For in the Laws of the *Lombards* we meet with frequent Appeals to the *Roman* Law (*n*). And *Baldwin*, in his *Prologomena* to his Comment on the *Inſtitutes*, obſerves, That when the ſeveral Laws of the *Goths*, *Vandals*, *Lombards*, *Franks*, and other Barbarous Nations prevail'd in *Italy*, and in the Weſtern Empire ; yet, even in that unquiet State of Affairs, ſome Remains of the *Roman* Law were ſtill preſerv'd at *Ravenna*, which for a long Time under the Exarchs of *Conſtantinople*, yielded Obedience to the *Greek* Emperors. And though the *Lombards*, together with their King *Deſiderius*, were ſubdued by the Proweſs and Valour of *Charlemagne* ; yet the Authority both of the *Lombard* and *Roman* Law ſtill continued among the *Italians*, even whilſt they were under the Dominion and Government of the *Franks :* And this Law the *Franks* retain'd within their own Territories, leaving it free to their own Subjects to live even by the *Roman* Law, if they thought fit. That which continued under the *French* Emperors laſted 'till the Reign of *Lotharius* ; but yet, in ſuch a manner, that the *Theodoſian* Code was rather uſed in *France*, when the Majeſty of the *Roman* Empire began to decline and come to an end there. The *Italians* rather choſe to uſe the *Juſtinian* Code than the *Novels* ; the Uſe of the *Digeſts*, with them, being almoſt aboliſh'd : whereby it came to paſs, that theſe Books of the *Digeſts* lay, as it were, dead and bury'd through Diſuſe, and became almoſt a Prey to Worms, and other ſuch-like Vermin.

But to return to the *Juſtinian* Law, from whence I have made this long Digreſſion, I ſhall here, in the firſt Place, conſider in what manner the Books of *Juſtinian* were receiv'd at *Conſtantinople* ; and then, in the Eaſtern Empire ; and afterwards, how they were brought into *Europe*, when the Law itſelf was almoſt forgotten. For theſe Books were, about forty Years after *Juſtinian*'s Time, receiv'd into the Schools at *Conſtantinople* ; and, being wrote in *Latin*, were uſed in all the Courts of Law under the Imperial Reigns of *Juſtin*, *Tiberius*, and *Mauritius* ; and the Law was pronounced from them, for ſome Time, in the *Roman* Language, wherein the Decrees of the Magiſtrates, and all the Judicial Sentences, were enter'd and publiſh'd : And this Honour was done to the *Roman* Language ; becauſe the vaſt Extent of this mighty Empire was entirely owing to the Wiſdom and other Virtues of the *Roman* People. But the *Juſtinian* Law hardly prevail'd more than forty Years after this Emperor's Death in the *Latin* Tongue : For, about the Year 600, *Phocas* (on the Death of *Mauritius* the Emperor) ſucceeded to the Empire ; who, being a Prince of great Sloth and Imprudence, cou'd neither preſerve the Laws as they ſhou'd be, nor repel the Invaſions which the *Saracens* made in *Aſia*. Under the Reign of this weak and indolent Prince the *Germans*, *Gauls*, *Spaniards*, and *Lombards* began to ſap the Foundation, and to ſhake the Power of this vaſt Empire in *Italy*. After which Time the *Roman* Emperors were contented to be ſtiled by the Name and Title of the *Greek* Emperors, 'till ſuch time as the City of *Conſtantinople* was deſtroy'd by the *Turks* : Some of theſe Emperors deſiring to be call'd the Succeſſors of *Conſtantine* the Great ; and others, the Succeſſors of *Alexander*. But from the Time of *Phocas* to that of *Baſilius Macedo*, who being brought to *Conſtantinople*, together with his Sons *Leo* the Philoſopher, and *Conſtantine Porphyrogenitus*, among the Captives to be ſold there, was, through a rare Inſtance of

(*n*) Ex Leg. Luitprand. lib. 1. LL. Longobard. tit. 39. l. 2. (*o*) Circ. An. 360.

Fortune (*o*), proclaim'd Emperor by the Arms and Acclamations of the Soldiers, and afterwards was by his Sons ſucceeded in the Empire: I ſay, 'till this Time the Books of *Juſtinian* were for two hundred Years in ſome kind of Uſe under the Emperors, and continued to preſerve their Authority in the Courts of Law and the Univerſities. For the *Code* and the *Digeſts* were, either in *Juſtinian*'s Time, or ſoon after, tranſlated into the *Greek* Tongue by *Thalelæus* a Chief among the Lawyers; as the *Inſtitutions* were by *Theophilus* a Lawyer of *Conſtantinople*, who lived near the Time of *Juſtinian*; and ſeveral other Books, out of which the *Digeſts* were taken, were alſo turn'd into *Greek*. For when the Uſe of the *Latin* Tongue had by Degrees forſaken the *Greek* Schools and Courts of Law, the *Greek* Lawyers began to introduce ſome Parts of the *Juſtinian* Law into their Courts, by tranſlating them into the *Greek* Tongue; and in the Eaſtern Courts of Judicature the Law was pronounced and given from theſe Books, and eſpecially from the Conſtitutions of thoſe Emperors that ſucceeded *Juſtinian* to the Time of *Baſilius* aforeſaid. And thus the Force and Vigour of the *Roman* Laws began very ſenſibly to diminiſh under theſe Emperors, who were ſorely haraſſed by the Arms of the *Saracens* in the Eaſtern Empire, 'till the ſaid *Baſilius*, a Prince of great Courage and Magnanimity, did, by his Arms againſt the *Saracens*, and other Enemies of the Empire, acquire a mighty Reputation, and no leſs Glory, by reſtoring the *Roman* Laws and Methods of Judicature. *Theophilus* tranſlated the Imperial *Inſtitutions* into *Greek*, as aforeſaid, in ſome Places paraphraſing thereon, wherein he has explain'd ſeveral Rites and Cuſtoms among the *Romans*: but yet he has made this Paraphraſe, in many Places, contrary to the Senſe and Meaning of *Juſtinian*. We have theſe *Inſtitutions* in *Greek* ſtill extant among us, being twice lately publiſh'd at *Paris* by *Hannibal Fabrottus*, who has corrected the Text in ſeveral Places, from three manuſcript Copies in the *French* King's Library, and has added thereunto the *Latin* Verſion of *Curtius*, and ſome *Greek Scholia* and Notes thereon. This Paraphraſe is much extolled by *Viglius Zuichem*, ſaying, That he, receiving it written in the *Greek* Tongue from Cardinal *Bembo*, tranſlated it into *Latin*. But as to the Tranſlator of the *Code*, 'tis very uncertain whether he was the ſame *Thalelæus* that tranſlated the fifty Books of the *Digeſts* into *Greek*, or not; for there was one of that Name, who was one of the Collectors of the *Pandects*, and who has given us a literal Tranſlation thereof in the *Greek* Tongue. The *Latin* Novels have been tranſlated into *Greek* by ſeveral Hands, and, as already remember'd, epitomiz'd by *Julianus*. But the *Imperial* Conſtitutions, which were publiſh'd after *Juſtinian*'s Time, made the chief Part of the *Greek* Law, being collected in the *Greek* Tongue. And hence it came to paſs, that That Body of Law, as it was publiſh'd by *Juſtinian* in the *Latin* Tongue, was plainly laid aſide, and the *Greek* Law aroſe in its Place, though, in the main, drawn from the *Juſtinian* Law. And ſo the Tranſlation of the *Juſtinian* Law continu'd in Uſe 'till the above-mention'd *Baſilius*, about the Year 867, caus'd a new Body of Law, as it were, to be compiled out of the *Juſtinian* Law; though this new Body of Law varies much from the old one, both in reſpect of its Number of Books, and in the Titles thereof; nor are theſe Books diſtinguiſh'd or divided into Laws, as the *Digeſts* are. The firſt Part or Period of this Work conſiſts of forty-one Books; and the ſecond Part or Period, conſiſting of nineteen Books, was continu'd by his Son and Succeſſor *Leo* the Philoſopher: ſo that the Whole amounting to ſixty Books, was publiſh'd by this Emperor, under the Title of *Libri Baſilicωn*. At length *Conſtantine Porphyrogenitus*, another of *Baſilius*'s Sons, about twenty or (as ſome ſay)

(*o*) Circ. Ann. Dom. 860.

forty

forty Years afterwards (*p*), reviſ'd and purged this Work, by publiſhing a ſecond Edition thereof, and by reducing it to a better Form and Method. And this Work we now make uſe of upon ſome Occaſions; though it rather ſeems to have been compiled with a Deſign of a aboliſhing the Memory of *Juſtinian*. For *Baſilius* himſelf, envious of the great Reputation which *Juſtinian* had acquir'd by new-modelling the Law, endeavour'd firſt to deſtroy his Book, by publiſhing an *Epitome* of the *Juſtinian* Law, under the *Greek* Title of Περχέων Νόμων, or, *A Manual of Laws*; and then finding this wou'd not do, he publiſh'd this Work of the *Baſilicωn*. After which Time the Books of *Juſtinian* became obſolete in the Eaſtern Empire, being never read by the Lawyers there, and ſeldom or never tranſcribed and copied. And hence it was, that in all that Multitude of Books which have been brought into the Weſt ſince the *Turks* took *Conſtantinople*, there have not been found any Books of *Juſtinian*'s; unleſs it be, perhaps, the *Novels*. *Baſilius* compiled his Law from the Books of *Juſtinian*, (as already hinted), and from thoſe Edicts which *Juſtinian* publiſh'd after the *Novels*, and from the Conſtitutions of *Juſtinian* and the following Emperors that reign'd 'till the Time of *Baſilius*; many of which Edicts are publiſh'd by *Enimundus Boneſidius* and *Joh. Leunclavius* in their Books of the Eaſtern Law. And, laſtly, they were compiled from the Books of the *Roman* Lawyers then found among the *Greeks*, and ſince brought among us. But yet theſe Books of *Baſilius* lay conceal'd for a long Time, after the Fall of that Empire, 'till *Gratian Hervettus* publiſh'd ſeven of them in *Latin*; and *Cujacius*, who had moſt of them in his keeping, publiſh'd three others, borrowing great Light and Help from them in his Comment on the *Roman* Law, and eſpecially in his Obſervations, which *Thuanus* ſtiles *a divine Work*. And thus this Work of the *Baſilicωn* remain'd to be the Foundation of the Laws of the *Greek* Empire, 'till that Empire was diſſolved and came to end. For theſe Books, after the Death of *Baſilius* and his Sons, were neither receiv'd in the Univerſities; nor were they allow'd of in any Courts of Judicature, no, not even in Matters of Practice.

Though this Work of the *Baſilicωn*, as tranſlated into *Latin* by the aforeſaid *Hervettus*, was publiſh'd in a very maim'd and imperfect Condition; yet the above-mention'd *Fabrottus* has given the World a more perfect and accurate Edition of it from the *French* King's Library, not only with a new Verſion thereof in ſeven Volumes in *Folio*, printed at *Paris*, but alſo with the *Scholia* and *Greek* Interpreters thereon; by which Means ſeveral Paſſages in the *Juſtinian* Law are clearly explain'd and illuſtrated. But even this Edition is imperfect in reſpect of nineteen Books; the entire Body of this Law being not now extant: For not only the 19th Book is now loſt, but all the Books from the 31ſt to the 38th; and ſo likewiſe are the 43d and 44th, and from the 49th to the 60th. But *Fabrottus* has endeavour'd to ſupply this Defect from the *Synopſis Baſilicωn*, and the *Gloſſes* thereon. To this laſt Edition is added the *Notitia Baſilicorum* of *Joſ. Suarez*, which conduces much to the Knowledge of this Hiſtory, and to the Law of the *Greeks*. Some Perſons aſcribe theſe Books of the *Baſilicωn* to *Leo* only, who, after theſe Books, publiſh'd one hundred and thirteen Novel Conſtitutions now extant, and only made uſe of in ſuch Matters, for which *Juſtinian* has provided no Conſtitution at all: And others aſcribe them to *Baſilius* the Father, to whom even *Leo* himſelf aſcribes them.

But though this Work of the *Baſilicωn* is not of ſufficient Authority in Courts of Law for the Deciſion of Cauſes, yet it is of admirable Uſe and

(*p*) Circ. An. Dom. 910.

Service

Service for reſtoring the Text of the *Juſtinian* Law, ſince it often gives us a Paraphraſe thereon. Wherefore, as this was the Foundation of the *Greek* Law, there have been ſeveral other Lawyers, beſides ſuch as are here mention'd, who have wrote *Scholia's* and Commentaries on theſe Books of *Baſilius*, and have publiſh'd either Gloſſes or Paraphraſes thereon, though they are not equal in Number to the *European* Commentaries on the Books of *Juſtinian*; among which we meet with ſome Gloſſes that have reach'd even our Times; as thoſe of *Stephanus*, *Eudoxius*, *Iſidore*, *Baſil*, and other *Greek* Lawyers, which are added to the Books of *Baſilius*, as the Gloſſes of *Accurſius* are to the Books of *Juſtinian*. Among ſuch as are of principal Note, we may alſo reckon theſe, *viz. Nicæus*, *Euſtathius*, *Calocyrus*, *Sextus*, *Leo*, *Domninus*, *Joh. Priſcus* a Gloſſator on the *Novels*, *Hagiotheodoret*, *Doxapater*, *Gregorius*, *Garidas*, *Beſtes*, *Theophilitzes*, *Patzus*, *Phobenus*, and *Demetrius* the Keeper of the Archives at *Conſtantinople*. *Cujacius* mentions ſeveral others; but then they are ſuch Perſons as ſeem to have lived before the Time of publiſhing the *Baſilicωn*, as *Suarez* obſerves. A *Synopſis* or an *Epitome* of the Law, rather ſeem'd to pleaſe the *Greeks*: And hence it is, that we have ſeveral Abridgments made from this great Work, which were framed according to the Model of the *Inſtitutions*. From *Baſil's* Manual of Laws above mention'd, *Conſtantine Harmenopulus*, a Judge of *Theſſalonica*, has compiled an Abridgment of the whole Law; and alſo from thoſe *Imperial* Conſtitutions which came down to the Time of *Emanuel Comnenus*, who, being in Poſſeſſion of the Empire, about the Year 1150, order'd an Abridgment of this Law to be made. But before the Time of *Harmenopulus*, the Lawyer *Mich. Attaliota* did (*q*), by the Order of the Emperor *Ducas*, publiſh another *Synopſis* of theſe Conſtitutions, which he ſtiled *A Compendium of a Compendium*; or, according to the *Greek* Title of it, call'd, Ποίημα νόμικον ἤτοι θεσματικόν. About the ſame Time *Mic. Pſellus* publiſh'd a *Synopſis* of Law in Political Verſe; and then *Leunclavius* (*r*) aforeſaid publiſh'd his *Ecloga Baſilicωn* from the Library of *Joh. Sambuci* of *Pannonia*, afterwards Great Chancellor of *Poland*, who found this Eclogue at *Tarentum* in *Calabria*. For that Part of *Italy* which was formerly call'd *Old Greece*, and afterwards term'd the Exarchate of *Ravenna*, was for a long while ſubject to the Eaſtern Emperors: And then firſt it ſubmitted itſelf to the *Lombards*, and afterwards to the *Normans*, who lorded it over *Italy* for many Years. Some ſay, that *Lacoponus* the Younger was the Author of the *Ecloga Baſilicωn*, which *Sambucus* found at *Tarentum*. *Leunclavius* firſt publiſh'd this *Synopſis* with a *Latin* Verſion; and afterwards *Charles Labbé* republiſh'd the ſame, with Critical Obſervations and Amendments. Another Abridgment, or *Delectus Legum*, was made by the before-mention'd *Leo* and *Conſtantine Porphyrogenitus*, and divided into twenty-eight Titles. *Leunclavius* has tranſlated three Books of the *Paratitla* into *Latin*, wherein the Laws relating to *Perſons* and *Things ſacred* are borrow'd from the *Juſtinian* Law. From all theſe, and from the Conſtitutions of the Emperors ſucceeding *Baſilius*, the Law was pronounc'd and practis'd in the Eaſtern Empire: The Books compiled by *Juſtinian's* Order being entirely laid aſide and neglected, either through Envy to his high Reputation, or elſe through *Baſil's* ambitious Deſigns of procuring a greater Authority to his own Laws and Books of Inſtitutions; or, laſtly, from the eaſy Uſe and Attainment of the *Greek* Tongue, wherein his Laws were written and publiſh'd; this Language being then the Mother-tongue of all the Eaſtern Empire. But after the Diviſion of the Eaſtern and Weſtern Empire, they only made uſe of their own Laws in the Weſt, which they had received from the *Romans*.

(*q*) Circ. Ann. Dom. 1120. (*r*) Ann. Dom. 1570.

Though

Though ſome Men have endeavour'd to leſſen the Envy and Ambition which *Baſilius* had conceiv'd againſt the Books and Reputation of *Juſtinian*, by aſcribing the Loſs of *Juſtinian*'s Books to a dreadful Misfortune then happening, there being no leſs than 120,000 Books loſt in the Conflagration of *Conſtantinople*, under the Reign of *Zeno* the Emperor; and when *Berytus*, the moſt flouriſhing School of the Law, was ſwallow'd up by an Earthquake, as already related; Unto which two Loſſes we may alſo add the great Havock and Devaſtation which the *Goths* and *Vandals* made of all Books in *Italy*: Yet ſeveral Perſons heavily charge *Baſilius* and *Leo* both, with this criminal Ambition, and that not without good Reaſon, in the Opinion of moſt Men. But *Leo*, notwithſtanding all his Calumny and Rancour to *Juſtinian*, can find no other Fault with his Books, but that the Compoſition thereof was not perfect enough to ſolve all Difficulties in Law, and that the Order wherein *Juſtinian* placed them, was not preciſely accurate. But this Fault may even be retorted on *Leo* himſelf. And the Lawyers of the Weſtern Empire do ſufficiently defend *Juſtinian* in this Point; only blaming him in this Particular, *viz.* That he endeavour'd to ſuppreſs the Books of the old *Roman* Lawyers (as already hinted) after the *Digeſts* were finiſh'd: And hence (ſome think) that *Juſtinian* deſervedly underwent this Fate and Puniſhment by way of Retaliation from *Baſilius*.

About the ſame Time that the Eaſtern and Weſtern Empires were divided by an Agreement, (made between *Charlemagne* King of *France* and Emperor of *Germany*, and *Irene* Empreſs of *Conſtantinople*,) *Photius* Patriarch of *Conſtantinople*, in Imitation of the two Emperors *Baſil* and *Leo*, publiſh'd (*s*) his *Nomo-Canon*, or Table of the Laws of the Empire, extracted from the Conſtitutions of *Baſil*, and from the Canons of the Eaſtern Churches; which *Theodore Balſamon*, Patriarch of *Antioch*, has ſince (*t*) illuſtrated with proper Annotations. And *Burchard*, Biſhop of *Wormes*, after the Example of *Photius*, has compiled (*u*) the Canons of the Weſtern Church; being follow'd in this Undertaking (*x*) by *Ivo* Biſhop of *Chartres*; as *Ivo* himſelf was afterwards (*y*) herein by *Gratian* the Monk, who compiled that Book of the *Canon* Law called the *Decretum*. And thus the *Greek* and *Roman* Law continu'd to govern from the Time of theſe two Emperors, *Baſil* and *Leo*, till the Reign of *Conſtantine* the Thirteenth, ſurnam'd *Palæologus*, being the laſt of the *Greek* Emperors: At which Time *Mahomet*, the *Ottoman* Emperor, taking *Conſtantinople* (*z*), the Eaſtern Empire was extinguiſh'd together with its Laws. For till this fatal Period of Time, the Dernier Reſort of the Eaſtern Empire was held at *Conſtantinople*, the moſt celebrated Mart in all the World for the Study of the Law and all other Parts of human Learning, and for its great Concourſe of Lawyers there, as *Æneas Sylvius* well obſerves.

But about two hundred Years after *Juſtinian*'s Death, *Charlemagne* being choſen Emperor of the *Romans* by the People and Senate of *Rome*, and confirm'd in his Election (as 'tis ſaid) by the Approbation of Pope *Leo* the Third, thought it his Duty hereon to attempt a Reſtoration of the *Roman* Law, which had been overwhelm'd in the Weſt through the Barbarity of the *Goths*, *Lombards*, *Moors*, *Saracens*, and other ſavage People: But this Reſtoration he could not effect, though he earneſtly labour'd the ſame, either through the continual Wars he was embroiled in, or elſe through a want of Books in the *Roman* Law, which his Lawyers could never purchaſe at any Rate. And thus did the Knowledge of the Law, with all other Parts of Learning lie dead and buried (as it were) under the *Ruins* of the *Roman* Empire, during the Reign of *Charlemagne* and the two ſucceeding

(*s*) A. D. 880. (*t*) A. D. 1143. (*u*) A. D. 1020. (*x*) A. D. 1080. (*y*) A. D. 1120. (*z*) A. D. 1452.

Ages, to the unſpeakable Loſs and Grief of all learned Men at preſent. And ſuch was the Madneſs and Stupidity of thoſe Times, upon the Church's prevailing over the State, and ſetting up for an Independency thereon, that we can hardly find any Prince or Pope that did any one Thing worthy of Remembrance, during this great Eclipſe of Learning: And ſo it will always happen, when the Clergy get the Aſcendant in any State or Nation; it being their Intereſt (as they conceive) to extinguiſh all Light and Knowledge in the World, that they may rule the Laity by a blind Obedience to their Power, as we ſee they do at this Time in all Places where Ignorance prevails on the rampant Power of the Church over the State, and particularly in thoſe too illiterate Kingdoms of *Naples* and *Portugal*. But upon the Dawn and Appearance of Learning again about the twelfth Century, ſuch was the Happineſs of the *Roman* Law, that all other Sciences ſeem'd to revive with it under the Reign of *Lotharius* the *Saxon* Emperor of the Weſt; who, about the Year 1127, in Confederacy with Pope *Innocent* the Second, waging War againſt *Roger* Duke of *Apulia*, or (as others call him) King of *Sicily*, and imploring the Aid of the Commonwealth of *Piſa*, (then a free State,) firſt diſcover'd and found out that Part of the *Civil* Law (*a*) which is contain'd in the *Digeſts* or *Pandects*, upon deſtroying the City of *Amalphis* or *Amalfis* near *Salernum* in *Apulia* (*b*), written in very ancient Characters or Capital Letters connected and running into each other, without any Interſtice of Words or Diſtance obſerv'd between them. The People of *Piſa*, who aſſiſted the ſaid Emperor in this War with their Fleet, in Honour of their gallant Atchievements, begged this Book of him, as a Reward of the Service done him by their Navy. And thus it was given to the City of *Piſa*, there to remain as a Memorial of their good Service: Whither all the Doctors reſorted, upon any Diſpute about the Senſe of the Law, in order to conſult the ſame. But when the City of *Piſa* was reduc'd and taken (*c*) by *Caponius*, General of the *Florentine* Army, after a long Siege, it was remov'd from thence and carried to *Florence*, as a Part of his Triumph, where it is now very carefully and religiouſly kept in the Great Duke of *Florence*'s Library, conſiſting of two Volumes bound in Crimſon Velvet, and adorn'd with Silver Claſps and Plates: And hence theſe Books are ſtiled the *Florentine Pandects*, or the *Pandects* of *Piſa*. And this Book or *Code* of Laws was formerly in ſo great Eſteem and Veneration, that whenever it was brought forth and expos'd to any Perſon's View, it was perform'd with the Solemnity of lighted Torches, and with a certain Number of Monks ſtanding round about it uncover'd, in the Preſence of the Great Duke or Chief Magiſtrate. Some Perſons aver this Book to be the very Original, which *Juſtinian* publiſh'd in his Life-time, as before hinted: And this they infer from the ancient Characters wherein it was written. But *Anton. Auguſtinus*, and ſince his Time, *John Mabillon*, will have it to be written in *Greece* by the Hand of ſome private Perſon after *Juſtinian*'s Death, though they both acknowledge it to be very ancient: And this Concluſion they make, becauſe the *Amanuenſis* has made uſe of Numbers and Characters, which *Juſtinian* prohibited under the Penalty of the *Cornelian* Law, and for that ſeveral Faults are found herein, which have been corrected by the *Exemplar* of ſome other Book, or elſe do ſtill want Correction. But though I cannot think this to be the Original Manuſcript; yet I readily agree with all other Perſons in this Point, *viz.* That this Book now at *Florence* is the *Archetype*, from whence all other Copies have ſince been taken. Hence Recourſe is always had to this Manuſcript, when we meet with various Pleadings in the

(*a*) Coraſ. ad L. 2. D. 1. 2. (*b*) Foliet. Hiſt. Genuenſ. lib. 9. ad An. 1406. (*c*) A. D. 1406.

ſeveral

ſeveral Editions thereof. 'Tis the vulgar Opinion, that the ſaid Emperor, upon finding this Book, did in a publick Manner introduce the *Juſtinian* Law into all Courts of Law and Univerſities, by abrogating the *Lombard* Laws: But as no Writer of any Credit makes mention of ſo memorable a Paſſage, we may infer this to be an erroneous Opinion.

On the Reſtoration of the *Digeſts*, all other Arts and Sciences (as already hinted) began to flouriſh again, and to get out of that Darkneſs under which they labour'd for ſo long a Time: And the Books of the *Civil* Law were receiv'd into all Parts of the Weſtern Empire, and were adorn'd with excellent Gloſſes and Commentaries, which were made with great Harmony and Agreement unto each other. There was at this Time (*d*) in the Court of *Maud* the Empreſs, one *Irnerius* (*e*), a Profeſſor of the *Civil* Law at *Bononia*, who had ſtudied the Law at *Conſtantinople* with much Reputation, and was Prime Miniſter of State to the Emperor *Lotharius* (*f*). By the Perſuaſion and Authority of this Perſon, *Lotharius*, in a publick Convention of the States held at *Roncalia* (*g*), order'd the *Roman* Law to be read and taught in all Univerſities of the Empire: And by an Edict appointed all Judicial Cauſes to be decided according to the Decrees of this Law. This *Irnerius* was the firſt Perſon that brought the *Code*, which contains the *Juſtinian* Law, and the *Pandects*, back again into the Univerſity of *Bononia*, after they had been long found out, as aforeſaid: And this he did at a Time when *Pepo*, who had done the ſame Thing before, continued to be of an obſcure Reputation; teaching at *Bononia* with great Applauſe, and gaining many Auditors, whom he afterwards made Doctors of Law. Theſe Perſons propagated the Learning which they had receiv'd from *Irnerius*; and hence, by Degrees, the *Civil* Law was admitted into ſeveral Courts of Law and divers Univerſities. But as the Power of the Emperors ſenſibly increas'd the Force of the *Juſtinian* Law; ſo did *Irnerius*'s Scholars, not only by their Gloſſes, but alſo *vivâ voce*, expound this Law in the Univerſity of *Bononia*; variouſly promoting and tacitly confirming the ſame. And even ſuch Perſons as were bred up in the Schools of theſe Men, did alſo in their own Schools introduce the Study of the *Civil* Law, which they in a particular Manner recommended to other Univerſities, on the ſcore of its great Equity. Yea, the *Italian* Univerſities did ſo far excel all others in the Study of the *Civil* Law, that, being thus famous, no Perſons were admitted into any Princes Courts, or into any Courts of Law, nor into any Univerſities as Profeſſors of Law, unleſs they were ſuch as came from the *Italian* Univerſities: Nor were they admitted as Judges or Advocates, *&c.* in the Imperial Diets, unleſs they had ſtudied the Laws in thoſe Univerſities. And hence it was, that out of the Schools of *Irnerius*, there aroſe that famous Set or Period of Lawyers, which have inſtructed the learned World in the *Civil* Law. Among the chief of which were *Martin* of *Cremona*; and *Bulgarus*, an Oppoſer of the ſaid *Martin*, who ſtudied in the Univerſity of *Bononia*, and lived in the Reign of *Frederick Barbaroſſa*. Then came *Hugo à Porta*; and *Jacob Ugolinus*, the firſt Collector of the *Feudal* Law-Books. After him ſucceeded *Rogerius*, *Otto*, and *Placentinus*, who was a publick Profeſſor of the Law at *Montpellier*. We next read of *Pyteus*, who taught the Law at *Bononia* and *Mutina*, and was the Author of the *Quæſtiones Sabathinæ*, and a Scholar unto *Bulgarus*. *Albericus à Porta Ravennate*, was a Perſon more remarkable for his great Proficiency in the Law, than for his Morals and good Behaviour in the Conduct of Human Life. *Azo*, a Native of *Bononia* and Profeſſor of the *Civil* Law at *Montpellier* in *France*, was *Albericus*'s Scholar, and reckon'd

(*d*) Circ. Ann. 1150. (*e*) Abb. Arſperg. fol. 291. (*f*) Giron. lib. 5. Obſ. Jur. Can. c. 5. (*g*) A. D. 1136.

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the chief Lawyer among thoſe of his Time. This *Azo* was Maſter to *Baldwin* of *Bononia*, and to *Roffredus* of *Beneventano*. But theſe Men, though eminent Lawyers in their own Days, have yet, through their Ignorance of Hiſtory, Antiquity, and true Philoſophy, been guilty of ſeveral Errors and Miſtakes in their reſpective Expoſitions of the Law.

Theſe Perſons have, in a different Manner, divided the *Juſtinian* Law. Firſt, They divided the *Pandects* into two Parts: The ſecond Part beginning about the End of the Law here quoted (*h*). But afterwards they, with other of the Doctors, divided the *Digeſts* or *Pandects* into three Parts. The firſt Part was called the *Old Digeſt*, reaching to the third Title, *De Soluto Matrimonio* (*i*). The ſecond Part, according to this Diviſion, was ſtiled *Digeſtum Infortiatum*, which ends with the Title *De Novi Operis Nunciatione* (*k*). And the third Part is intitled the *New Digeſt*, which cloſes with the End of the *Pandects*. But the only Reaſon for this Diviſion ſeems to be, that they were willing to divide theſe Volumes according to their Bulk or Proportion. Wherefore the *Old Digeſt* comes down to the third Title of the twenty-fourth Book; the *Infortiatum* to the firſt Title of the thirty-ninth Book; and the *New Digeſt* to the End of the *Pandects*, as aforeſaid. This Diviſion is aſcrib'd unto *Burgundio*, a Judge and Citizen of *Piſa*, who diſtinguiſh'd the *Novels* into *nine Collations*, as already remember'd: So that the *Old Digeſt* denotes the firſt Part; the *Infortiatum* imports the middle Part, and the *New Digeſt* points out the laſt Part of the *Pandects*. But 'tis ſtill a Doubt among the Learned, why this ſecond Part is ſtiled the *Infortiatum*: And as there are almoſt infinite Conjectures touching the ſame; ſo, I think, no good Reaſon can be given why it was thus called. Some, indeed, derive it from the *Latin* Verb *Infero*; becauſe (ſay they) that Part of the *Digeſt* which treats of *Inheritances*, *Subſtitutions*, and the like, *plurimùm infert*, or, in *Engliſh*, it brings much Grieſt to the Lawyer's Mill. Whereupon the Lawyer *Alexander*, in his Preface to that Title of the Law which concerns *Vulgar* and *Pupillary* Subſtitutions, ſays, That *Baldus* got fifteen thouſand Ducats by the Buſineſs of Subſtitutions alone, as he himſelf inform'd *Raphael Cumanus*. But *Du Freſne* will have the Word *Infortiare* to have the ſame Signification as the Verb *Firmare*; and that it is here ſo called, becauſe it is the middle Part of the *Pandects*, which is encompaſs'd and fortify'd with the *Old* and *New Digeſt*. *Ludovicus Romanus* thinks, that ſome Interpreter or other impos'd this Name on it, according to his own Fancy, without any juſt Reaſon at all; which Name being receiv'd by conſtant Uſage, has been deliver'd down to us: And this ſeems to be the moſt probable Conjecture. In quoting the *Digeſts*, the Ancients, according to *Alciatus*, were wont to put a *Circumflex* Accent over the *Greek* Letter ($\tilde{\pi}$), in the Form and Manner here deſcribed: And *Hagemeir* entirely agrees with *Alciatus* in this Opinion. *Hubert*, in his Preface to his Readings on the *Digeſts*, ſays, That we denote or mark the *Pandects* with a double (f), as being a Corruption of the *Greek* Letter (π): For at this Day we either uſe a double (f) as thus written, *viz.* (ff), or elſe we make uſe of the Letter (D), to ſignify the *Digeſts*. Now, touching this Mark, and the Original of it, there are ſeveral Opinions different from each other, too many to be here inſerted.

But to return to the more eminent Interpreters of the Law. In the thirteenth Century we meet with *Accurſius*, a *Florentine* by Birth; who, at the Age of forty Years almoſt, applying himſelf to the Study of the *Civil* Law under *Azo* and *Odofredus*, became ſuch a Proficient therein, that he far excelled his Maſters in the Knowledge thereof. But, leaving his Pro-

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(*h*) D. 35. 2. 82. (*i*) D. 24. tit. 3. (*k*) D. 39. tit. 1.

ſeſſion and Practice of the Law for ſome Time, he retir'd from the World; and, in the Space of ſeven Years (*l*), collected together all the particular Gloſſes, which the above-mention'd Lawyers and their Contemporaries had made on the Body of the Law; and (*m*) publiſh'd his Gloſſes on the *Digeſts* and *Novels*; and in two Years more, according to the Teſtimony which he gives of himſelf, he finiſh'd his Gloſſes on the *Code* (*n*); wherein he has, in a very conciſe manner, connected together all the ſimilar Parts of the Law, and reconcil'd all thoſe Paſſages which ſeem'd to differ from each other; obtaining from hence a mighty Reputation on the ſcore of his great Judgment and Memory. But though he was ſo very induſtrious in explaining the Laws, ſo very acute and clear in finding out the Meaning thereof, and ſo very happy in reconciling them together, that he was on this Account ſtiled *Gloſſatorum Coryphæus*; yet, not being well skill'd in the Hiſtory of the Times, and in the more elegant Parts of Learning, we often find him guilty of Errors, as others were before him. In Admiration of him, the ſucceeding Interpreters of the Law have, with equal Pains, apply'd themſelves to the Explication of his Gloſſes, and other Terms of Law, (for which they are highly blameable): And thus, following him, (as they imagine) they have begun another Way of teaching the Law by prolix Commentaries, contrary to the Law and Sanction of *Juſtinian*, who had forbid any Commentaries to be added to his Laws (*o*). And hence aroſe a new Body of Law, with the Gloſs on it, publiſh'd in a different Manner; which ſo far prevail'd, that theſe ſucceeding Interpreters rather employ'd their Time in explaining his Gloſſes, as aforeſaid, than in expounding the Terms of the Law themſelves; ſo that, by this Means, they corrupted not a little the Text of the Law itſelf. Yea, the Authority of the Gloſs was in ſuch Eſteem, that all Cauſes were order'd to be determin'd according to the Senſe thereof, whenever any eminent Interpreter of the Law, in his Opinion, adhered thereunto. But the Authority of the *Gloſs* is at this Day much leſſen'd in its Value. *Cujacius* (*p*), in ſhort, prefers *Accurſius* to all the *Greek* and *Latin* Interpreters of the Law; ſtiling thoſe Opinions, wherein *Bartolus* and others deviate from him, by the Name of *Dreams*, &c.

After *Accurſius*, no more Gloſſes were attempted on the Law 'till the Time of the Commentators in the fourteenth Century; for then began, as it were, a new Period of the *Civil* Law, when *Bartolus à Saxoferrato*, *Baldus*, and their Followers, ſprang up; as did alſo, about that Time, *Alexander*, *Tartagnus*, *Bartholomæus*, *Salycetus*, *Paul. de Caſtro*, *Jaſon* the Great, *Cynus*, *Oldradus*, *Petrus de Billapertica* Profeſſor of the Law at *Orleans*, *Raph. Fulgoſius*, *Raph. Cumanus*, *Hippolitus*, *Riminaldus*, and other *Italian* Doctors (*q*), who wrote new Comments on the Body of the Law. But though theſe were Men of vaſt Subtlety in Point of *Genius*, yet they rather made uſe of a Scholaſtick Gravity, and were too prolix in their Stile; yea, they proceeded in their Works without any Order or Method at all, being no ways verſed in the proper Parts of Learning. But tho' all or moſt of theſe Perſons were eminently skill'd in the Knowledge of the *Roman* Law: Yet it muſt be own'd, that *Bartolus* and *Baldus* (among them) far ſurpaſs'd all the reſt in reſpect of Learning. *Bartolus* was born in the Year 1303, and profeſſed the *Civil* Law at *Piſa* in *Italy*, and afterwards at *Peruzium*; which he has explain'd in his immenſe Commentaries with ſo much Judgment, in regard to his Age, being then but forty-ſix Years old, that he is celebrated by all Men as the beſt Expoſitor of the *Juſtinian* Law ſince the Days of *Accurſius*: And all the Doctors aſſure us, that his

(*l*) Forſt. Hiſt. Jur. Civ. v. *Accurſius*. (*m*) A. D. 1220. (*n*) Accurſ. Gloſſ. in l. 2. C. 9. 2.
(*o*) C. 1. 17. 1. 12. (*p*) Lib. 12. Obſ. 16. (*q*) Gravin. n. 166, 167, 168 & 169.

Skill in the Laws was ſo wonderfully great, that, by a great Felicity of Parts, he far excell'd all others therein. *Baldus* of *Peruzium* was his Scholar, who profeſſed the *Civil* Law at *Bononia* and *Tecino* for fifty-ſix Years with ſo much Judgment and *Acumen* of Wit, that *Jaſon* uſually ſaid of him, *That he was ignorant of nothing.* And *Phil. Decius* informs us (*r*), that no one ever equalled *Baldus* in Point of Authority. He liv'd to a very old Age, dying in the Year 1420. And truly, among theſe Men there ſeemed to be nothing wanting, but that they ſhould have lived in more happy Times (*s*) : For in thoſe Days the Barbarity of the *Goths* and *Lombards* had in ſome meaſure extinguiſh'd the Uſe of the *Latin* Tongue, and almoſt all other Parts of Literature. And hence it is, that *Anton. Contius* (*t*) ſtiles theſe Interpreters by the Name of the *Lombard* Doctors. Therefore, if they uſe a *Gothic* Stile in their Writings, or if we meet with any Fault in their Works, either through their Ignorance of Hiſtory, or any other Part of Learning, it ought to be imputed to the Time wherein they wrote their Comments ; and their accurate Knowledge in the *Roman* Law, deliver'd down by them to future Ages with ſo much Judgment and Induſtry, ought to atone for theſe Defects in their Works.

The Lawyers, who follow'd theſe two great Lights of the Law, were *Angelus Peruſinus* the Brother of *Baldus*, *Salycetus*, *Alexander*, *Paul de Caſtro*, *Franc. Aretinus*, *Jaſon*, *Decius*, and others, who taught the *Roman* Law with equal Judgment and Induſtry, as their Commentaries do ſufficiently teſtify : But all theſe Perſons too, ſtood in Need of the Elegance of the *Latin* Tongue, and wanted that Knowledge in the *Greek* and *Latin* Authors, which the Lawyers of the following Age attain'd to. This want of general Learning, and the Unhappineſs of their Stile, was, in a great meaſure, owing to the Deſtruction of *Conſtantinople*, as above recorded : For, after the Ruin of this City, all ſuch Books as related to *Greek*, were, by way of Baniſhment, ſent into the Weſtern Parts of the World ; and, from an Emulation between the Eaſtern and Weſtern Parts, the *Latin* Erudition began again to flouriſh, and the *Civil* Law receiv'd much Embelliſhment from this Accident. This Age of Commentators continu'd 'till the Time of *Andræas Alciatus* an eminent Lawyer of *Milan* (*u*), and of the Univerſity of *Pavia*, who was the firſt of any Note that reſtor'd the *Civil* Law to its ancient Splendor in Point of Stile, by removing that *Barbariſm* with which it had been cloathed for ſo long a Time : His Commentaries, from the Learning therein contain'd, being much more ornamental in regard of Stile, *&c.* than thoſe of the above-mention'd Lawyers. For he has illuſtrated the ſame not only from the Text of the *Roman* Law, but even from the Books of the *Roman* Antiquities too, and has compleated that Work which *Caſtilionæus*, *Cumanus*, and *Fulgoſius* had ſo unſucceſsfully attempted. The School of *Alciatus* produc'd not only many excellent Lawyers, but ſeveral Commentators alſo, who, following the Example of their great Maſter juſt now mention'd, much improv'd the Knowledge of the Law by their learned Works (*x*). Among the *Italians*, we may reckon *Decianus*, *Menochius*, and *Pancirollus* : Among the *Spaniards*, there appear'd *Anton. Auguſtinus*, *Didacus*, *Covarruvius*, *Goveanus*, *Penellus*, and ſeveral others : Among the *French*, are *Budæus*, *Cujacius*, *Duarche*, *Tiraquel*, *Contius*, *Hotoman*, *Baldwin*, *Briſſonius*, *Anton.* and *Pet. Faber* : And, laſtly, among the *Germans*, we may note *Udalricus*, *Zazius*, *Hugo Donellus*, *Sichardus*, *Viglius*, *Zuichem*, and others ; who have all ſince adorn'd the *Roman* Law with ſo much Learning of all

(*r*) Dec. Conſ. 283. (*s*) Baldwin. in Prologom. in Inſt. (*t*) Lib. 1. Diſp. Jur. Civ. c. 8.
(*u*) Ripamont. Hiſt. Mediol. lib. 10. (*x*) Duck. de Auth. Jur. Civ lib. 1. cap. 5.

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Kinds, that they may, without the leaſt Imputation of Envy or Arrogance, contend with the Profeſſors of all other Sciences. But, among theſe, *Cujacius* has done as much as all the reſt (*y*) and has been ſince follow'd, herein by ſeveral of the Moderns; and among theſe, we may reckon his Scholar *Peter Pithou*, who ought not to ſit the loweſt in this Claſs of the Moderns. And though we are indebted to the former *Italians* for the true Uſe of the *Roman* Law; yet the Light, Elegance, and Ornament of it, is wholly owing to the Interpreters of the ſucceeding Age. For the old Expoſitors of the Law only left us the Fruits; but *Budæus* and the Moderns have rather given us the Flowers than the Fruits thereof, as the *Italians* themſelves confeſs.

And thus the *Juſtinian* Law now appearing to be a much better Law than the Laws of the aforeſaid Barbarous Nations, did not only ſhew itſelf within the Bounds of the *Alps*, but it even paſſed over thoſe Hills, and began by Degrees to be introduced into the ſeveral Univerſities of *France* and *Germany* even in the 13th Century, (as already rehearſed) notwithſtanding the Efforts of ſeveral Popes to prohibit the ſame, in order to advance the *Canon* Law, which makes ſo much for the Papal Power and Uſurpation over Princes. And though it be contain'd among the Privileges granted by *Philip the Handſom* to the Univerſity of *Orleans* (*z*), That the Kingdom of *France* ſhould be govern'd by an *unwritten* Law; yet the ſame King enacted, That this cuſtomary or unwritten Law, which Uſage had introduced among them, ſhould be practis'd according to the Form and Model of the *written*, meaning the *Roman* Law, and that this *cuſtomary* Law ſhould be explain'd by it. Hence we may conclude, that the Authority of the *Roman* Law was not only great under the firſt Line of their Kings, but alſo under thoſe of the *Carolingian* Line: And, the Uſe of this Law being preſerv'd in *Aquitain* and *Narbonne* by the Kings of *France*, the Parts of *France* were hereupon ſtiled the *Roman Gaul*; and theſe ſaid Provinces were likewiſe call'd the Provinces of the *written Law*, whilſt other Parts of *France* were termed the *French Gaul*. And tho' the Uſe of the *Theodoſian* Code prevail'd moſt in *France* for a While; yet no ſooner was the *Juſtinian* Law entirely reſtor'd in *Europe*, but the Authority of this Law came alſo into *France*. And though the *French* do at this Time make uſe of their own *Municipal* Laws; yet they call in the Aſſiſtance of the *Roman* Law, in many Caſes, which they call the *Common Law*, and is ſtill practiſed there. Indeed, in *Spain* the *Roman* Law has been forbidden, by ſeveral of their Kings, to be quoted and made uſe of in their Courts of Judicature: Yet *Alphonſo* the tenth King of *Caſtile* did, in a great meaſure, borrow his Collection of the *Partitæ*, which is the beſt Part of the *Spaniſh* Law, from the *Roman* Law. Wherefore, in all the *Spaniſh* Univerſities they make uſe of the *Roman* Law in all their Expoſitions of the *Partitæ*, though the ſame be not practiſed in their Courts of Law. The ſame Method is obſerv'd in *Portugal*, eſpecially ſince the *Roman* Law has been taught in the Univerſity of *Conimbra*. But in *Germany* the *Roman* Law has met with a better Fate, and the Authority thereof is ſtill preſerv'd therein, with ſome Limitations only in reſpect of the Publick Law, wherein that Law is corrected by ſeveral modern Conſtitutions or Ordinances of the Emperors and the Electoral Princes. For in all the Circles of the *German* Empire the Princes have a Sovereign Power of Judicature, by Judges and Magiſtrates of their own chuſing, according to the various Statutes, Conſtitutions, and Cuſtoms of their own reſpective Provinces: Yet all theſe Things are adapted to the Rules of the *Civil* Law,

(*y*) Thuan. Hiſt. lib. 99. p. 99. (*z*) Ann. Dom. 1312.

and

and are held in Subordination thereunto, as being expounded thereby; eſpecially in the Supreme Court of the Empire. This Supreme Court was formerly held in the Imperial Palace, to which Appeals lay from all the Courts of the inferior Provinces, and in Cauſes concerning the *Regalia*, Honours and Fiefs of the Empire, and Suits in all Cauſes of greater Moment were tried here, till the Year 1495, at which Time the Imperial Chamber was ſettled at *Wormes* by *Maximilian* the Firſt, and by the Imperial Diet or States of the Empire (*a*): But, by a ſubſequent Conſtitution, this Court is now ſettled at *Spires* (*b*); unto which all the Electors, Princes, and Subjects of the Empire, yield Obedience, as to a Court of *Dernier* Reſort (*c*), having a Concurrent Juriſdiction with the Emperor himſelf (*d*). Nor can the Emperor call a Cauſe from thence, nor does there lie any Appeal or Supplication from this Court (*e*); but yet the Party may pray a Review. But the Power of this Court only extends to Civil Cauſes; a Criminal Accuſation being only admitted there when the Peace of the Empire is violated (*f*): For it takes Cognizance of no other Crimes; nor does it receive Appeals in Criminal Cauſes; ſuch Appeals being prohibited in the Dominions of almoſt all the Princes (*g*).

In the Imperial Chamber, beſides the Preſidents which are Counts or Barons, there are thirty-ſix Aſſeſſors appointed, who are not admitted without having been Readers and Profeſſors of the *Civil* and *Canon* Law for ſome Time in ſome Univerſity, or elſe having ſpent five Years (at leaſt) in the Study of theſe Laws. And by the Conſtitutions of the Empire, they are enjoin'd to pronounce Sentence according to the *Roman* Common Law, when there are no Conſtitutions, Statutes, or Provincial Cuſtoms to the contrary: For theſe Aſſeſſors, upon entering into their Office, do ſwear to judge all Cauſes according to the Ordinances of the Empire, and (in defect of ſuch Ordinances) to determine them according to the *Roman* Law. So that from hence it appears, that the *Civil* Law prevails very much in *Germany*. The Court of *Rotweiler* is more ancient by three hundred Years than the Imperial Chamber, being eſtabliſh'd by the Emperor *Conrade* the Fourth (*h*), for the Circles of *Auſtria*, *Swabia*, and the *Rhine*: Beſides all the Conſiſtories in the particular Provinces of Princes and States of the *German* Empire: In all which Conſiſtories, by the Conſtitutions of the Empire, Cauſes ought to be decided according to the *Roman* Law; provided it be not derogatory to the Statutes, Cuſtoms, and Conſtitutions of theſe Provinces. And hence it is the Opinion of all the *German* Lawyers, That the *Roman* Law is ſtill the *Common* Law of the Empire (*i*), and has yet Force in all the Imperial Territories, though it be limited in ſome reſpects by Municipal or Particular Laws; and that not only Natives, but even Foreigners reſiding in the Empire, are ſubject thereunto. So that whatever is contain'd in the *Roman* Laws, remains ſtill entire and uncorrected among the *Germans*; provided it does not claſh with the Municipal Laws of the *German* Nation. Hence the *Germans*, in making their Wills, are oblig'd to the ſame Number of Witneſſes as is requir'd by the *Roman* Law (*k*); and an Appeal from an Interlocutory Sentence is not allow'd of in the Imperial Chamber, following the *Civil* Law (*l*). But though there were anciently ſeveral Municipal and Provincial Laws in *Germany*, which the Princes and People of that Nation made uſe of as a *Cuſtomary* Law, before the *Roman* Law was reſtor'd by the Emperor *Lotharius*, as

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(*a*) Ordon. Camer. p. 1. tit. 27. (*b*) Imp. Jud. Cam. Ord tit. 34. (*c*) Mynſ. Cent. 4. obſ. 5. (*d*) Steph. de Juriſd. lib. 2. p. 1. c. 3. (*e*) Gail. lib. 1. obſ. 29. (*f*) Mynſ. Cent. 2. obſ. 98. (*g*) Pacian. Conſ. 1. n. 70. (*h*) Lorich. Enchirid. Arr. n. 1337. (*i*) Gilman. Deciſ. Cam. Imper. 24. Weſemb. Conſ. 23. p. 1. n. 1. (*k*) Everard. in Loc. rat. leg tit. 35. (*l*) Gail. lib. 1. obſ. 120. C. 7. 63. 7.

aforeſaid;

aforeſaid; and though many of the ſaid Uſages and Cuſtoms do ſtill continue with them; yet in many Places they are now changed by the Prudence and Equity of the *Civil* Law; and in all Caſes they receive an Interpretation from this Law. In *Saxony*, indeed, the People chiefly make uſe of their own Law, as being very fond thereof; and this Law, in a great meaſure, prevails in the Territories of *Luſatia*, *Sileſia*, *Brandenburgh*, *Brunſwick*, *Lunenburg*, and *Heſſia:* And out of the Empire, the *Poles* and *Lithuanians* (*m*) do embrace the ſame. For the *Saxons* were a ſevere and warlike People, who not only extended their Dominions by the Force of their Arms, but were ſtrict and exact Obſervers of Juſtice; puniſhing all Crimes with great Rigour, according to the Manners and Cuſtoms of their own Nation; which made other Parts of *Germany* in love with their Laws, as being well adapted for the Preſervation of the publick Peace. This *Saxon* Law is very ancient, and was ſo dear to the *Saxons*, that *Charlemagne*, upon the Conqueſt of *Saxony* after a long War, granted the Uſe thereof unto this brave People, when he made Peace with them: And thus the *Saxons* and other Dominions in *Germany*, do ſtill retain the ſame. But it continued an unwritten Law for a long Time, until *Eccard à Repichaw*, a *Saxon* Nobleman and Lawyer, made a *Latin* Compilement of all the *Saxon* Cuſtoms, in three Books, which he ſtiled *Speculum Saxonicum*, or the *Saxon* Mirror; and the Emperor *Otho* the Firſt confirm'd this Work as a Body of Laws for them. But in the Interpretation of the *Saxon* Law, theſe Rules are commonly admitted, *viz.* 1*ſt*, That the ſame ſhall be expounded ſtrictly, and ſhall not be extended to Caſes therein not expreſs'd (*n*). 2*dly*, That in doubtful Caſes, they ſhall receive their Interpretation from the *Roman* Law (*o*). 3*dly*, That in all Caſes omitted, and where that Law is defective, it ſhall be ſupplied by the *Roman* Law (*p*): And for this Reaſon the Benefit of a *Ceſſio Bonorum* (*q*) is granted unto Debtors, which the Rigour of the *Saxon* Law does not allow of; and the Oath of Calumny is reſtor'd to Uſe again in their Courts, which was grown into Diſuſe by the Cuſtoms of *Saxony*. And, *Laſtly*, That, after the *Saxon* Law, there ſhould be no other *Common* Law acknowledg'd there, beſides the *Roman* Law (*r*). In *Italy*, though the Power of the *Roman* Emperors be now entirely extinguiſh'd there, yet *Rome* and *Italy* do ſtill retain the Authority of the *Roman* Laws, and yield a voluntary Obedience thereunto, on the account of their great Wiſdom. But in thoſe Territories which the Pope has poſſeſs'd himſelf of, as *Ancona*, *Benevento*, *Bologna*, *Ferrara*, *Romandiola*, *Spalato*, and many other Cities and States, the *Civil* Law has been ſomewhat eclips'd, and ill receiv'd, by the undue Expoſitions of the *Canoniſts* in Favour of the Hierarchy; yet by a Statute of the City of *Rome* it is provided (*s*), That in *Rome*, and the Territories thereunto belonging, Judgment ſhall be given according to the *Civil* Law, in all Civil Cauſes, without any Recourſe had to the Canons, unleſs it be when the *Civil* Law is defective; becauſe the *Civil* Law there had its Riſe, and from thence was deriv'd unto other States. And the *Roman Rota*, or Court of Chancery, does not follow the Equity of the *Canon* Law, but the *Civil* Law itſelf (*t*), unleſs ſome Caſe occurs wherein the *Civil* is corrected by the *Canon* Law; as in the Puniſhment of Women marrying again within the Year of Mourning (*u*); becauſe a Law corrected has loſt the Force of a Law; and therefore *Margaret de S. Cruce* marrying a ſecond Husband within the Year of Mourning, was acquitted in the *Roman Rota* (*x*). And by a Statute of the City of *Ancona*,

(*m*) Celer. in Orat. de Jur. Saxon. (*n*) Goden. Conſ. 15. n. 12. (*o*) Schnedwin. in 6. I. 3. 28. (*p*) Hartm. Peſt. lib. 1. 2. 31. (*q*) Coler. Deciſ. 135. n. 12. & Deciſ. 117. n. 10. (*r*) Schrad. Con. 6. n. 31. (*s*) Stat. Urb. Rom. c. 42. (*t*) Seraphin Deciſ. 487. & Deciſ. 819. (*u*) Capr. Con. 70. n. 12. (*x*) Farinac. Deciſ. Crim. lib. 2. Deciſ. 65.

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all Civil Cauſes are firſt to be determin'd by the *Civil*, and ſecondly by the *Canon* Law (*y*). But at *Avignon*, where the Pope has an abſolute Sovereignty by the Grant of *Joan* Queen of *Sicily* unto Pope *Clement* the Sixth, it is ſpecially enacted, That all Cauſes ſhall be decided there by the *Canon* Law alone (*z*). But of all the People of *Italy*, the *Venetians* have in the leaſt manner ſubmitted themſelves unto the *Roman* Laws: And as they have preſerv'd their firſt Liberty againſt the Power of the *Roman* Emperors, ſo they now always make uſe of their own Laws, this being the higheſt Evidence of Liberty among all Nations. Wherefore ſome of the Doctors, ſpeaking of the *Venetians*, ſay, That they are govern'd by Cuſtoms and unwritten Law; and others affirm them to be directed by the Law of Nature and of Nations (*a*): Upon which Account their Wills, if teſtify'd by two Witneſſes, are valid; and their Sentences never paſs *in Rem Judicatam*, becauſe they will have them to be *de facto* revokable (*b*). But yet it cannot be deny'd, but that the *Venetians* worſhip and reſpect the *Roman* Civil Law for its wholſom Rules and Inſtitutions; and therefore they make uſe of *Civilians* for their Aſſeſſors in Courts of Law (*c*), and ſend them in all their Embaſſies. The ancient City of *Milan* was for a long Time in Obedience to the *Roman* Laws, until the Government of the Kings of *Lombardy* was erected there; and then it was for two hundred Years in Subjection to the *Lombard* Laws. But upon *Charlemagne*'s Expulſion of the *Lombards*, the *Feudal* Laws and Cuſtoms obtain'd under their Succeſſors, who granted ſeveral Parts of *Italy* unto Perſons, in Fief, under the Titles of Dukes, Marquiſſes, and Counts: And theſe Laws and Cuſtoms, being reduc'd into Writing by the Lawyers of *Milan*, under the Emperor *Frederick Barbaroſſa*, they are at this Day made uſe of as a Body of Law by the *Milaneſe*. But yet theſe Laws are expounded according to the Senſe of the *Civil* Law; and the Senate of *Milan*, conſiſting of a Preſident and twelve Senators, all Profeſſors of the *Civil* Law (*d*), are Judges in Matters of Controverſy. Likewiſe in the Senate of *Mantua* they have ſeven Doctors of the *Civil* Law for their Judges; and are govern'd by the *Roman* Law, as their own Common Law (*e*). Thus alſo is the *Rota* at *Genoa* govern'd by their own Statutes, and by the *Roman* Civil Law; and have *Civilians* for their Judges, which are for the moſt part Foreigners (*f*), to avoid all Partiality and Affection, *&c.* So that from hence it plainly appears, that the *Roman* Civil Law is the Common Law in *Italy*; and that the *Italians*, next unto their own Statutes, are bound to obſerve this Law in the Deciſion of their Cauſes, and do ſupply and expound their own Municipal Laws thereby.

As *Great Britain* is divided from every other Part of the World by the Sea, ſo likewiſe it is divided from all other *European* Nations by the Practice of its Laws; our Kings having never granted ſo much Authority to the *Roman* Laws to be mix'd with their own, as other *European* Princes have done. Hence it has been ſaid, that the *Roman* Civil Law has ſcarce ever been admitted among us: And there are ſome *French* Writers (*g*) of Diſtinction too, who aver, that the *Civil* Law is not in Uſe here in *England*. But this Error is eaſily accounted for; ſince they have ſeen no *Britiſh* Commentators on the *Roman* Law, which has been common to all other Nations: And as our Law-books are written in a Language unknown to them, they cannot learn what Uſe the *Roman* Law has among us. Now to know what Authority the *Roman* Law has among

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(*y*) Ant. de Amat. Deciſ. Rot. Maren. 59. n. 4. (*z*) Hier. a Laurent. Deciſ. Aren. 68. (*a*) Caſtren. Conſ. 424. lib. 1. (*b*) Felin. in c. 24. X. 5. 1. (*c*) Angel. Matheai. de via & rat. Jur. C. 36. (*d*) Stat. Mediol. C. 414. (*e*) Burſat. Mantuan. Conſ. 199. n. 41. (*f*) Flamin. Chartar. Deciſ. Ret. Jen. (*g*) Forcatul. de Gal. imper. lib. 7. Cheppin. lib. 2. De Doman. Franc. tit. 15. n. 5.

us, and how it was heretofore receiv'd, we ought to conſider the ſeveral Changes of Government that have happen'd from the *Romans*, *Saxons*, *Danes*, and *Normans*: All which People did in their Times introduce ſeveral of their own Laws amongſt us; ſo that now our Laws are a Mixture of all theſe Laws put together, as may be eaſily collected from the Laws of theſe ſeveral Nations. For if we contemplate the Books of the *Roman*, *Saxon*, *Daniſh*, and *Norman* Laws, we ſhall readily find, that our Anceſters borrow'd much from the Laws of theſe ſeveral Nations, and not a little from the *Lombard* Feudal Law introduced by the *Normans*. The *High Conſtable* and *Earl Marſhal* take Cognizance of *Military* Affairs and *Martial* Diſcipline, (as well as of Cauſes relating to *Heraldry*) by ſome Rules of the *Civil* Law. The Court of *Admiralty* is guided by other Parts of it, with the Laws of *Oleron*, and the Maritime Conſtitutions, in the *Conſolato del Mare*, for Matters ariſing upon the Sea, and relating to Sea Affairs. We have derived many of our Definitions, Diviſions and Maxims, either from the *Roman* or *Feudal* Law. Our *Chancery* or Court of Equity has borrow'd the very Method of Trial from the *Civil* Law: The Complaint being by Bill, which amounts to a *Libel*, without particular Poſitions and diſtinct Articles; and the Defendant makes an *Anſwer* in Writing to it, but ſets forth his *Defence* in his Anſwer, which has ſhortned the *Civil* Law Practice. There are Exceptions, Replications, Interrogatories, Witneſſes privately examin'd, a Publication of their Depoſitions, a Sentence or Decree in Writing by a Judge without the Verdict of a Jury, as in the Practice of the *Civil* Law; and, if Occaſion requires, there may be an *Appeal* in Writing to the Upper Houſe of Parliament: All which Method of Practice in our Court of *Chancery* ſhews, that the *Roman* Law had ſome Footing among us. Indeed, ſome paricular Cuſtoms relating to Deſcents of *Inheritances*, make a Difference between the *Civil* and ſome Parts of our *Common* Law; but the Succeſſion to Perſonal Eſtates is evidently the ſame. But the Reader will more clearly ſee the Relation between theſe two Laws, when he conſiders, that the *Common* Law originally gave no methodical Account of Things purely rational, as of Obligations, Contracts, Crimes, Treſpaſſes, Laſt Wills and Teſtaments, and the like: But we are told (*h*), that theſe Things were deliver'd down to the *Britons* by their *Druids*; they having borrow'd the reaſoning Part of theſe Titles from the *Civil* Law. But many of our Common Lawyers are apt to think that this is all their own from the Beginning, becauſe they are in Poſſeſſion of, and find it at preſent in their Books. But *Fleta* and *Bracton*, and the moſt ancient of their Writers, would look very naked, if every *Roman* Lawyer ſhould pluck away his own Feathers. Of late my Lord *Coke* has frequently and in *expreſs* Terms made uſe of the Maxims of the *Civil* and *Canon* Laws, and has taught the Way of Arguing from ſuch Rules to others. But Mr. *Weſt* having Occaſion, in his Book of *Precedents*, to give a general Account of Obligations, Contracts, Offences, *&c.* has unskilfully epitomized and tranſlated the Account from *Herm. Vultcius* (*i*), and paſs'd it off for the pure *Common* Law of *England*. If there is that wide Difference between the *Common* and *Civil* Laws, in their Forms of Pleading, and Manner of Trial, this is only the Stile, Practice, and Courſe of the Courts: But there is a Mixture in the *Principles*, *Maxims*, and *Reaſons* of theſe two Laws; and indeed, the Laws of all Countries are mixed with the *Civil* Law, which have arrived to any Degree of Perfection. 'Tis true, that the *Common* and *Civil* Laws had not the ſame Root and Stock; yet, by Inoculating and Grafting, the Body and Branches ſeem at this Day to be almoſt of a Piece.

(*h*) Cok. Preface to the 3d Rep. (*i*) Vult. Juriſp. Rom. Contr.

For

For the *Engliſh* Law has receiv'd great Alteration, and is very much unlike itſelf, or, (as Mr. *Selden* expreſſes it) *in regard of its firſt Being, it is like the Ship, that, by often mending, has no Piece of the firſt Materials.* Upon a Review, I think it may be maintain'd, that a great Part of the *Civil* Law is Part of the Law of *England*, and interwoven with it throughout. I hope therefore, that the Study of it may be encouraged among us, as in other Nations, not only to ſupport the Profeſſors of it, but for the better underſtanding of the *Common* Law of *England*, and that the Laws of other Kingdoms may be known to us, or that thoſe Rules of Argument (on which, at leaſt, the private Affairs of Property depend) may further inſtruct our Gentry to ſerve the Publick in Foreign Negotiations, as well as in Council at Home. If we do not underſtand the *Terms*, which are frequently made uſe of in the Affairs of other Nations, they will be apt to deſpiſe us; for our Character often riſes and ſinks, in the Judgment of the Common People, according to the Figure that thoſe Perſons make which we ſend among them. And as Princes are not exempt from the Prejudices that attend on human Nature; ſo the Reputation of Wiſdom and Knowledge (which ſometimes follows our Ambaſſadors) does often inſenſibly prevail, when a formal Repetition of their Inſtructions will concur very little to the Succeſs.

In *Scotland*, the Form and Practice of the *Civil* Law is obſerved in reſpect of the Judicial Proceedings of Cauſes, which we call the *Modus Procedendi*: But their Statutes and Acts of *Sederunt*, part of the *Regiam Majeſtatem* (ſuppos'd to be compiled by our *Glanvil*), and their Cuſtoms, do controul it chiefly in their Sentences or Judgments given. See *Mackenzy's Inſtitutes of the Laws of* Scotland (*k*). In the *Low Countries*, commonly call'd the *Netherlands*, the *Roman* Law obtains a much greater Authority than in *France* and *Germany*, inaſmuch as it every-where abounds with great Reaſon and Equity, and is well adapted to private Trade; it being formerly quoted in their Courts, as a Pattern of Juſtice and Equity in all the Dealings of human Life. It was afterwards receiv'd among them as the ſtanding Law of their Country; and, regularly ſpeaking, it has even at this Day the Force and Authority of Law, where the ſame is not corrected and alter'd by the Municipal Laws and Ordinances of the Countries. Hence it is, that the *States General*, in making Laws, do often refer themſelves to the *Roman* Law, as the common and received Law of the Country; and the Senators or Judges of their Courts do ſwear to obſerve the ſame: And the People in *Frieſeland* do in the ſtricteſt manner adhere to the *Roman* Laws, preferring them to all other Laws whatſoever.

(*k*) P. 4 & 5.

AN

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An EXPLANATION of the Marginal Quotations from the Books of the *Civil* and *Canon Law*.

And First, of the *Civil Law*.

THE *Inſtitutes of* Juſtinian, *Book the firſt, Title the ſecond, Section or Paragraph the third and fourth.* I. 1. 2. 3 & 4.

Digeſt, Book the firſt, Title the ſecond, Law the third, and Paragraph or Section the fourth. D. 1. 2. 3. 4.

Digeſt, Book the firſt, Title the ſecond, Law the third. Pr. *in* Principio, *and* fin. *in* fine ejuſdem legis. D. 1. 2. 3. *Pr. fin.*

Digeſts, Book the firſt, Title the ſecond, and Laws the third and fourth. D. 1. 2. 3 & 4.

Meaning, Law the firſt, Section or Paragraph beginning with the word Furtum ff. *ſignifies the Digeſt, and the Words* de Furtis *denote the Title thereof.* L. 1. 33. *Furtum*, ff. *de Furtis.*

That is to ſay, Bartolus *on the firſt Law of the* Digeſts, *Book the ſecond, and Title the fourth.* Bart. in l. 1. D. 2. 4.

Code, *Book the firſt, Title the twelfth, Law the eighth, and Section or Paragraph the ſecond.* C. 1. 12. 8. 2.

That is to ſay, Baldus *on the fourth Law of the* Code, *Book the ſixth, and Title the tenth.* Bald. in l. 4. C. 6. 10.

The Novels, *Conſtitution the eighty-ninth, and Chapter the ninth.* Nov. 89. c. 9.

Authentick, *Collation the ninth, Title the ninth, and Novel the twentieth.* Auth. 9. 9. 20.

All theſe Books of the *Civil Law* are ſometimes quoted by the initial Words of the Law itſelf; and by the Words of the Title: As, *Qui totam Hæreditatem*, ff. *De acquir. vel omit. Hæred.* that is to ſay, *The firſt Law of the Digeſt, Book the twenty-ninth, and Title the ſecond.*

Marginal Quotations from the Books of the *Canon Law*, explain'd.

X. 1. 9. 6. 4. THAT *is to ſay, Book the firſt, Title the ninth, Chapter the ſixth, and Paragraph the fourth of the Decretals of Pope* Gregory *the Ninth: The Letter* (X) *denoting the Decretals of that Pope.*

VI. 3. 4. 23. *Book the third, Title the fourth, and Chapter the twenty-third of the ſixth Book of the Decretals, by Pope* Boniface *the Eighth.*

Cl. 2. 5. 2. *Book the ſecond, Title the fifth, aud Chapter the ſecond of the* Clementines.

Extra. 14. 3. *That is to ſay, Title the fourteenth, and Chapter the third of the* Extravagants *of Pope* John *the twenty-ſecond.*

Com. 3. 2. *That is to ſay, Book the third, and Chapter the ſecond of the* Communes.

Diſt. 76. c. 2. *Diſtinction the ſeventy-ſixth, and Chapter the ſecond of the firſt Part of the* Decrees: *And if a* V *Conſonant, or this Note be added,* viz. §. *it denotes the Verſe or Paragraph of that Chapter, as* Diſt. 16. c. 2. v. 3. *or* §. 3.

16 Q. 7. 3. *That is to ſay, Cauſe the ſixteenth, Queſtion the ſeventh, and Chapter the third of the ſecond Part of the Decrees.*

Con. 1. 2. *Diſtinction the firſt, and Chapter the ſecond of the third Part of the Decrees.*

All theſe Books of the *Canon Law* are likewiſe ſometimes quoted by the initial Words of the Law, or Chapter itſelf; and by the Words of the Title: As thus, *Ex ſpecialis*, extra *de Judæis*; that is to ſay, *Cap.* 17. *Tit.* 6. of the fifth Book of *Gregory*'s Decretals. For the word *Extra* imports theſe *Decretals*, as well as the *Extravagants.*

A NEW

PANDECT

OF THE

Roman *CIVIL LAW.*

BOOK I.

Of LAWS in General.

TIT. I.

Of Juſtice *and* Right, *both Publick and Private, from whence the* Civil Law *had its Beginning; and of the ſeveral Diviſions thereof.*

THE Deſign of the following Work being to give the Reader a full and ample Account of the *Roman* Civil Law, I ſhall begin the ſame, as the Compilers of the *Digeſt* [a] have done before me, with the Title of *Juſtice* and the *Law* in General; which has its Riſe from Juſtice, as a Daughter has her immediate Birth and Deſcent from her Mother: becauſe Juſtice was before there was any ſuch Thing as a poſitive Law; and as ſoon as there was ſuch a Thing as Juſtice, the Law immediately enſued thereupon. This Title I ſhall divide into Five principal Parts. In the *Firſt* I ſhall give a Definition of Juſtice, and diſtinguiſh it into its ſeveral Branches or *Species*. In the *Second* I ſhall explain, what the Lawyers mean by the *Latin* Word *Jus*, which we in *Engliſh* call the Law; and what they likewiſe underſtand by the Word *Juriſprudence*, or the Knowledge of the Law. In the *Third* Part of this Diviſion I ſhall lay down the Order and Method, whereby Students may probably come at this Knowledge of the Law. In the *Fourth* I ſhall deliver ſome certain Precepts and Maxims of the Law itſelf. And in the *Laſt* Part I ſhall exhibit a general Diviſion of the Law into the Law of Nature, Nations, *&c.*

[a] D. 1. 1. 1.

[b] D. 1. 1. 10. Now *Juſtice* is defined [b] to be a conſtant and perpetual Will or Diſpoſition of giving unto every one, that which is his Right or Due: For as he cannot be ſaid to be a juſt Man, who has not ſuch a firm and immoveable Purpoſe of Mind; ſo, on the other hand, he may be called a juſt Man, who has ſuch a conſtant and fix'd Reſolution of doing Juſtice, tho' he does not equally render to every Man his Due, thro' ſome lawful Impediment or Diſability; the Will being a Habit of the Mind which is ſtirr'd up and diſpos'd to do that which right Reaſon perſwades. And to the End that Juſtice may be more ſucceſsfully adminiſter'd in every State or Common-
[c] D. 1. 1. 9. wealth, the Law is to be learn'd and ſtudy'd [c], which is nothing elſe but an Art which directs us to the Knowledge of Juſtice; or (as *Celſus* elegantly
[d] D. 1. 1. 1. defines the Law) it is *Ars boni & æqui* [d]: So that Juſtice is nothing but Goodneſs and Equity itſelf; and the Law has Juſtice for its Mother, in the ſame manner as an Obligation is ſaid to be the Mother of an Action.

Tho' Juſtice may be divided into what we call *Divine* and *Human* Juſtice; yet, in the Senſe here to be treated of, as it has only reſpect unto Man, I ſhall only diſcourſe of it under the latter Head, as it is a certain Kind of Political Juſtice; which barely tends to form the civil Manners and Behaviour of Men in this Life, and which requires an external Kind of Obedience and Honeſty, to the End that the State may be govern'd in Peace and Quietneſs. And this Kind of Juſtice Philoſophers make to be two-fold: The firſt being that which comprehends all other moral Virtues, and is, therefore, commonly ſtiled *Univerſal* Juſtice; and the other is that, which is deemed to be one of the cardinal or primitive Virtues in Morality, and is uſually
[e] I. 1. 1. pr. known by the Name of *Particular* Juſtice, as it is deſcribed in the *Inſtitutes* [e]. I ſhall only here contemplate the ſecond, which is contrary to every Injury that may be committed, and is divided into *Commutative* and *Diſtributive* Juſtice. The firſt has a Reſpect to Contracts among Men; and, as it is exercis'd in Commerce, is directed without any Regard to the different Conditions of Men, and obſerves a *Simple* or *Arithmetical* Proportion. And the ſecond, as it is exercis'd in Beneficence and in governing Mankind, relates to the Diſtribution of Rewards and Puniſhments, according to the ſeveral Conditions and Qualities of Men, and according to the different Nature of Mens Merits or Demerits; and if there are many Claims, it obſerves a *Compa-*
[f] C. 1. 24. 4. *rative* or *Geometrical* Proportion [f]. *Commutative* or *Expletory* Juſtice is wholly intent upon the Value or Price, or what is Due: But *Diſtributive* or *Attributive* Juſtce is directed to a Perſon as he is more or leſs uſeful or worthy, and no otherwiſe.

It has been obſerv'd, That the Law is an Art directing us to the Know-
[g] D. 1. 1. 1. ledge of Juſtice, or (in other Terms) *Ars boni & æqui* [g], that is to ſay, a Collection of Precepts, teaching us, what is juſt and what is unjuſt, what is equitable and what ſavours of Iniquity: For the Word *Art* here ſignifies a Syſtem of certain Propoſitions, *viz.* which are known to us by Practice, and which lead Men to ſome profitable End of Life. The Law may alſo be called an Art, as it contains and deſcribes every *Species* of the Law; as the Law of Nature, the Law of Nations, the Civil and Prætorial Law, *&c.* And then it is put for a Coarcting Precept, which is either Poſitive or Negative. But this Account does not pleaſe ſome Men; ſince ſeveral Parts of a Profeſſion are not Arts, but only Parts of an Art. The Words *Æquum* and *Bonum* in this Definition denote that, which is good, uſeful, and equitable. For 'tis to be noted, that *Bonum* is one Thing, and *Æquum* is
[h] D. 12. 1. 32. another: There being ſome Things, which are good and equitable both [h]; ſome Things that are good, tho' not equitable, as in the Buſineſs of Uſu-
[i] D. 41. 3. 1. capions [i]; and ſome Things which are equitable or expedient, and yet
[k] C. 5. 14. 8. not good [k]. The Word *Bonum* may be referr'd to *Univerſal* Juſtice; and the Word *Æquum* to *Particular* Juſtice. The Word *Æquum* may be underſtood

underſtood of ſuch as is ſo by Nature; for the Word *Equity* denotes that Right, which is founded on the Law of Nature and right Reaſon itſelf [l]. But the Word *Bonum* has a Relation to that, which is good and profitable in civil Society, tho' ſometimes it differs in ſome reſpect, as to its Appearance, from that natural Equity [m].

[l] D. 1. 1. 11.

[m] D. 1. 1. 6.

Juriſprudence is defined to be the Knowledge of Things Human and Divine; of that which is juſt, and that which is unjuſt [n]: or (in another Phraſe) we may define it to be the Knowledge of the Written Law, whoſe Precepts inſtruct us in that which is good, juſt, and equitable. And 'tis call'd the Kowledge of Things Divine, not in the ſame manner as the Goſpel gives us divine Knowledge, but becauſe thoſe *Ideas* which are born with us, (if any ſuch there be), are Things truly divine. And, ſecondly, it treats of Things Sacred, Religious, and Holy, which are ſaid to be Things of Divine Right, or ſuch as are founded on the Law of God [o]. That which *Ulpian* ſtiles *Jus* [p], or the Law, the ſame Perſon elſewhere calls *Juriſprudence* [q]; tho' the Law itſelf only differs from *Juriſprudence*, as an Art which ſubſiſts of itſelf differs from the Knowledge of an Art which cannot ſubſiſt alone and of itſelf: Therefore *Ulpian* has rightly given us a different Definition of *Law* and *Juriſprudence*.

[n] D. 1. 1. 10. 1.

[o] D. 1. 8. 1.

[p] D. 1. 1. 1.

[q] D. 1. 1. 10. 1.

Having thus defin'd what is meant by *Juriſprudence*, I ſhall next conſider, how it is to be learn'd and obtain'd by ſuch as deſire to be acquainted with the Law: For thoſe Perſons ought not immediately in the Beginning to commit themſelves raſhly to that vaſt Ocean, but to ſet out in their Searches after this Knowledge from ſelf-evident Principles, and from the Elements of the Law. For all Arts (as *Juſtinian* obſerves in his Proem to the *Digeſts*) have a certain kind of Infancy, ſaying, That in all Studies and Points of Learning, the Inſtitutions of Science require the firſt Place. And therefore he adds That, for the firſt Year, Scholars ought to apply themſelves wholly to the Inſtitutions of the Law: For Perſons ought to begin their Studies with Things eaſy and of the leaſt Difficulty in them, to the End that they may come to the Knowledge of Things more abſtruſe and of greater Conſequence. For no one becomes a Proficient on a ſudden [r]: And therefore, thoſe Things are to be taught them, which are leaſt diſcouraging, and beſt adapted to the *Genius* of the Scholar. Hence, leſt Students in the Law ſhould be at firſt perplex'd and burden'd with too great a Variety of Matters, and be thus frighten'd from this Study, the Elements of the Law are firſt to be taught in a plain and ſimple manner, according to this Rule, *viz. Qui vadit-planè, vadit ſanè.* Wherefore, he that would make any Progreſs in the Study of the Law, ought, in the firſt Place, to read *Juſtinian's Inſtitutions*, as being the firſt Elements of the Law, made by the Emperor's Order, for the Benefit of Youth who have a mind to apply themſelves that Way: They cannot be too often read, nor too perfectly learn'd, ſince they contain an Abridgment of the whole OEconomy of the *Roman* Law. To ſucceed herein, the Definitions and Titles are firſt to be learn'd by Heart: Then the Text is to be read over carefully, with the Notes made by *Vinnius* thereupon. After which, it will be very eaſy to reap Advantage from the *Commentaries* made in the Schools. The Paraphraſe of *Theophilus* will be of great Help towards a right Underſtanding of the Text, by Means of the ſeveral Caſes therein reported upon moſt of the Paragraphs. As to the Text of the *Inſtitutes*, we muſt not be ſatisfy'd with once reading it; we muſt turn it over and over, and, as far as poſſible, retain it: For 'tis the Text, that is the chief Object of their Application, who deſire to make any Progreſs in the Study of the Law. The Stile of the *Roman* Law, eſpecially in the *Digeſts* and *Inſtitutes*, is ſo fine and pure, the Terms are ſo proper and well-choſen, that there is no making Uſe of any other, without running the Hazard of forſaking their true Meaning,

[r] Q. 1. 8. 12.

or

or (at leaſt) rendring them obſcure. One Thing, which Beginners ought eſpecially to avoid, is the reading of Abundance of Books: They ought to chuſe the beſt, to read them often, and endeavour to underſtand and retain their Subſtance. Above all, they ought not to meddle with large Commentaries, which are rather apt to confound than help Beginners.

As to the Precepts of the Law, which was the *Fourth* Thing to be conſider'd, the moſt general are theſe Three; viz. *To live Honeſtly*; *Not to Hurt another*; and, *To give unto every one his Due* [s]. For all Laws are deriv'd from theſe Three Tenets of Doctrines, as from their proper Fountains; there being no Law or Reaſon but what may be reduced to one of theſe Precepts. The Firſt Precept is, An Honeſt Life, and a Sober Behaviour: And though, in a large Senſe, this may comprehend all other human Duties; yet, in a ſtrict and proper Acceptation, it ſeems only to relate to the individual Perſon of every Man; teaching him ſo to govern all his Thoughts, Words, and Actions, as right Reaſon perſwades him to do; and not raſhly or negligently to think, ſpeak, or do any Thing contrary to the Rules of Decency and Honeſty; but in all Actions of Life, not only to conſider what is lawful, but likewiſe what is agreeable to right Reaſon [t]. The other Two Precepts have a Regard rather to our Behaviour with other Men, and chiefly reſpect the Conſervation of human Society. But tho' the Second Precept, which forbids all Offences in civil Life, properly ſeems to reſpect the Body of our Neighbour; yet, according to *Aldobrand* [u], it may be underſtood of any other Injury, in what manner ſoever a Man's Perſon or good Name, which is compar'd unto Life itſelf, is evilly treated or offended [x]; or the Goods and Eſtate of another, which is the Life and ſecond Blood of Man [y], is injured. And as it is not lawful for one Man to offend another, unleſs it be in a Man's own Defence; ſo every Man is forbidden to offer any Violence to his own Body [z]; [for no Man is Lord of his own Life and Members [a]]; and therefore, he who does by any Malice fore-thought, or thro' Fear of Shame and Puniſhment for a Crime, greatly wound or hurt himſelf with Death, is capitally puniſh'd [b]. Hence a Perſon may not ſuffer himſelf to be impriſon'd, or bind himſelf by a Contract, to the End that ſuch a Puniſhment ſhould be inflicted on his Body, unto which he is not liable by the Law, as to have his Body quarter'd, or put to the Rack [c], *&c.* Therefore Sureties, who do in criminal Cauſes promiſe to exhibit the Defendant's Perſon, cannot bind themſelves to undergo a corporal Puniſhment, if ſuch Defendant ſhould run away, ſo that they cannot produce him, as I ſhall obſerve hereafter under the Title of *Sureties*. But if a Perſon ſhall wound or lay violent Hands on himſelf, thro' Madneſs, or any Diſeaſe, or thro' Impatience of Pain, or Irkſomeneſs of Life, he ſhall not be puniſh'd: But a Perſon pretending no ſuch Thing ſhall be capitally puniſh'd [d], as aforeſaid. The Third Precept concerns the Eſtate and Subſtance of our Neighbour, forbidding one Man to deceive another in the Buſineſs of Contracts, and the like: And this commands us to give every one his Due, whether it be Rewards or Puniſhments; and in this Senſe it includes *Diſtributive* Juſtice, and relates to the Magiſtrate; as it does alſo *Commutative* Juſtice, which only reſpects private Dealings among Men.

The *Fifth* Thing to be conſider'd was, A general Diviſion of the Law, which *Juſtinian* diſtinguiſhes into two Parts or *Species* [e], *viz.* into the Law *Publick* and *Private*. The *Publick* Law is that, which concerns the general State of the Commonwealth, or the *Roman* Government in particular [f]; and it has a Reſpect to Religion, Magiſtrates, the Right of War, Leagues and Alliances, *&c.* Tho' by accident and conſequentially it may redound, by a happy Adminiſtration, to the Advantage of private Men. For, by the *Publick* Law here, I do not mean the Law in reſpect of its Form, for that

[s] D. 1.1.10.1. I. 1.1.3.

[t] D. 50.17. 197.

[u] In §. 3. I. 1.1.

[x] D. 39.2.9.

[y] D. poſt Text in l. 14. C. 2. 7. v. *Vitem.*

[z] I. 49.16.6.1.

[a] D. 9.2.13.

[b] D. 49.16.6. 187.

[c] Ang. in §. 7. D. 44.16.6.

[d] D. 49.16. 6.1.

[e] I. 1.1.4. D. 1.1.1.2.

[f] I. 1.1.4.

that it was made by Publick Authority, as we make Laws in our Parliaments, [for in this Senſe the whole Civil Law is Publick], but in reſpect of the Object or End thereof; for that it concerns the Church, Clergy, Magiſtracy, and other-like Publick Functions. The other *Species* of the Law, which we may call *The Law of private Men*, is that, which principally regards the Advantage of private and particular Men [g]: And as it is occupy'd in giving every Man his own, it muſt of Neceſſity be proportionable to the Rules of Equity and Juſtice. This treats of the Diſtinction of Perſons and of Things, and includes the Buſineſs of Contracts, Succeſſions, Judicature, Actions, and the like; which Things chiefly belong to the Advantage of private Men, tho' they may alſo conſequentially tend to the Welfare of the Publick; ſince it is the Intereſt of the State to have rich and wealthy Subjects, in order to ſupport itſelf againſt foreign Enemies, provided this Wealth does not center in a few rich Citizens. And of this private Right or Law I ſhall chiefly diſcourſe in the Sequel of this Undertaking, as this Right is either founded on the Law of Nature, the Law of Nations, or on Civil Inſtitutions [h]; therefore I ſhall divide this private Right into the Law of Nature, the Law of Nations, and the Civil Law [i], as the Emperor *Juſtinian* has done, after he has given us ſome Account of Juſtice and the Law in General.

[g] I. 1. 1. 4.

[h] D. 1. 1. 1. 2.

[i] I. 1. 1. 4.

TIT. II.

Of the Primary *and* Secondary *Law of Nature, the Law of Nations, and of the Civil Law, according to the largeſt Acceptation of the Phraſe, otherwiſe call'd a Poſitive Law; and of the Way and Method of Enacting and Abrogating Laws among the* Romans, *&c.*

HERE it is to be obſerv'd, That God had no ſooner created Man after his own Image, but that he gave him a full Diſcovery of the firſt Law, commonly call'd The Law of Nature; which I ſhall diſtinguiſh into the *Primary* and *Secondary* Law of Nature. The firſt is that which is common not only unto Men, but alſo unto all other living Creatures [k]: And this is nothing elſe but a bare Inſtinct, or natural Inclination; as Self-preſervation, the Deſire of Liberty, the Conjunction of Male and Female for Procreation-ſake, the avoiding of ſuch Things as are hurtful, ſeeking after ſuch Things as are neceſſary unto Life, repelling Force with Force, the taking Care of an Off-ſpring, *&c.* But herein I only follow the Diſtinction of the Lawyers, who, I think, uſe the Word *Jus* very improperly in this Diviſion; ſince the aforeſaid Examples are rather natural Appetites or Affections, than Rules of Law, being ſuch Inclinations as are born with us: For as there is no ſuch Thing as Reaſon in Brutes, there cannot be any ſuch Thing as Law or Right with them. But this the Doctors call the *Primeval* or *Primary* Law of Nature, to diſtinguiſh it from that other Law, which is truly and properly the Law of Nature, as being only adapted unto Men; and as this Law is founded upon natural Reaſon alone, it diſtinguiſhes Man from brute Animals. *Cicero* defines this *Secondary* Law of Nature to be right Reaſon implanted in Man by Nature; com-

[k] I. 1. 2. pr.

manding thoſe Things which ought to be done, and forbidding the contrary [l]. Thus Religion towards God, the Love of our Parents, and the Duty which we owe our Country, and the like, may be ſaid to be Inſtances of this *Secondary* Law of Nature. But this *Secondary* Law the Lawyers often ſtile *The Ancient Law of Nations* [m], as being that which natural and unimprov'd Reaſon has eſtabliſh'd among all Nations, and is obſerv'd by all People. For this Law is common unto all Men [n], and proper unto Men alone [o]. At the Time when this Law began, there were no Poſitive Laws or Conſtitutions among Men, but they liv'd in ſuch a natural State, that all Things were in Common, without the Diſtinction of *Meum* and *Tuum*: And according to this ancient Law, Men lived for a certain Time, whilſt there were but few Inhabitants upon Earth. But afterwards, as Men increas'd in Number, the Malice and Wickedneſs of Men likewiſe increas'd with them, ſo that they were not able to live by this Law of Nature alone: Whereupon Men came to ſeveral Acts of Concord and Agreement among themſelves, being ſuch Rules as were founded upon right Reaſon, for eſtabliſhing Peace and Quiet among each other, and for the Defence of their natural Subſiſtence; and then began thoſe Diſtinctions of *Meum* and *Tuum*, which have been the Occaſion of ſuch Miſchief ever ſince, *Whatſoever thy Foot ſhall tread on, let it be thine*; and all Nations did, by common Conſent and Agreement, make certain Conſtitutions, forbidding one Man to enter the Poſſeſſion of another. Hence aroſe Wars, Captivities, Services, and the like. This we may call the *Secondary* Law of Nations, which proceeded from Neceſſity, and the Natural Judgment of Men, tho' not ſimply ſo, but from Cuſtoms and Uſages had among all Nations, and wherein they agreed for the common Good of all Mankind in general. *Livy*, ſpeaking of the *Gauls* [p], calls it *Jus Humanum*, for that it was every-where receiv'd by the greateſt Part of Mankind. The Doctors call it the *Secondary* Law of Nations, as it is diſtinguiſh'd from the Natural Law, which is alſo ſometimes ſtiled the Law of Nations, and ſometimes the Divine Law [q], becauſe it was implanted in us by God himſelf. And thus the Law of Nations is that, which the Reſult of common Reaſon has eſtabliſh'd among Men, and is obſerv'd in all Nations alike, tho' it be not reduc'd into Writing, or promulgated in the Form of a Law. Upon this Law is founded the Diſtinction of Mens Rights, the Building of Houſes, the Erecting of Cities, the Forming of Societies of Life, the Deciding of Controverſies by Judgments of Law, the Buſineſs of War, Peace, Contracts, Obligations, Succeſſions, and the like.

[l] Cicer. de Leg. lib. 1.

[m] D. 41. 1. 1.

[n] I. 1. 2. 2.

[o] D. 1. 1. 1.

[p] Lib. 5.

[q] I. 1. 2. 11.

The *Civil Law* is diſtinguiſh'd from the Law of Nations, and, taken in a large Senſe, and is that Law, which every particular State has eſtabliſh'd for its own proper Uſe. It partly conſiſts of thoſe Laws and Cuſtoms which are peculiar to the State, and partly of the Law of Nations [r]. Thus we ſay, the Civil Law of *Rome*, the Civil Law of *Athens*, &c. by which we mean the Municipal Law of this or that State and Commonwealth. The Civil Law of any State is that, which does not entirely recede from the Law of Nature and of Nations, and which is not in every reſpect the ſame, or miniſterial thereunto: For if we add any thing unto the Common Law, or take any thing from thence, we thereby make it a Law peculiar unto ourſelves. But in a more ſtrict Acceptation, the *Civil* Law is the Law which the old *Romans* made Uſe of, and is, for the great Wiſdom and Equity thereof, at this Day, as it were, the Common Law of all well-govern'd Nations, a very few only excepted: The Principles of the *Civil* Law, in this Senſe, being only an Emanation from the Law of *Nature* and *Nations*. And certainly, tho' ſundry other Nations, by the Light of Nature, have many wholſome Rules and Maxims in their Municipal Laws; yet

[r] I. 1. 1.

yet if all the Conſtitutions, Cuſtoms, and Laws of all other People and Countries were put together, they are not comparable to the Law of the *Romans*, either in Point of Equity or Wiſdom, nor in Gravity and Sufficiency. Hence it is, that moſt other Nations (ſaving our own), tho' they do not wholly receive the *Roman* Civil Law for their Law, yet they ſo much admire the Equity of it, that they interpret their own Laws by it, as *Pechius* obſerves in his Treatiſe *De Regulis Juris* [s]. [s] Reg. 28.

Now all Perſons that live under any Government at all, are govern'd either by written or unwritten Laws, which laſt are uſually call'd Cuſtoms; more of which under the next Title. There were ſome Nations, we read of, that only made uſe of written Laws, as the *Athenians*; others, that did not make uſe of written Laws, but only of Cuſtoms, as the *Lacedemonians*; and others, that made uſe of both written and unwritten Laws, as the *Romans*. The Word *Lex* is properly underſtood of a written Law; tho' Writing be not neceſſary to the Being of a Law, but only made uſe of for the Proof and Evidence thereof; and it is oppos'd unto an unwritten Law [t], which we call Cuſtom, as aforeſaid. The Orator *Demoſthenes* defines a Law to be that Rule, by which all Men, dwelling in that Commonwealth where it rules, ought to govern their Lives and Actions, and to which they ought to yield Obedience, not only for many other Reaſons, but for this in particular, *viz.* becauſe (ſays he) it is of the Invention and Gift of the Gods, tho' the ſame be decreed by the Authority of wiſe Men: And he therefore calls a Law, The Gift of the Gods; becauſe Princes make Laws by the Divine Permiſſion. But the Lawyer *Papinian* defines a written Law to be a Conſtitution made with great Prudence and Deliberation; commanding Things juſt, honeſt, and reaſonable; and forbidding the contrary, under the Reſtriction of Puniſhment, whether the Offence againſt the ſame be committed wilfully, or thro' vincible Ignorance [u]. And the Law reſtrains Offences, by puniſhing ſuch Perſons as commit them; to the End that the Puniſhment of ſuch Offenders may become a Dread and Terror unto all others that commit the like. And this Puniſhment is call'd the *Sanction* of a Law. *Chryſippus*, the chief of the *Stoick* Philoſophers, will have the Law to be the Queen of all Things both Divine and Human, as it preſides over good and bad Men, by giving unto each according to his Works; for it is a Rewarder of the Good, and an Avenger of the Evil.

[t] Cicer. de Leg. lib. 1.

[u] D. 1. 3. 1.

From what has been offer'd, it appears, That the Power of the Law is manifold: For ſometimes it commands, as the *Julian* Law of Adultery does, when it orders the Accuſer and the Accuſed, and their Advocates, to be preſent at the Time when Bondmen are put to the *Rack*, in the Cauſe of Adultery. Sometimes it forbids, as when it prohibits the real and immoveable Eſtates of Minors to be alienated without the Judges Decree. And thus a Law commands that which it enjoins, and forbids that which it would not have to be done. A Law ſometimes permits, as it does a Soldier to uſe his Exceptions againſt a Sentence: And ſometimes it puniſhes, as it does Offences committed againſt the ſame. A Law or Conſtitution, that forbids any Thing certain and in particular, forbids all Things that are derived from the Thing thus forbidden: For a Prohibitory Law is not reſtrain'd to the Caſe therein expreſs'd, but may be extended to all ſuch Matters as follow from ſuch a Caſe; and thus the Law, in this Caſe, admits and receives an extenſive Signification. For Example; All Evils ariſe from Concupiſcence: And therefore it follows, that if Concupiſcence be forbidden, all Evils are forbidden. For the avoiding of an Abſurdity, a Law may be extended to a Caſe not expreſs'd therein, if it has a Parity of Reaſon with the Caſe expreſs'd [x]. [x] D. 22. 5. 13.

It

It is the Nature of a Law, To ordain and have a Reſpect unto Things which may happen hereafter, and not to Things paſt; unleſs there be a *Proviſo* in the Law, That it ſhould be extended to Things paſt, or now depending [y]. And a Law ought rather to be adapted to Things which frequently happen, than to ſuch Things which come to paſs but very ſeldom, *Præter opinionem hominum*, and out of the Courſe of Nature [z]. A new Law, when it corrects a Matter, is extended to all the Conſequences of an old Law; as when a Perſon qualify'd to take a Degree, aſſumes the Quality of ſuch a Degree, he is deem'd qualify'd for all Things that are conſequent unto the Quality of ſuch Degree. But the Amendment and Correction of Laws ought to be avoided as much as poſſible. If one Law be corrected; other Laws, which tend to the Explanation and Interpretation of it, are alſo underſtood to be corrected by it: But a new Law ſometimes interprets an ancient Law. General Laws are underſtood to take away particular local Cuſtoms and Statutes, when the Prince or Legiſlative Power is made acquainted with them, as they are preſum'd to be, but not otherwiſe. A Law founded on the Nature of Things, cannot be changed by the Prince, or any Sovereign Power whatſoever: For tho' a Prince may change particular Laws, and make Laws derogatory thereunto; yet he cannot alter a Law that is founded upon natural Equity and right Reaſon. Thus if any one bound a Freeman with a Deſign to make him a Slave or Vaſſal, knowing him to be a Freeman, he could neither have the Poſſeſſion of ſuch Freeman, nor could he have the Goods of ſuch Perſon, which he acquir'd, tho' ſuch Freeman ſhould become his Priſoner by Conqueſt; becauſe a Law cannot alter the Nature of Things. Whenever a Law is correctory, and carries a Penalty along with it at the ſame time, the Maſculine Gender does then comprehend the Feminine [a], as in moſt other Caſes it does. When one and the ſame Law has ſeveral Meanings and Significations, ſuch Law ought not to be quoted for the Deciſion of Cauſes; and the ſame may be ſaid of any Statute. The Laws often quote the Antients in the Deciſion of Cauſes; and the Authority of the Antients is ſometimes, among Lawyers, deemed to be good Law, and ſound Reaſon [b]. The common Opinion of the Lawyers is preſum'd to be true; and Judges, in pronouncing Sentence, ought not to depart from it, when the Meaning of a Law is doubtful [c]: For this is a Preſumption, which ariſes from the great Authority of the Doctors and Profeſſors of the Law. For when a Doctor is an honeſt Man, and well-skill'd in the Laws, he is, for this Reaſon, preſum'd to declare the Truth thereof. But this Concluſion admits of a Limitation, and has not Place, when the common Opinion is evidently falſe, and may be convicted by more probable and better Arguments, which is left to the Diſcretion of a learned and upright Judge to determine; for he may ſubmit himſelf to the Judgment of a fewer Number of Doctors [d]. *Secondly*, This Concluſion is underſtood to be true, according to *Baldus*, when the common Opinion is ſtrengthen'd with the Authorities of ſeveral learned Doctors [e]: but then the Number of theſe Doctors ought to be of ſuch Perſons as are very eminently remarkable for their Honeſty and ſuperior Knowledge in the Laws; for a Multitude of ſimple Scriblers ought not to be regarded, but only the Gravity and Arguments of ſuch honeſt Men as are Perſons of conſummate Learning [f].

In the Buſineſs of Deciding Cauſes by Precedents, as it ſometimes happens, every Judge is a Law-giver, by drawing the Law *de Similibus ad Similia*, as he fancies: But this is a dangerous Way of proceeding, and only ſerves to confound the Law, and not to do Right and Juſtice oftentimes. Precedents are indeed uſeful to decide Queſtions in ſome Caſes: but in Caſes which depend upon fundamental Principles, from which Demonſtrations may be drawn, Millions of Precedents are to no Purpoſe.

Not

[y] C. 1. 14. 7.
[z] D. 1. 3. 3. 4. 5. & 6.
[a] D. 2. 1. 7.
[b] D. 2. 14. 39.
[c] DD. in l. 4. D. 3. 2. X. 5. 40. 27.
[d] C. 17. 1. Abb. in c. 1. X. 2. 14.
[e] Bal. in l. 1. D. 1. 13.
[f] D. 37. 14. 17. C. 4. 5. 10.

Nor are Precedents of any great Account or Conſequence, eſpecially when they are but few in Number: Tho' Precedents founded upon great Reaſon ought to be regarded: Yet an extrajudicial Opinion, given in or out of Court, is no good Precedent; for it is no more than the *Prolatum* or Saying of him who gives it; nor can it be taken for his Opinion, unleſs every thing at Pleaſure muſt paſs as the Speaker's Opinion. An Opinion given in Court, if not neceſſary to the Judgment given on Record, is, according to *Vaughan* [g], no Judicial Opinion at all; and, conſequently, no Precedent: For the ſame Judgment might have as well been given, if no ſuch, or a contrary Opinion, had been brought; nor is ſuch an Opinion any more than a *Gratis dictum*. But an Opinion (tho' erroneous) concluding to the Judgment, is a Judicial Opinion; becauſe it is deliver'd under the Sanction of the Judge's Oath, upon mature Deliberation; which aſſures us, that it is, or was (at leaſt) when deliver'd, the Opinion of the Deliverer.

[g] Rep.

I have ſaid, That the Judging by Precedents, is a dangerous Way of Proceeding, and cannot be defended by right Reaſon. For, *Firſt*, The Conformity of one Sentence to another, to wiſe and rational Men, argues nothing as to Right or Equity, but only concludes a Concurrency in Opinion, both of which may be erroneous and miſtaken; which is a ſad Caſe, when we come to judge of Mens Lives, Intereſts, and Eſtates, by former Judgments. *Secondly*, As in Adjudged Caſes, taken merely as ſuch, there is often want of Reaſon to perſwade, ſo there is alſo a want of Authority to oblige. For what Force can the Judgments or Sentences of any Predeceſſors have, to bind thoſe who ſhall ſucceed them in the ſame Judicatory; ſince Judges of equal Power cannot exerciſe Rule over one another? Nor indeed can any one tie up one's own ſelf [h]: And therefore we often ſee, that, upon the ſame Fact, one Judge determines one Way, and another the contrary; ſo it happens too, that the very ſame Men judge the ſame Fact, at divers Times, in a different Manner. See *Ærodius*, of Adjudg'd Caſes [i]. For, indeed, the Judgments of Men may grow more perfect by Age, Study, and Experience, than they were when they gave the firſt Judgment: And thoſe that ſucceed, may be by many Degrees more eminent in Wiſdom, Reaſon, Knowledge, and Experience, than thoſe that ſate in the ſame Tribunals before them; for there is in this World an undoubted Rotation in all Things. Knowledge and Underſtanding does not ſhine ſo proſperouſly in ſome Times as in others; and Time, to Poſterity, may diſcover that to be an Error, which our Anceſtors thought a Truth. *Thirdly*, There muſt be but little Weight laid upon foregoing Judgments, even of the higheſt and moſt exemplary Tribunals of Men; nor can they be ſuch fit Patterns for our Imitation, when we conſider what Uncertainties they lie under, what Fatigues they are ſubject to, and what Artifices, Subtilties, and Inventions are too frequently uſed to corrupt and poiſon them. Sometimes the greater Part weighs down the leſſer. Where many Judges are to pronounce Sentence, and ſome one or two of them are eminently qualify'd above the reſt; that which the greater Number concurs in only, muſt prevail: But if the Wiſe be Diſſenters, there is more of Number than of Weight or Knowledge in ſuch a Sentence. Many other Reaſons may be given againſt Judging by Precedents, which I here omit.

[h] D.36.1.13.4.

[i] Lib. 1. tit. 1. cap. 18, &c.

Tho' all Perſons whatſoever, living within the Territory and Juriſdiction of a Prince who has the Power of making Laws, be obliged by ſuch Laws [k], even the Prince's Houſhold; yet Perſons, living out of ſuch Juriſdiction, are not bound thereby through a Defect of Power in the Legiſlator [l]. Wherefore Foreigners, who come into ſuch a Prince's Dominions only for the ſake of Travelling, and the like, and have not a fix'd Dwelling and Abode there, are not bound by the Laws of ſuch a Prince [m], as

[k] C. 1. 14. 10.

[l] D. 2. 1. 20.

[m] C. 10. 39. 7.

as his Subjects are, whilſt they remain there, unleſs the Words of a Law are framed to this End and Purpoſe, or ſome Reaſon of State requires it; as when Perſons trade and traffick there, or commit any Treſpaſs and Offence in ſuch Prince's Dominions; becauſe then Strangers, who make Contracts, or commit Offences, do, *eo ipſo*, tacitly oblige themſelves to the Laws and Juriſdiction of the Magiſtrate of ſuch Place. For a Magiſtrate may, in his own Diſtrict, preſcribe a certain Form and Law unto Contracts, Judicial Proceedings, Laſt Wills and Teſtaments, and other the like Matters: In all which Caſes Strangers are oblig'd by the Laws of a foreign
[n] DD. in l. 1. C. 1. 1. State, ſo long as they deal there [n]. For Peace and Tranquillity could hardly otherwiſe be preſerved in a State, if Strangers were not oblig'd to
[o] P. 3. c. 13, & 14. conform themſelves to the Laws thereof. See *Coraſius de Juris Arte* [o]. So in *France*, the King, *Jure Arbinatûs*, i. e. *Alibi Natorum*, ſeizes the Eſtates of Aliens and Strangers, when they die there, unleſs they have a Privilege granted to be exempt, as the *Scotch*, *Dutch*, *Switzers*, &c. have; or unleſs they marry a Native, and have Children by her. See *Perezius*
[p] 10. n. 15, 17. on the *Juſtinian* Code [p]. Therefore all Perſons but the Prince alone are ſubject unto the Laws of a State; for the Prince is excepted and exempt
[q] D. 1. 3. 31. from the Law [q]. For as the Force of a Law conſiſts in Commanding and
[r] C. 1. 14. 7. Correcting [r], no one can compel or coerce the Prince, becauſe he has no Superior. Nor can the Prince ſo command or preſcribe a Law unto him-
[s] D. 48. 51. ſelf, as that he may not recede from thence [s]. But yet it becomes a Prince, [I ſpeak here of a Prince veſted with abſolute Power, as the *Roman* Emperors were], to live according to the Law, and to approve of that
[t] C. 1. 14. 4. Law which he has made, by his own Life and Actions [t]. *Bartolus* ſays, That a Prince is only ſubject to the Laws *de debito honeſtatis*, for Decency-ſake: but yet he allows it to be otherwiſe, where the Form of Government is limited in reſpect of the Prince's Power. In *England* the King may ſue, and be ſued, and the Execution of the Sentence is againſt his Attorney-general. A good Prince deſires no more to be granted to him in Point of his own Actions, than he is willing to grant unto his Subjects; and a good Prince always makes good Subjects by his Example. *In imperio maximus, major in exemplo ſit*, ſays the *Roman* Orator. Therefore, tho' the Laws of the *Roman* Empire exempted their Princes from the Solemnities of the Law; yet they thought nothing ſo much the Buſineſs of a Prince,
[u] C. 1. 14. 4. as to live according to the Laws, and to obſerve the ſame [u].

I have before hinted, That the Power of the Prince does not extend itſelf to the Laws of Nature and Right; for he is equally ſubject to them as a private Perſon; and the Laws of Nature carry more Power with them
[x] In l. 4. C. 1. 14. than the Sovereignty of any Prince. And the ſame may be ſaid of the Law of Nations: Hence it is, according to *Bartolus* [x], that a Prince is effectually obliged by all his Contracts and Conventions enter'd into with any one; for otherwiſe no one would have any Dealing or Commerce with him, through a fear leſt he ſhould break his Faith and publick Word, which once given, he ought to preſerve ſacred and inviolable; ſince nothing is more agreeable unto Nature, and better ſuits the Dignity of a Prince, unleſs ſuch Contracts are made very much to the Prejudice of his Subjects, whoſe Fortunes and Eſtates ought not to be diminiſh'd by the unjuſt Conventions
[y] DD. In l. 4. C. 1. 14. of their Prince [y]. But if a Prince, in his Contracts, be circumvented by Fraud and Deceit, he ſtands upon the common Footing with other Men, and may renounce the ſame, or reſcind it by his Power, according to the Law of Nations, if Satisfaction be not made him: But if ſuch Pacts and Covenants are juſt, and ſuch as reſpect the publick Good of the State, he ought not only to obſerve them, but they bind his Succeſſor after his Demiſe, and ought to be obſerv'd by him, who repreſents the Deceaſed; for that they were not enter'd into *Nemine Proprio*, but in the Name of the State:

But

But it is otherwiſe, if ſuch Pact or Covenant be entred into as a private Man and in his own Name: For then as the Obligation ariſing from thence is Perſonal, it does not deſcend to his Succeſſor; becauſe *par in parem non habet imperium* [z].

[z] Felin. in C. 1. X. 2. 19.

Where one and the ſame Determination has a Reſpect unto ſeveral Things, that are determinable by the ſame Law, it ought (according to *Bartolus*) [a] to be underſtood to determine all Things equally and after the ſame Manner. There is a Difference between Diſpoſitions of Law, and Diſpoſitions or Orders of Men; becauſe he that is bound by an Order or Diſpoſition of Law, if he acts contrary thereunto, is oblig'd and made liable *in ſolidum*; for the Law totally obliges ſo far as it may. But it is otherwiſe in an Order or Diſpoſition of Man; becauſe a Teſtator cannot oblige an Heir, unleſs it be only ſo far as the Aſſets extend [b].

[a] In L. 4. D. 28. 6. 2.

[b] C. 3. 32. 14.

A Conſtitution is ſo called from the Latin Verb *Conſtituo*, which is the ſame as *ſimul Statuo*: And as it is referr'd to the Conſtitution of a Prince, it is called a Conſtitution, *quaſi communis & ſimul Statuitio*; becauſe the Law ought to be common to all, and not enacted againſt particular Perſons. For if a Conſtitution be made againſt any certain particular Perſon, he, againſt whom ſuch Conſtitution is made, may lawfully reſiſt the ſame, if he pretends to have received any Hurt or Damage thereby, tho' ſuch Conſtitution ſhou'd expreſly in general Terms forbid the contrary. For tho' a Conſtitution ſpeaks in general Terms; yet if it may be gather'd and inferr'd from Conjectures, that it was made and publiſhed in Hatred of ſome particular Perſon, then an Appeal will lie from ſuch a Conſtitution; for a Perſon ſhall be relieved againſt a Fraud, even in the making of a Law. A Conſtitution may be taken *ſtrictly* and *largely*. In the firſt Senſe hereof a Conſtitution is properly that which is decreed and ordain'd by the Prince or Emperor: But in the largeſt Acceptation thereof, it is uſed to ſignify every kind of written Law, *viz.* for the written Law of inferior Perſons, as well as that of Princes or Emperors. Or elſe, *Secondly*, A Conſtitution may be ſo named from the Word *Con*, which is the ſame with *ſimul*, and the Verb *Statuo*, to ordain; becauſe the Prince, in making a Conſtitution, calls together his Judges and Nobles, and conſulting with them, takes their Advice. But if the Word *Conſtitution* be taken in a large Acceptation thereof, it is ſo called from the Word *Con*, which denotes the ſame as *Communiter*; becauſe the whole Congregation being aſſembled together, do in common ſtatute the ſame.

Whether Writing be of the Subſtance of a Law or Conſtitution, there have been various Opinions of the Lawyers: But the prevailing Opinion is, That, regularly ſpeaking, Writing is not of the Subſtance of a Law or Conſtitution. A ſpecial Conſtitution is not abrogated and taken away, unleſs it be by another ſpecial Conſtitution derogatory thereunto. The Authority of the Prince depends on the Law; and therefore whatever Conſtitution a Prince ordains, he is preſum'd to do it as acting upon a juſt Motive. Reſcripts, Edicts, Pragmatick Sanctions, and the like, may be comprehended under the Appellation of the Prince's Conſtitution, according to the Rubrick of the Law here quoted [c]. *Edicts* are thoſe Decrees of the Prince, which are made by him *proprio Motu*, without having any Matter come before him for his Determination, and they ought to be for the Good and Welfare of his Subjects. But the Prince's *Decrees*, which may alſo be call'd Conſtitutions, are ſuch Determinations as are made on the Deciſion of ſome Cauſes, as almoſt all the Conſtitutions in the *Juſtinian* Code are.

[c] C. 1. 14.

A *Statute* is, in Propriety of Speech, ſuch a Law which every City or State ordains for its own peculiar Uſe upon extraordinary Occaſions, which is called a *Municipal* Law [d]; and it is alſo termed the Law of

[d] I. 2. 1. Gloſſ. & DD. ibid.

of the Place where a Statute has its Force. A Statute is ſometimes ſtiled the *Common* Law, ſometimes a *Municipal* Law, ſometimes a *Conſtitution*, and ſometimes the *Prætorian* Law, according to the Perſon or Perſons that eſtabliſh it. If a Statute be made by the Prince, or *Jure Principatus*, it is called a *Conſtitution* [e]. A Statute made by the State or a City is ſtiled a *Municipal* Law [f], and is perpetual, if ſuch State or City recognizes no Superior [g]: But if ſuch City acknowledges a Superior, it is called a *Prætorian* Law, and is limited to a Year. And thus the Statutes of Officers and Magiſtrates, who are only for a Time, continue in Force during the Time that ſuch Officers remain in their Office, and no longer; and the Action ariſing from thence is only temporary. When a Statute ordains the ſame thing as the Common Law enacts, it is called the *Common* Law, and not a *Statute* [h]. By the Common Law, I here mean the Imperial Law, which is common unto all Places ſubject to the *Roman* Empire. And now tho' the *French* King does not acknowledge the Emperor as his Superior, yet he retains and lives by the Imperial Laws; and all Statutes and Municipal Laws there receive their paſſive Interpretation from this Common Law. A Statute may only be made by the People or Commonalty of a City, and not by the Officers or Counſellors thereof; unleſs it appears, that the People or Commonalty have transferr'd this Power on their Officers, or ſome particular Perſons [i]. A Subject or Citizen is preſum'd to know and be acquainted with the Statutes of the Place, where he is a Subject or Citizen [k]: But this is to be underſtood of a Citizen or Subject by Birth, and not of one who has only dwelt there for ſome ſmall Time of late [l]; and a new Citizen is pardon'd, if he does any Thing that is permitted by the Common Law, tho' it be prohibited by a Municipal Law [m]. A Statute contrary to the Common Law is valid in ſeveral Reſpects: Thus a Statute is valid whereby one Perſon may acquire any Thing for another, or make a Covenant for him, tho' the Perſon for whom the Thing is acquir'd be abſent, which is contrary to the Common Law [n]. The Words of Statutes are to be taken truly and properly, and not by Fiction and Impropriety of Speech: For Statutes receive a reſtrictive Interpretation, leſt a Perſon ſhould thereby be unduly puniſhed. A Statute made by a Magiſtrate, binds and obliges the Magiſtrate himſelf: And a Statute *in pœnam* ought not to be converted *in præmium.*

[e] D. 1. 4.
[f] D. 50. 9. 3.
[g] Jaſ. in. L. 5. D. 45. 1.
[h] Ang. Conſ. 357.
[i] Gem. Conſ. 63.
[k] Socin. Conſ.
[l] Rom. Conſ. 228.
[m] D. 49. 16. 4. Fin.
[n] Bald. Con. 341. lib. 2.

As every Statute ought to be reduc'd into Writing, ſo it is hereby diſtinguiſhed from a Cuſtom: For a Municipal Law is two-fold, *viz.* Written and Unwritten, as elſewhere noted. Our ancient Law-Books, indeed, do not make uſe of this Word *Statute*, but call a Statute by the Name of a Municipal Law: Yet in our modern Laws, eſpecially in the Conſtitutions of the Emperor *Frederick* the Second, after the Book *de Uſibus Feudorum, &c.* was publiſh'd, we have frequent mention made of Statutes and Cuſtoms eſtabliſh'd againſt the Liberties of the Church; and from theſe Conſtitutions the *Authenticks* are derived and taken. Yet ſometimes a Statute may be taken for a general Law or Cuſtom, and may be ſaid to be an Ordinance, which is *quaſi ſtabiliter ordinatum*, a Law firmly eſtabliſhed: For Statutes ought to be firmly obſerved; and we ought not to depart from the Words thereof, becauſe Statutes are Matters *of ſtrict Law.* And they may be alſo called *Statutes*, becauſe they are made in Defence of the Publick State and Commonwealth: And tho' Actions have their Beginning from the *Civil* Law, yet Obligations have their Riſe from the Law of Nations. I ſay, That ſuch Statutes as are made contrary to the Diſpoſition and Order of the Common Law, are Matters *of ſtrict Law*, becauſe they are in Derogation to *Common Right*: But ſuch as are totally made in Imitation of the Common Law, or which wholly agree with it, are not *ſtricti Juris*, but

but ought to be govern'd according to the Form of the Common Law. And thus Statutes ought to be ſtrictly underſtood, when they are derogatory to the Common Law: And they are ſaid to be derogatory to the Common Law, when they correct and alter the ſame. Statutes which alter and correct the Common Law, ought not to be extended beyond the Caſe wherein they expreſly ſpeak; nor ought they to be extended by an Identity of Reaſon: And hence it is, that Statutes excluding Women from the Inheritance of an Eſtate, (Males being extant) are to be ſtrictly interpreted; becauſe the excluding of a Daughter may be ſaid to be a ſort of Diſheriſon by Statute Law, which Diſheriſon of Law is as odious as a Diſheriſon of Man.

Statutes receive their Interpretation *ex æquo & bono*; that is to ſay, they ought to be expounded according to Equity and good Conſcience: And therefore what ſome Perſons deliver is not a ſafe Doctrine, *viz.* That Statutes ought to be obſerv'd *ad unguem*, and according to the Letter; becauſe they require an equitable Conſtruction. For tho' it be ſaid, That a Statute only ordains ſo much as is expreſly contain'd therein, and no more; yet this only obtains, when ſuch Statute is made in Derogation to the Common Law; for in ſuch a Caſe it is to be underſtood ſimply and according to the Letter. But this is otherwiſe, if the Words of a Statute are General; becauſe then that Generality ought to receive its Interpretation from the Common Law, and to be ſo underſtood, that the Common Law be corrected by it as little as poſſibly it may. General Statutes are to be reſtrained to that which is reaſonable, and to receive their Interpretation *per punctum rationis*: And theſe Things eſpecially obtain, when the Reaſon of a Statute does not appear, and when we endeavour to avoid a Damage or Inconvenience thereby. Nay, the Words of a Statute, tho' they ought to be taken truly and properly, and not by way of Fiction or Improperly, may be underſtood Improperly, in order to avoid an Abſurdity, or doing an Injury to the Right of a third Perſon: For no Statute, Ordinance, or Conſtitution, ought to be underſtood in ſuch a Manner as to introduce Iniquity or an Abſurdity. But, regularly ſpeaking, Statutes are to be underſtood and explain'd as they lie, *ad unguem & literam*; ſo that Statutes written in General Terms, ought to be taken and underſtood in a General Senſe: And if the Reaſon and Deſign of Statutes be not expreſs'd, the Words of them ought to be more regarded than the pretended Reaſon and Deſign of them. When the Reaſon of a Statute is not expreſs'd and ſet down therein, the Senſe and Meaning thereof may then be inferr'd and made by ſome probable Conjecture, leſt ſome Abſurdity, Iniquity, or other Inconvenience, ſhould flow from thence. And this Conjecture ought to be ſuch as may prevail on wiſe and juſt Men, and not ſuch as may be reprehended by them. Yea, a Statute ought rather to be judged unprofitable and ſuperfluous, than that it ſhould unduly impoſe any kind of Detriment or Damage on Man. And hence is that vulgar Saying true, *viz.* That Statutes ought not to be *Judaically* underſtood; meaning, captiouſly, fraudulently, and with a Deſign of doing an Injury to ſome Perſon: It being the Property of the *Jews* to defraud and deceive ſuch as had Dealings with them.

[Statutes or Acts of Parliament here in *England* ought to be conſtru'd according to the Intention of the Law-makers; and the King's Judges ought to expound the ſame according to the Rules of the Common Law known here in *England* °: And the Preamble of an Act of Parliament is the beſt Expoſitor of ſuch a Law. And where an Act of Parliament reſtores the Common Law, it is to be taken there in a favourable Senſe: But private Acts are to be underſtood and taken ſtrictly. The Common Law Judges here in *England* are the ſole Expoſitors of Acts of Parliament, tho' they concern Spiritual Matters, according to *Serle*'s Caſe in *Hobart*'s Reports P. But herein, I think, they ought to have a due Regard to the Senſe of the *Civil* or *Canon* Law, if the Common Law be ſilent therein.]

° 4 E. 4. 37, 38.

P Pag. 437.

It is not neceſſary for him, who alledges or quotes Statutes in a Court of Judicature, to produce the whole Book of Statutes: For, in the Production of Statutes, it is ſufficient for him to produce that Statute which conduces to his Purpoſe, or makes for his Cauſe in Hand. And hence alſo, it is not neceſſary to produce the whole Articles *ſub rubro*, but enough to produce that Article which makes for the Cauſe. But it is not now lawful to produce Part of a Statute in Judgment: For unleſs the whole Statute be produced, a Part or Portion of a Statute thus produc'd avails nothing; becauſe a right Judgment cannot thereby be made of the whole Statute, unleſs it be by a Sight and View of the whole Matter thereof: For there is ſometimes ſomething at the latter End of a Statute, which reſtrains and tempers what goes before. Where a particular Puniſhment is directed by a Statute or Act of Parliament, ſuch Puniſhment ought to be purſued, and no other can be inflicted on the Offender. Where there is a Prohibitory Clauſe in a Statute, and another which gives a Penalty, as in 23 *Hen.* 8. *cap.* 9. and the Party will go on the Prohibitory Clauſe, he is not confin'd to the Manner expreſs'd in the Statute: but if he will proceed on the Penalty, he muſt then purſue what the Statute directs. When a Statute or Act of Parliament is Penal, it ought to be conſtru'd according to Equity, and not in a rigorous Manner. A ſubſequent tolls and deſtroys a former Statute, which has not a derogatory Clauſe in it, if theſe two Laws or Statutes are contrary to each other: but a ſubſequent Statute does not repeal a precedent one, which has a derogatory Clauſe in it, unleſs there be ſome ſpecial mention made therein of the firſt Statute. And thus a ſecond Statute does not toll and deſtroy the firſt, when it is therein provided that ſomething ought to be preciſely obſerv'd, unleſs there be ſpecial mention made in the ſecond Statute of the firſt. A Statute, exceeding the Bounds of the Legiſlator's Power, or which is made by ſuch Perſon or Perſons as have no Power of making the ſame, is null and void, *ipſo Jure.*

Cities and other incorporated Towns and Bodies Politick, as Colleges and other approved Societies, may make Statutes. Thus an Univerſity of Scholars, or any other Arts or Trade, as Bakers, Colliers, *&c.* may make Statutes to oblige their own Members: but it has been a Queſtion, whether they can annex a Penalty thereunto. Yet the common Opinion holds, that they may impoſe a Penalty in reſpect of their own Rights, and within their own Juriſdiction. A Conſtitution or Statute made by Lay-men, according to the Papal *Canon* Law, does not oblige the Church, or the Lands of the Church; it being a Law which exceeds the Bounds of the Legiſlators Power, (as the *Canoniſts* ſay), and conſequently is void, *ipſo Jure.* A Statute or Decree made in Hatred to any particular Perſon, may be appealed from, as being unjuſt.

TIT. III.

Of Cuſtoms, Reſcripts and Privileges, their Nature, Force and Duration, and how the ſame are circumſcribed and aboliſhed.

HAVING in the foregoing Title chiefly treated of Written Laws, I ſhall here diſcourſe of Cuſtom, or an Unwritten Law, in the firſt Place, as it includes and gives a Right unto Men. And it may be well obſerv'd,

obſerv'd, That tho' Cuſtom has been deem'd more ancient than the Written Law; yet the Written Law is more certain and better known than Cuſtom, and it deſerv'd to be firſt ſpoken of in the Order of this Work. Some indeed will have the Written Law to be more ancient than the Unwritten Law, among human Laws; yet moſt of the Lawyers lay it down for a certain Principle, that the Cuſtomary Law is of greater Antiquity than the Written Law: For tho' Men liv'd in Common, before Laws were reduced to Writing; yet it does not follow from hence, that Cuſtom had the Place of a Law, but the Perſonal Command of the Prince was inſtead of a Law, which is neither a Written Law nor a Cuſtom. The Law of Cuſtom was more ancient among the *Lacedemonians* than the Written Law among the *Athenians*, from which the *Civil* Law of the *Romans* drew its Original. But as this Enquiry touching the Antiquity of Written Laws, and of Cuſtoms, is more nice than profitable, I ſhall proceed to explain, what is meant by Cuſtom, and then lay open the Conditions it requires, and the Cauſes and Reaſons of it, and afterwards ſay ſomething of its Effects; and laſtly, I will ſpeak of the Abrogation and Change of it.

Now *Iſidore* defines [q] a Cuſtom, to be a certain Right, which has its Inſtitution from Uſage, and the Manner of Men, and is taken for a Law, when the Law is defective; and he ſeems to have borrow'd this Definition from *Tertullian* [r], where he ſays, That Cuſtom, in Civil Matters, is taken for a Law, when there is a Failure of Law. But, from this Definition, or rather Deſcription, a three-fold Difficulty immediately occurs; *viz. Firſt*, About the *Genus*; for Cuſtom rather ſeems to be a Matter of Fact, than a Matter of Right: Therefore, it is not what we call a Right, but a Fact or Action often repeated. Wherefore, to mend the Matter, *Iſidore* preſently ſubjoins, That it is ſo call'd, becauſe it is in common Uſage, or of the Manners of Men. Now 'tis plain, that Uſage is a Fact, and not a Right, and therefore it can be no good Definition: And thus we are to call it a Queſtion of Fact, and not of Law, when it is doubtful whether it be a Cuſtom, or not. The *Second* Difficulty is, touching the Word *Manners*; becauſe the Thing defined ſeems to be put in the Definition: For *Mos* and *Conſuetudo* ſeem to be the ſame Thing, and only to differ in Name. And the *Third* Difficulty reſpects that Part of the Definition, where a Cuſtom is taken for a Law; becauſe this does not belong to the Eſſence of a Cuſtom, but to its Effect. But theſe Differences rather ariſe from an Equivocation of Terms: And therefore, for the better underſtanding of the Matter itſelf, we ought to explain the Signification of them. The Terms are *Cuſtom*, *Uſage*, and *Manners*; which agree well in the Acts compriſed: And tho' they have a Kind of Affinity and Connexion, yet they have their Difference: For the Word *Uſus*, among the School-men [s], denotes that Act, whereby the Will freely executes that which it makes choice of: but in the common and Law Acceptation, the Word *Uſus* ſignifies a Frequency or Repetition of the like Acts [t]. Hence the Word *Uſus* has its Riſe from thoſe Things, which a Man has conſtantly done for ſome Length of Time. *Secondly*, The Word *Mos* has not only a relation to reaſonable Men, but alſo to brute Animals [u]; for, in Scripture, Men are ſaid to act after the manner of brute Beaſts; and thus the Word *Mores* is ſometimes taken in a good, and ſometimes in a bad Senſe. But to this I anſwer, That the Word *Mores* is attributed unto Beaſts, by Analogy or Likeneſs, as they, by natural Inclination, obſerve the ſame Kind of Reaſon with Men; for the Word *Mos* has only a regard unto free Acts. Hence only a free Act bears the proper Denomination of a *moral* Act; becauſe a free Act is both praiſeworthy and blameable. But I have ſaid enough of this Matter; and therefore I ſhall leave it to the School-men and Etymologiſts to fight it out.

[q] Lib. 2. Orig. cap. 10.

[r] De Coron. Mil.

[s] Thom. 1. 2. Quæſt. 16.

[t] D. 1. 2. 1.

[u] Thom. 1. 2. Quæſt. 58.

The

The Lawyers, and particularly *Azo*, define a Cuſtom to be an Unwritten Law, introduced by the continued Uſage of the People, and ſuch as has its Riſe from Length of Time only [x]: And as it is in Imitation of a Written Law; ſo, where a Written Law fails, it has the Force of a Law. But *Bartolus* does not like this Definition, therefore he defines it to be a certain Law founded on the Uſage of Men; which is obſerv'd and practis'd as a Law, when the Law is deficient: But this (I think) is rather a Law Definition, than a Logical one. By an Unwritten Law here, I do not mean, that Cuſtomary Laws may not be reduced into Writing; becauſe it often happens, that Cuſtomary Laws are, for Convenience, put into Writing in Proceſs of Time, as the Feudal Law and Common Law of *England* are; but only that Writing is not of the Eſſence of Cuſtom. To introduce a Cuſtom, then, nothing more is requir'd than the tacit Conſent of the People in a free State for ſome Length of Time, and a reaſonable Beginning: For, in order to eſtabliſh a Cuſtom, it ought alſo to be founded on Reaſon, or (at leaſt) it ought not to be contrary thereunto [y]. A Cuſtom differs from a Written Law; becauſe this laſt is founded on the expreſs Conſent of the People alone; whereas the other is founded on their tacit Conſent, and on a Repetition of uniform Acts: but I do no-where certainly find in our Law-books expreſs'd, how many Acts are ſufficient to induce a Cuſtom, nor what Length of Time is requir'd thereunto; and therefore this Matter is to be left to the Deciſion of the Judges [z]. And ſo, whether a Cuſtom be founded upon Reaſon, is to be diſcuſſed and conſider'd by the Judge, who ought to examine it according to the Rules of Nature, or of Nations: For if it be entirely contrary to the Law of Nature, or does profeſſedly thwart the ſame, it is unjuſt, and ſavours of nothing but Tyranny, and therefore ought not to be purſued, or follow'd. But a Cuſtom rightly founded has all the Virtues of a Law; and, for this Reaſon, *Baldus* [a] calls it a *tacit* Law; and it ought to be regarded in the Deciſion of all Cauſes where a Written Law is not found, or is found, but not in uſe. And thus a Cuſtom introduced, as it is a *Species* of the Civil Law, has the ſame Force and Effect as a Written Law [b]; for it is in Imitation of a Written Law, (as aforeſaid) and is obſerv'd as ſuch in all Things [c]. As to the Continuance of Time, in reſpect of a Cuſtom, if it be *præter Legem*, it ought to be founded on a ten Years Preſcription; that is to ſay, it ought not, in ſuch a Caſe, to be determin'd otherwiſe during all that Time: But if it be *contra Legem*, and repugnant to ſome poſitive Law, a Term of forty Years Preſcription is requir'd to eſtabliſh ſuch a Cuſtom, eſpecially according to the *Canon* Law [d]. The Conſent of the People in the Buſineſs of a Cuſtom, is evidenced by a Frequency of Acts; whether they be Judicial, or Extrajudicial, it matters not [e]; and it is likewiſe proved by Length and Continuance of Time [f].

[x] D. 1. 3. 35. 1. I. 1. 2. 9.

[y] D. 1. 3. 39.

[z] Arg. D. 28. 8. 1.

[a] In l. 31. D. 1. 3.

[b] I. 1. 2. 3.

[c] D. 1. 3. 35, & 37.

[d] D. 8. inc. 11. X. 1. 4.

[e] C. 8. 53. 1.

[f] D. 1. 3. 33.

The Lawyers make a Difference between Cuſtom and Preſcription. For Cuſtom, ſay they, is a ſettled Right, which ariſes from immemorial and common Uſage, and is generally extended to all the People of that State or Country where it obtains, and is not of any ſpecial Advantage limited to this or that Place therein. But Preſcription is a kind of Private Right, which has a Reſpect to Particular Places or Perſons; and it is directed to their Advantage or Diſadvantage in a ſpecial Manner [g]. Preſcription may be immemorial as well as Cuſtom; tho', generally ſpeaking, Preſcription is limited to a certain Number of Years, as 40, 50, 100, *&c.* Immemorial Cuſtom has the Force of a Privilege; but a Cuſtom preſcribed may be taken away by another Cuſtom: For as later Laws do abrogate former Laws, ſo alſo does a later Cuſtom deſtroy a former [h].

[g] Corn. Conſ. 268. lib. 4.

[h] I. 1. 2. 11.

A Cuſtom, which in other Terms is call'd an Unwritten Law, (as already hinted) is that which has its Beginning from the Manners of any People, and is continued by their tacit Conſent, or the Will of the greater

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Part of them [i]. And it may be divided into a general Custom, such as is observ'd in all Parts of the Empire, as the *Feudal* Customs are; or else in a particular Custom, which is only observ'd as a Law in this or that Province or City. The Force of a particular Custom consists very much in the Proof thereof, inasmuch as it is an Unwritten Law, and depends upon Fact: But a General Custom, which is notorious, does not stand in need of Proof; for the Judge ought to take Notice thereof upon bare pleading the same. A General Custom, which a Prince knows and tolerates, generally speaking, tolls a Law; but the Particular Custom of any Place does not abrogate a Law, tho' it be introduced *ex certâ scientiâ*, and may be observ'd in that Place [k]. But a subsequent Law tolls a Particular Custom, unless such Custom be specially reserv'd thereby [l]. Where-ever a Special or Private Custom fails, Recourse is always had to the General Custom of the Country. The Quality of every Custom ought to be regarded and consider'd.

[i] D. 1. 3. 32.
[k] D. 8. 4. 13.
[l] I. 1. 2. 9.

All such Persons as may make Statutes, may also introduce a Custom [m]: For the tacit Consent of the People has the same Operation in this Respect as their express Consent [n]. Therefore, a Corporation, that has not the Power of making Statutes, has not the Power of introducing a Custom: And because the Law has granted this Power of introducing a Custom unto every State [o], the Knowledge and Authority of the Sovereign or Superior is not necessary to introduce it; for if it was, it would be seldom or never introduced. But a Custom cannot be introduced against an express Prohibition of Law. As a Custom succeeds in the Place of a Law, a Prince is bound thereby, as he is also by a Law [p]: But yet some falsely maintain, That a Prince is not bound by a Custom of his own Subjects, but only by a Custom founded on Natural Reason. And tho' it be in the Power of the Prince or Emperor to toll and destroy a Custom by a contrary Written Law; yet it is not in his Power to introduce a Custom; because a General Custom does not depend on the Power of one Man, as it is not the Act of one Person, but of many.

[m] Bart. in L. 32. D. 1. 3.
[n] D. 1. 3. 32. D. 12. 1. 3.
[o] D. 1. 3. 32.
[p] C. 1. 14. 4.

A Custom is not valid, unless it be founded upon Reason: For every Custom ought to be reasonable, as before related. Now a Custom founded upon Reason, is extended from a Case express'd in Law, to a tacit Case, or a Case imply'd, wherein we meet with the same Reason: As thus, for Instance, it being a Custom that the Son of a Vassal, being a Monk or Religious, ought not to succeed to a Feudal Estate. And hence it is the same Thing, tho' the Person be not a Monk, but a Canon Regular; because *de similibus ad similia*, it holds good in Law. But tho' a Custom be extended to the like Cases, yet it ought not to be extended to the like Persons, according to *Roland* [q].

[q] Cons. 94. N. 17. Vol. 2.

As the first principal Effect of a Custom is the Introducing of a Law, (of which I have already spoken); so the second Effect thereof is the Interpreting of it; and it may likewise be made use of in Expounding Contracts, and Last Wills and Testaments. Now a Custom, which is the best Interpreter of a Law [r], must be such a Custom as is *secundum legem*: For a Custom, which is *præter legem*, does now suppose a Law; and that which is *contra legem*, is derogatory to a Law. Therefore, only a Custom *secundum legem* can interpret it. And the Reason of this Effect is, because a more express Will, and a greater Authority, is not necessary to the Interpretation of a Law already made, than to introduce a new Law. Now a Custom for the Interpretation of a Law may be valid two Ways: *First*, In *ratione signi & testis*; because, when it is such, a Custom touching the Observation of a Law, points out and testifies, that such was the Mind of the Legislator, and no otherwise. But under this Method a Custom cannot render an Interpretation certain and infallible, because it is only a kind

[r] D. 1. 3. 37.

of human Conjecture: And as it is very probable, it conduces much to the Doctrinal Interpretation of it; and the greater and more laſting a Cuſtom has been, by ſo much the more probable the Conjectures will be, wherein no certain Rule can be aſſign'd, but it muſt be left to the Diſcretion of a prudent Man. Hereunto we may add, That not only a Cuſtom, which reſpects the Obſervation of a Law after it is made, but even ſuch a Cuſtom as was previous thereunto, is of great Help to underſtand the Meaning of a Law. For as a Law ought to be made according to the Cuſtom and Genius of the Country, we may make a probable Conjecture from the ancient Manners of the State, in what Senſe ſuch Law was made. *Secondly*, A Cuſtom may interpret a Law as a concurrent Cauſe to introduce and eſtabliſh ſuch an Interpretation, and the Obligation of a Law in ſuch a Senſe.

[s] D. 1. 3. 38. For the Emperor ſays [s], That *in Ambiguities, which ariſe from Laws, Cuſtom or the Authority of Caſes that have been always adjudged in like Manner, ought to have the Force of Law.* And thus the Emperor obſerves in the Law quoted, That the Ambiguities of a Law may be expounded either by *Cuſtom*, or by the Authority of adjudg'd Caſes, (for there are thoſe two Parts in that Law to be taken Notice of.) The Word *Always*, in the latter Part thereof made uſe of, is to ſhew, that a Law is not to be interpreted by all ſorts of adjudg'd Caſes whatſoever, but only by ſuch as have always had a Concurrence in the like Caſes without any Variation. And as *Cuſtom* here has no definite Time aſcrib'd to it, ſo neither has the Authority of *adjudg'd Caſes.*

The Third principal Effect of a Cuſtom is, That it may abrogate a human Law, whether it be Civil or Canonical: And this all the *Civilians* and

[t] D. 1. 3. 32. *Canoniſts* are agreed in. For it is ſaid [t], That *Laws may not only be repealed by the Suffrage of the Legiſlator, but alſo by the tacit Conſent of all the People by a Diſuſer.* Touching this Matter, the Caſe is clear in Free States, that recognize no Superior: But the Difficulty is in reſpect to the Civil Laws of Sovereign Princes; which Difficulty may be ſolved (according to ſome) two ſeveral Ways. *Firſt*, In ſaying that theſe Laws are not made *abſolutely*, but only under a tacit Condition, if the People are willing to retain them: And here a new Conſent of the Prince (ſay they) is not neceſſary to an Abrogation, but the ſame is included in the very Mode and Manner of making a Law. But this Way of Abrogating we reject, by joining the Power of the Prince together with that of the People, with us call'd the Legiſlative Power. The People may indeed reject a Law by a Non-uſer, and the Prince may connive or conſent to it, but this is no Repeal of a Law made. Some Perſons diſtinguiſh between the Abrogation and the Irritating of a Law, ſaying, That the Irritating of a Law is, When the whole Law is hinder'd from having the Force of obliging, before it be fully conſtituted: As when the Law requires the Confirmation of the Prince, in order to give it the Force of obliging, and ſuch Law is not confirm'd by him; or when a Law made by the Prince is not accepted of by the People, according to the Opinion of thoſe, who think ſuch an Acceptance neceſſary. But this laſt Inſtance admits or ſuppoſes a Falſhood: For the Law of the Prince, before the Acceptance of the People, is a true Law, if the Prince has the full Power of making a Law; and that Change, which is made by the Oppoſition of his Subjects, belongs to an Abrogation made by Cuſtom. Some Perſons will have it, That a Penal Law, impoſing a Penalty *ipſo facto*, cannot be Abrogated by a Cuſtom preſcrib'd, tho' ſuch Cuſtom be reaſonable; becauſe (ſay they) as ſoon as it is violated, the Perſon incurs the Penalty of the Law. But this Exception is groundleſs, and contrary to Reaſon, and therefore rejected: Becauſe a Cuſtom againſt a Law may be reaſonable, as is ſelf-evident, and may ſufficiently ſhew the tacit Will of the Legiſlator for Abrogating ſuch a Law.

A Cuſtom

A Cuſtom contrary to Law, regularly requires the Knowledge and Sufferance of the Sovereign, as well as the Knowledge of the People: But the ſpecifick Knowledge of the Prince is not neceſſary, but his general Knowledge is ſufficient [u]. But ſuch Knowledge is not requir'd in reſpect to a Cuſtom, which is not contrary, but only *præter Jus*: And it it is the ſame thing in reſpect to an immemorial Cuſtom; becauſe the Knowledge and Sufferance of the Sovereign is therein preſum'd [x]. It is not neceſſary to prove the Knowledge of the People or Sovereign by Witneſſes, but enough that the Witneſſes depoſe touching the Frequency of the Acts from which ſuch Knowledge is inferr'd; becauſe this Matter is to be left to the Diſcretion of the Judge. This Knowledge and Sufferance is ſufficiently prov'd, if the Prince's Officers, in the Place ſubject to ſuch Cuſtom, have known and ſuffer'd the ſame. A Perſon alledging a Cuſtom which is contrary to the Common Law, is oblig'd to prove the Reaſonableneſs thereof; for ſuch a Cuſtom is preſum'd to be unreaſonable, in that it is contrary to the Common Law.

[u] Oldr. Conſ. 172.

[x] Decian. Con. 124. lib. 3.

In Things which are *meræ facultatis*, that is to ſay, merely in a Man's Power, and in Things which are granted in a gratuitous manner, a Cuſtom is not to be introduced: For if any one entertain his Friend a thouſand times, and ſhou'd as often invite him to Dinner; yet a Cuſtom is not hereby introduced, in ſuch a manner as that he ſhould be oblig'd to entertain him for the future, whenever he came to that City or Place. And if any one ſhould go to a Mill for a thouſand Years (if he liv'd ſo long) for the ſake of grinding his Corn, a Cuſtom is not ſo induced by this Frequency of Acts, as always to oblige him to go to ſuch a Mill. And if a Country-man has for a long Time, every Year, been wont to give a Capon to his Landlord, by way of Preſent, at ſuch a Feaſt, he is not hereby oblig'd to give him one for the future. And it is the ſame thing, if a Prince ſhould often grant to his Ambaſſadors a ſpecial Right, by doing ſome Things reſerved unto himſelf, he does not hereby introduce a Cuſtom for Ambaſſadors to do and attempt theſe Things without a ſpecial Grant: But if ſuch Grant had been made Time out of Mind, perhaps, it wou'd be otherwiſe.

It has been ſaid, That every Cuſtom is founded upon Reaſon, or (at leaſt) it ought not to be without Reaſon: Therefore a Cuſtom deriv'd or drawn from Error, does not obtain in the like Caſes [y]. Hence *Tertullian*, in his Book *De Coronâ*, calls Cuſtom the Interpreter of Reaſon. The Judge or Preſident of a Province, upon Cognizance had of a Cauſe, ought to determine the ſame according to the Proof of a Cuſtom, which is frequently made uſe of, in the ſame Act of Controverſy, in ſuch Province or Town [z]: For an extraneous or foreign Cuſtom is no Relief. We ought not to argue from a Cuſtom, in a foreign or extraneous Caſe; but it ought to be in the like Kind of Controverſy.

[y] D. 1. 3. 39.

[z] C. 8. 53. 1.

A ſpecial Cuſtom cannot take away a general Law [a]; but it may toll a ſpecial Law [b]. According to the *Feudal* Law, Uſage and Cuſtom do ſuperſede the *Roman* Law [c]: But it is not every Uſage that eſtabliſhes a Cuſtom, but only ſuch as is attended with a Repetition and Frequency of reaſonable Acts [d].

[a] C. 8. 53. 2.

[b] D. 8. 4. 13.

[c] F. 2. 1.

[d] C. 8. 53. 1.

A Cuſtom is not proved from different or diſſimilar Acts: Becauſe if it has been obſerv'd ſeveral ways, it cannot be call'd a Cuſtom; for that, according to *Bartolus* [e], it requires ſimilar and uniform Acts.

[e] In l. 2. D. 24. 3.

When the Matter in Debate is touching the Proof of the Beginning of a Cuſtom, or when the Witneſſes depoſe touching Length of a Cuſtom, two neſſes are then ſufficient [f]: But if the Cuſtom itſelf be in Queſtion, then it ought to be prov'd by all Perſons where ſuch Cuſtom obtains [g]. But leſt ſuch Proof ſhould be extended *in infinitum*, the univerſal Term *Omnes*, in the Law, is referr'd to the greater Part of the People [h]: yea, ten are ſufficient,

[f] D. 22. 5. 12.

[g] D. 22. 3. 28. fin.

[h] D. 50. 1. 19.

D. 47. 8. 4. 3. ſufficient, ſince this Name makes a Multitude i. Witneſſes produced to prove a Cuſtom, ought to give Evidence touching Three Things; *viz.* 1*ſt*, touching the Uſage of the People; 2*dly*, touching the Frequency of the Act; and 3*dly*, they ought to ſpeak touching the Length and Diuturnity of Time. Tho' Length or Diuturnity of Time is differently reckon'd, according to the Doctors; yet it moſt commonly obtains, that in reſpect of a Cuſtom, which is *præter* or *contra Jus*, ten Years Space is ſufficient: For the Law calls Ten Years Time, by the Appellation of *Longa conſuetudo*, k D. 1. 3. 33. and *Diuturnitas temporis* k. For the *Inſtitutes*, touching *Uſucapions*, ſay, That Length and Diuturnity of Time is concluded by Ten Years; and *Panormitan*, in his laſt Chapter, touching *Cuſtoms*, avers this to be the received Opinion of the Doctors.

[If a Cuſtom be contrary to the Eccleſiaſtical Law, or infers any Loſs or Damage to the Church, then Forty Years are required; as in Cauſes, which are ſpecially reſerved to the Prince, an Immemorial Preſcription is neceſſary, to eſtabliſh a Cuſtom againſt the Prince's Prerogative: i D. 43. 20. 3. But many Perſons aver a Hundred Years to be neceſſary for this End and Purpoſe i.] 4. Bald. in C. 2. C. 7. 22.

This Legal Time, whereby a Cuſtom obtains the Force of a Law, has its Beginning from the Time of the firſt publick and notorious Act. And thoſe Acts ought to be Judicial Acts, or ſuch as are diſpatch'd in publick Places, or by publick Perſons, or by the People themſelves in a Community aſſembled; and an Act of this Kind ought to be conformable to Reaſon, and to be ſupported thereby. The Currency of Time for the Eſtabliſhment of a Cuſtom, ought to be with a *Continuando* to the End of the Term preſcribed, unleſs all the intermediate Acts, or the greateſt Part of them, even from the Beginning, until the End of the Time appointed, be conformable to the Beginning. For if a repugnant Act intervenes within ten Years, paſt Acts do not confirm the Cuſtom begun, but ought to begin m Bart. in C. 32. D. 1. 3. *de novo* from the Act which ſupports the Cuſtom m. Witneſſes ought not only to ſpeak to the Frequency of Acts, but the Judges ought alſo to conſider the ſame; ſince one Act at once does not fully and plainly declare the Conſent of the People: For in ſuch a Time preſcribed, ſo many Acts are neceſſary, as may probably convey the Cuſtom to the Knowledge of the People. And this happens ſeveral Ways, according to the Quality of the Fact, the Diverſity of Time and Place; and is left to the Diſcretion of the Judge, who ought to pronounce according to theſe Things. In a Judicial Cuſtom there ought to be two Judicial Acts, inaſmuch as the Judge ought to have pronounced twice touching the ſame Act: But if it be an Extrajudicial Cuſtom, *viz.* a Cuſtom made uſe of out of Court, then two Acts are ſufficient, with a legal Currency of Time, if thoſe Acts are remarkably known to the People, and ſuch as may eaſily come to their Knowledge. But if thoſe Acts are only private Acts, and ſuch as come to the Peoples Knowledge with ſome Difficulty, many Acts, in this Caſe, ought n Bald. in C. 32. D. 1. 3. to be proved, in order to ſettle an eſtabliſh'd Cuſtom n. And in caſe two Acts are ſufficient to prove a Cuſtom, the Advocate ought to draw his *Libellate* Articles thus, and the Witneſſes ought to depoſe thereon accordingly, *viz.* That ſuch an Act happen'd twice in ten Years; and that the o Zar. in C. 32. D. 1. 3. Act is of ſuch a Nature, that it may be eaſily known to the People o. Touching Acts of this Kind, the Depoſitions of the Witneſſes ought to be ſuch, that it may probably appear there was the Peoples Conſent, or (at leaſt) the Conſent of the greater Part of them intervening, *viz.* from the Words and Method of the Depoſitions; to the End that the Judge may know that the Acts were notorious (at leaſt) to the greater Part of the p Bald. in C. 32. D. 1. 3. People: And thus the tacit Conſent of the People may appear p. When I ſay that two Acts are ſufficient to introduce a Cuſtom, I mean, that the tacit Conſent of the People may be diſcover'd from Acts of this Kind,

without which Conſent no Cuſtom can be introduced: For this Conſent is the proximate Cauſe, or the *cauſa cauſans*, from whence a Cuſtom ariſes. Hence it is, that tho' there may be many Acts reported by Witneſſes, their Depoſitions are of no Effect to introduce a Cuſtom. This tacit Conſent is proved, if the Witneſſes depoſe thus, *viz.* That ſuch an Act, which ſuppoſes that Cuſtom, was done in the Preſence of ſuch and ſuch Perſons, and was known to ſuch and ſuch, and that the ſame are the major Part of the People [q]. But 'tis not enough to prove a Cuſtom, for the Witneſſes to ſay *ſimply*, that there is ſuch a Cuſtom; for by this Means they depoſe touching the Law, and are not Witneſſes of the Fact, as they ought to be, but ſet themſelves up for Judges.

[q] Roſat in L. 2. C. 7. 22.

A *Privilege* includes and ſignifies two Things in the large Acceptation of the Word, *viz.* *Firſt*, The Right itſelf, or the Grace and Favour granted to the privileged Perſon; and, *Secondly*, The Charter or Inſtrument, whereby a Prince grants unto any Perſon a ſpecial Grace or Favour, which Charter or Inſtrument is ſometimes in our Books call'd a *Reſcript*, *Indultum*; and, in Canonical Privileges, a *Bull:* Tho' theſe Names have a larger Signification; becauſe not only Privileges, but other Effects, may be wrought by them, as I ſhall ſhew hereafter. I will at preſent diſcourſe of a Privilege in reſpect of the Right and Grace itſelf granted.

Cicero, in his Oration *pro domo ſua*, defines a Privilege to be a private Law, or Right, conferring ſome Speciality or other upon ſome particular Perſon, or Body Politick [r]; and, according to another Author, it is called a particular Law or Right, whereby a private Man, or a particular Corporation, is exempted from the Rigour of the Common Law. It is ſometimes uſed in our Common Law for a Place that has a ſpecial Immunity granted to it. The Word *Law*, here in our Definition, is put by way of *Genus*; and the Word *private* is added, to diſtinguiſh it from other Laws: For other Laws are common unto all Perſons, but a Privilege is peculiar unto ſome Men alone. But ſome object, that this *Genus* is repugnant unto a *Genus*, becauſe it is the Eſſence of a Law to reſpect the Community; and it is not a Private, but a Common Law. But 'tis to be noted, that a Privilege is not called a Private Law, becauſe it lays an Obligation on one Perſon only; for a Privilege alſo reſpects a Community, even as to the Obligation which it induces, and as to the Good and End which it ultimately intends, as I ſhall ſhew hereafter. Therefore it is called a Private Law, becauſe it grants a Special Right, beſides a Common one, unto a Particular Perſon or Community: And thus the laſt Part of the Definition is declarative of the former. *Secondly*, 'Tis to be obſerv'd, that every Privilege is not a Law, properly ſpeaking, and, as a Law, is taken in a rigorous Senſe; becauſe it is the Eſſence of a Law to be perpetual: But every Privilege is not perpetual; and, therefore, that which is not perpetual is not properly a Law. And this chiefly obtains, when a Privilege is granted for a determinate Time: But if it be granted *abſolutely*, it has ſuch a Perpetuity, that it is not determin'd by the Death of the Perſon that granted it. But a Privilege granted *durante bene placito*, which may be revoked at the Will and Pleaſure of the Granter, is at an end on the Death of the Perſon that granted the ſame. Therefore, a Privilege granted *ad bene placitum*, laſts and continues till ſuch Time as the Granter revokes the ſame: Becauſe as a *bene placitum* is ſubject to no Law, it dies and expires with the Perſon himſelf, the Will of the Granter being diſſolv'd and extinguiſh'd by his Death. Yet, by modern Uſage and Cuſtom, it has obtain'd, that ſuch Privileges are not now revok'd by the Granter's Death; becauſe that which is not expreſly changed, is not prohibited to ſtand and remain in Force. Nay, the Prince himſelf cannot revoke Privileges once granted,

[r] DD. in Rub.

[s] C. 1. 14. 2. unleſs they are forfeited [s], (for they may be loſt and forfeited) and then ſuch Revocation is rather an Act of Law, than of the Prince.

There is a Difference between a *Privilege* and a *Benefice*; becauſe a Privilege is a Matter of ſtrict Law, as being contrary to the Common Law; [t] 3. Diſt. and it is called a Privilege *quaſi privata lex* [t], as already hinted: But 'tis otherwiſe in a Benefice, which is interpreted in a larger manner than a Privilege is. A Privilege and a Cuſtom are Things equivalent, and compared [u] Conſ. 49. par. 1. unto each other, according to *Baldus* [u]; and do equally found a Juriſdiction; and Cuſtom and Preſcription are the beſt Interpreters of Privileges. There are ſome Privileges that are General, and others that are Special: [x] C. 1. 14. 2. But yet Privileges are Special, and not General Laws [x]; for they only have a Regard to thoſe Matters and Perſons, for which they are granted. Privileges are called Perſonal Sanctions; and they are ſtiled Perſonal, and not General Conſtitutions, becauſe they reſpect the Buſineſs of one Man alone. A Privilege that is granted to a Man in Reſpect of his Perſon, does not [y] C. 7. 74. 1. deſcend and paſs to his Heir [y]; for Perſonal Privileges are not extended [z] I. 1. 1. 6. beyond their own proper *Individuum*, or the Perſon that enjoys them [z]. *Alexander*, in treating of Privileges as they are extended to Succeſſors, (for ſo real Privileges are) has handled the Matter with ſo much Obſcurity, [a] D. 24. 3. 13. that the reading his Comment on the Law [a] only ſerves from an Uncertainty to make the Matter more uncertain: Wherefore, I ſhall here chuſe to follow *Baldus*, who ſays, *Firſt*, That a Privilege granted to a Man's Per- [b] Bald. in L. 13. D. 24. 3. in L. 14. D. 50. 17. ſon, is limited to ſuch Perſon, and dies with him [b]. But this Concluſion of *Baldus* is otherwiſe, if the Cauſe of ſuch Privilege may be verify'd in the Man's Children; becauſe in ſuch a Caſe Perſonal Privileges are extend- [c] D. 24. 3. 13, & 14. ed even to Children [c]. *Secondly*, This is otherwiſe, if a Privilege granted to a Perſon be granted *propter cauſam*, on the Account of ſome Reaſon or other, and not on the Score of his Perſon, as *Baldus* diſtinguiſhes; becauſe then it is extended to other Perſons, wherein the ſame Reaſon dwells: But if a Perſonal Privilege be granted merely *propter Perſonam*, it is not [d] D. 26. 7. 42. then extended to others [d]. Thus a Privilege granted in reſpect of any certain Quality, laſts as long as ſuch Quality endures; and a Privilege granted to any one, ſeems to be granted to him in Reſpect of the Quality of his Perſon. Privileges granted to a privileg'd Perſon, ought to be extended to Perſons of his Family, and to ſuch as are ſubject to him. Thus, for Inſtance, a Perſon living with a Scholar in the Univerſity, enjoys the ſame Privilege: For it is a known Rule in Law, that a Privilege granted to Scholars, ſeems to be extended to all thoſe that dwell with ſuch Scholars in the Univerſity, as to Servants and other Domeſticks.

A Privilege is not preſum'd, but it ought to be ſet forth and proved, ſince it is a Matter of Fact, and ſuch as is *extra jus commune*, *viz.* foreign to the Common Law: And he that alledges and ſets forth a Privilege, ought to prove the ſame in the beſt manner he may. But a Privilege is not proved by the Uſe of a Privilege, but by a juſt and legal Title unto ſuch Privilege, as by the Prince's Grant or Charter, *&c.* For in Privileges, properly ſpeaking, there lies no Preſcription, becauſe he that avers a Privilege, alledges *malam fidem*, unleſs he proves a good Title to ſuch Privilege. The Title of a Phyſician here in *England* does not privilege a Perſon that is choſen Conſtable of a Pariſh; for there is a Difference between an Attorney or Barriſter at Law, and a Phyſician: Becauſe the former enjoy their Privilege by reaſon of their Attendance in publick Courts, and not on the Account of private Buſineſs in their Chambers; but a Phyſician's Buſineſs is a private Calling only. The Intimation or Inſinuation of Privileges ought to be made in the Preſence of a competent Judge, or before a Notary, or two Witneſſes: And Privileges not intimated to the Party, are of no Advantage to a Man in his Cauſe. A Privilege, granted contrary

to

to the common Course of Privileges, is presum'd to be false and surreptitiously obtained: And a Privilege procur'd contrary to the Utility of the Publick, is not valid. And moreover, it is to be observ'd, that the Privilege of one Person does not destroy and take away the Privilege of another upon equal Footing: Nor ought a Privilege to be granted to one Person, to the Hurt and Prejudice of another. A Privilege granted unto Students, is understood of such Students as do belong unto some University, or general Place of Study [e], as the City of *Milan* or *Oxford* is. All Privileges which are granted unto Minors, are also granted unto Idiots and Women. A Privilege indulg'd and granted unto several Persons, does not seem to be granted unto one against another of these Persons. The general Words of a Privilege ought to be taken strictly, and to receive a Limitation according to the Common Law [f]. A Privilege, which prohibits the Cognizance of a Cause, is not valid; for Privileges ought to be understood in such a manner as not to injure Common Right.

[e] Bald. Conf. 77. Vol. 5.

[f] C. 3. 2. 35. Pr. C. 1. 2. 1. Gloss. ib.

Privileges are Benefits and Matters of Grace, which are granted on the Account of Duty and good Offices; and therefore, a contumacious and undutiful Subject may be rightly deprived of the Privileges granted to him on the Score of Duty and Obedience, for his Contumacy or Disobedience: Because the Contumacy and Disobedience of Subjects towards their Liege Lords and Sovereigns, is an Offence of an heinous Nature, being cloathed with the utmost Ingratitude; and, for such an Offence, Privileges are lost and come to an end, since an Offence gives no Immunity unto Delinquents. For the Authority of Crimes ought not to receive any Growth and Incouragement from a Pretence of Privileges granted, since they do hereby shake the Foundation of the Publick-weal. But Privileges granted to an University, or Corporation, are not lost and forfeited by the Contravention of particular Persons therein; unless they be encourag'd or connived at, by the ruling Power, in their Crimes and Excesses: For, generally speaking, the Offence of particular Persons ought not to prejudice a Body Politick, or Corporation, without the aforesaid Incouragement or Connivance given. The Loss and Deprivation of Privileges, wherewith contumacious and disobedient Persons are usually punish'd, ought, undoubtedly, to be reckon'd among the lighter kinds of Punishments; for Privileges are suppos'd to be granted to Citizens and Subjects of a dutiful and benevolent Disposition, (as before hinted) and to such as will shew some sort of Gratitude for them, and not to Mal-contents and Rebellious Persons. Therefore, if the Motive, or final Cause, of granting such Privileges ceases, the Privileges ought to cease *. Hence it is, that Privileges granted to Scholars in Favour, and on the Account of their Studies, do not take Place, and extend themselves to false, idle, and loitering Students, tho' they be admitted into the Matriculation of the University, and the Catalogue or Register of Scholars. Thus a Monk does not enjoy the Privileges of a true Monk, that is to say, the Privileges of his Order, from wearing his Habit only; because the Habit does not make the Monk, but it is his Profession, and a Discipline suitable to such a Profession. A Soldier, that is discharged and cashier'd from his Military Service, loses and forfeits his Privileges of a Soldier, since they are only accessory to the State of War †. Tho' a Person seems to renounce his Privilege, *ipso facto*, by any Act of his done contrary to such Privilege; yet it it the Opinion of some Lawyers, that a Man does not seemingly renounce his Privilege by any one Act done by him contrary to such Privilege; for a Privilege is not taken away by one Act. Tho', regularly, every privileged Person may wave and renounce his Privilege, granted to him either by the Law or by the Prince, of impleading another, or of being impleaded himself, in some certain Court belonging to such Privilege, so that the Leave or Consent of the ordinary Judges is not requir'd,

* Bart. in L. 43. D. 28. 6.

† Bart. in L. 5. D. 5. 6. in L. 42. D. 29. 1.

the Parties Conſent being ſufficient; yet in caſe of mixed, it is otherwiſe. For tho' private Conſent makes him a Judge, who preſides over a Juriſdiction; yet the foregoing Rule proceeds no farther than this, *viz.* That then the Privilege of ſuch Court concerns Favour, and is granted for the Advantage of the Perſon's waving his Privilege.

A Privilege is either *real*, *perſonal*, or *mix'd*. The Firſt is that which is granted to a Place, as to the two Univerſities of *Oxford* and *Cambridge*; *viz.* That no privileg'd Perſons thereof may be call'd to *Weſtminſter-hall*, upon any Contract made within their own Precincts, or elſewhere, *Infra Regnum Angliæ*, upon the Account of any perſonal Plea whatſoever; or be proſecuted in other Courts. See the Charter of *Henry the Eighth* [g]. Nor can any one belonging to the Court of *Chancery* be ſued in any other Court, unleſs it be in ſome certain Caſes excepted: For if he thus be ſued, he may remove the Suit by a Writ of Privilege, grounded on the Statute of *Edward the Third* [h]. But the Quality of a Privilege, by the Change of the Perſon's being in another Condition, is alſo changed; and, conſequently, the Privilege is loſt and extinguiſh'd thereby: As when a Man leaves the Court of *Chancery*, and follows another Court; for perſonal Privileges ought not to be extended to extraneous Perſons. A *perſonal* Privilege, is that which is granted to any Perſon, either contrary to, or beſides the Courſe of the Common Law. For Example: A Member of Parliament may not be arreſted, nor any of his menial Servants, during the ſitting of Parliament, nor for any certain Time either before or after a Seſſion. This Kind of Privilege follows the Perſon to whom it is granted; and dies with him, if the final Cauſe of granting ſuch a Privilege be extinguiſh'd, as I have before remember'd; for where ſuch final Cauſe is not extinguiſh'd by the Death or Means of the Perſon to whom ſuch Privilege is granted, it remains. An Immunity or Privilege granted to Perſons, dies with the Perſons to whom it is granted; but, being granted to Things, it never dies [i]. Thus alſo, a perſonal Diſpoſition is extinguiſh'd with the Perſon. A Privilege determines at the end of any one's Office or Adminiſtration, if ſuch Privilege be granted to the Perſon as an Adminiſtrator [k]. As that is more eaſily taken away, which is valid *Jure ſpeciali*, than that which is valid of *Common Right*; Hence it is, that a Privilege is more eaſily deſtroy'd than the Common Law. If there are two Perſons, that are privileged with an equal Privilege, he is preferr'd who contends or litigates *de damno vitando*: But if both Parties contend and litigate about avoiding ſome Damage, the Law prefers the Defendant's Cauſe to the Cauſe of the Plaintiff: But if they are privileged with an unequal Privilege, the more powerful Privilege is then preferr'd [l].

[g] 8 Ann. 14.
[h] 18 Edv. 3.
[i] D. 50. 15. 3.
[k] D. 37. 14. 6.
[l] D. 4. 4. 12.

Reſcripts of Princes, are thoſe Forms or Letters, whereby they give an Anſwer either to the Addreſſes of Perſons preſent, or elſe to the Conſultations of abſent Magiſtrates, touching what they wou'd have to be done in ſuch an Affair [m]. Or elſe we may define it to be the Emperor's Letter ſent to particular Perſons, in Anſwer to their Enquiries touching the Law [n]: But if it be ſent to a Corporation or Body of Men that have conſulted him, his Letter is then call'd a *Pragmatick* Sanction [o]. The Prince's Reſcript, in reſpect of the Parties to whom it is ſent or granted, has the Force of a Law, but it is not extended to any other Perſon. There are ſome Reſcripts which are granted by way of Deciſion, and are *Deciſory* Reſcripts: And ſuch a Reſcript of the Prince is look'd upon as a Caſe of Law or Statute; and therefore ought not to be diſputed or call'd in Queſtion, but ought to be ſpecifically obſerved as it ordains; becauſe it is preſum'd to have been iſſued *ex certa Scientia*, tho' the Clauſe of *ex certa Scientia* be not expreſs'd therein [p]. A Reſcript, in a doubtful Caſe, is preſum'd to contain

[m] D. 19. 2. 19. 9. D. 27. 14. 17.
[n] I. 1. 2. 6.
[o] C. 1. 23. 7.
[p] D. 42. 1. 57.

contain Matter of Juſtice, and not of Grace and Favour ; and he who avers it to be a Matter of Grace, ought to prove it. A Reſcript is alſo taken for the Prince's Commiſſion, whereby he orders ſomething to be done, and the like ; and ſometimes it ſignifies a Charter, whereby he makes a Grant of any Thing. The expreſſing of a certain Form, in a Reſcript, or a Commiſſion for Trying a Cauſe, does not ſo bind a Judge delegated by ſuch Reſcript or Commiſſion, but that he may, according to *Decius*, admit of all legal Exceptions in a Cauſe : And the *Gloſs* ſays, That all Words inſerted in ſuch a Reſcript or Commiſſion, ought to be in Purſuance of Equity, even contrary to the Propriety of ſuch Terms, or tho' the Forms themſelves do not admit thereof. But *Alciatus* diſputes this *Gloſs* ; becauſe, in a Diſpoſition, the Teſtator's Mind is not regarded, if the Words of the Will do not admit thereof ; wherefore (ſays he) the ſame holds good in a Reſcript or Commiſſion. The Reſcript of the Prince is not valid, that is granted againſt the Utility of the Publick, or the Advantage of a private Perſon [q] ; nor that which is granted contrary to the Law of God, or the Publick Law ; or which is extorted out of the Hands of the Granter. Nor is a Reſcript valid, whereby a Minor has the Adminiſtration of his Goods granted him [r] ; and much leſs where he has the Adminiſtration of a Dignity conferr'd on him. Nor is a Reſcript valid, whereby a Perſon is deprived of his Goods, without a Citation and Juſtification had of him ; becauſe ſuch Reſcripts are not uſually granted, when a juſt Prince ſits on the Throne, but ſuch Prince is preſumed to be deceived and circumvented in granting the ſame ; wherefore, it ought to be ſuperſeded. Reſcripts and Privileges granted contrary to Law, with a Clauſe of *Non obſtante* therein, *viz.* when the Prince ſays, *Notwithſtanding any Law to the contrary*, are valid, according to the *Civil* Law ; becauſe the Prince may (according to the *Civil* Law) diſpenſe with Laws and Statutes of his own making.

[q] C. 1. 22. 6.

[r] Oldr. Conſ. 326. n. 4.

TIT. IV.

Of the Interpretation *of Laws and Statutes, according to the Senſe of the* Civil *Law ; and of the Power of Diſpenſing with Laws, and the like.*

TOUCHING the *Interpretation* of Laws, it is Firſt to be obſerv'd, That all Written Laws ought to be aided and ſupply'd, as much as poſſible, by ſuch an Explanation as beſt ſuits the Mind and Intention of the Legiſlator [s], where the Words of ſuch Laws are doubtful : And the Law provides, That it ſhall be in his Power to interpret a Law, in whoſe Power it was to make or ordain the ſame : but in ſuch Caſes, as come into Judicature, the Judges have a Power of Interpreting, for the Deciſion of Cauſes [t], deriving this Power from the Prince, or the Law itſelf.

[s] D. 50. 16. 6.

[t] C. 3. 1. 8.

Now the ſeveral *Species* of Interpreting Laws, are four in Number, *viz.* *Firſt*, The Interpretation of the Prince, or Sovereign Power, is ſaid to be a *general* Interpretation, becauſe it is extended unto all Perſons : whereas the Interpretation of the Judges, is only adapted to the Perſons that have their Cauſe before them, and binds none elſe. *Secondly*, The Interpretation of the Prince, or the Legiſlator, is ſaid to be neceſſary ; becauſe we are neceſſarily obliged to follow the ſame : And ſuch Interpretation ought to be

reduc'd into Writing; becauſe all Laws (according to ſome Mens Opinion) ought to be reduced into Writing; Writing being, with them, the Subſtance of a Law or Statute. And therefore, this Kind of Interpretation being deemed as a Law, it ought certainly to be reduced into Writing. *Secondly*, There is another *Species* or Way of Interpreting a Law which is made by Cuſtom; and Cuſtom is the beſt Interpreter of Laws [u], becauſe there is the tacit Conſent of the People. Now, this Interpretation is *general*, as being extended to all Perſons and Places where ſuch Cuſtom prevails; and it is alſo ſtiled *neceſſary*, after the aforeſaid manner, becauſe we are obliged to follow the ſame: yet it is not reduced into Writing, becauſe Cuſtom ſubſiſts by human Memory alone. The *Third Species* is that, which is made by the Judge, being ſtiled a *Judicial* Interpretation: For the Judge may, in doutful Matters, expound and interpret Laws, in relation to ſuch Cauſes as are decided by his Sentence, as already hinted. And this *Species* of Interpretation is not *general*; becauſe other Judges are not bound to pronounce according to a Precedent founded on his Sentence: For they ought to judge according to the Laws, and a well-inform'd Conſcience of their own, and not according to Precedents [x], which may be ill-grounded, perhaps. Yet this *Species* of Interpretation is alſo termed *neceſſary*; becauſe the Litigants are obliged to yield Obedience thereunto, and to obſerve the ſame. And this *Species*, in reſpect of the Judge's Sentence, ought to be reduced into Writing. The *Fourth Species* of Interpretation, is that which is made by ſome Maſter, or Doctor of Law: For every Maſter, or Doctor, may interpret doubtful Matters, or Points of Law, as ariſing within his own Faculty, wherein he has, or (at leaſt) ought to have a thorough Learning and Experience. And this Interpretation of the Doctors is neither *general*, *neceſſary*, nor need it be reduced into Writing: For the Interpretation of a Doctor, does not neceſſarily bind us to follow the ſame; but we only ſo far rely on it, as Law and Reaſon approve thereof.

[u] D. 1. 3. 37.

[x] C. 7. 45. 13. D. 1. 18. 12.

An Interpretation of Law ceaſes, when the Will and Intention of the Legiſlator clearly appears: And, in a doubtful Caſe, an Interpretation ought rather to be made for the Validity of the Act or Matter interpreted, than for the Invalidity and Deſtroying thereof; for an Interpretation ought always to be made in ſuch a manner, as not to render the Act or Law itſelf eluſory. Sometimes a Matter is interpreted in a large Senſe, as in Contracts; ſometimes in a larger Senſe, as in Laſt Wills and Teſtaments; and ſometimes in the largeſt Senſe, as in reſpect of Defamatory Words. When I ſay the *largeſt Senſe*, I mean the moſt favourable. But a Privilege ought not to be interpreted in a large Senſe, becauſe it is contrary to the Common Law, as I have already obſerved under the Title of *Privileges*. In the Interpretation of a Law, it is to be noted, That a *Prohibitory* Law, that is to ſay, a Law which forbids any thing to be done, is not reſtrain'd to the very Caſe therein, for it reaches to all Caſes of the like Nature [y]; and, conſequently, by this Means, a Law receives an extenſive Interpretation.

[y] D. 1. 3. 11, & 13.

Touching the Rules and Method of Interpreting Laws, it is to be known, That every Law conſiſts and is made up of Two Things [z]; *viz.* 1*ſt*, of the Words whereby a Law is expreſſed and declared; and, 2*dly*, of the Senſe and Meaning of ſuch Law. The Words of a Law, are thoſe Signs and Characters wherein a Law is penn'd and written, and by Means of which the Law itſelf is convey'd to our Minds and Underſtandings. And the Senſe and Meaning of a Law, is the Mind and Intention of the Legiſlator himſelf [a]; that is to ſay, That which the Law intends, and wou'd have done, or not have done. And this is a certain Maxim in all Laws, That whenever the Words of a Law differ from the Deſign and Intention of it, we ought to follow the Deſign and Intention of ſuch a Law [b]. Now, the Senſe and Meaning of a Law, which, in other Terms, I call the Intention of

[z] D. 1. 3. 29. D. 50. 16. 6.

[a] D. 1. 3. 30, & 32. C. 1. 14. 5.

[b] D. 1. 3. 17.

of it, may be found and known to differ from the Words of it two ſeveral Ways, *Firſt*, If the Senſe and Meaning of it is more limited and reſtrain'd than the Words themſelves couched under ſuch a Law. *Secondly*, When the Deſign and Intention of ſuch a Law is of a larger Extent than the Words themſelves will properly bear: And theſe two, in other Terms, we call a *reſtrictive* and *extenſive* Interpretation. The Senſe and Meaning of a Law may be diſcover'd to be more limited and reſtrain'd than the Words thereof, four ſeveral Ways; *Firſt*, By ſome Exception ſpecified and mentioned in the ſame Law: As when a precedent, or ſubſequent Exception, does qualify, govern, and moderate ſomething that is more general in ſuch a Law [c]. *Secondly*, It may be diſcover'd from the Reaſon given and made uſe of in ſuch a Law: For if the Reaſon of the Law ceaſes, the Law immediately ceaſes and comes to an End; there being no farther Occaſion of it [d]. *Thirdly*, It may be diſcover'd from the Equity thereof; and this Equity ought to be the chief Reaſon and Eſſence of every Law [e]. *Fourthly*, If there be a Law, which is written in very general Terms, it governs other Laws, wherein there are ſpecial Exceptions.

[c] D. 12. 1. 20.
[d] D. 2. 14. 32.
[e] C. 3. 1. 8. D. 1. 3. 18. D. 41. 9. 12.

The Meaning and Intention of a Law is known to be of a larger Extent than the Words themſelves, three ſeveral Way, *viz. Firſt*, As we ſay, *Ex contrario*, *viz.* When Matters contrary to what is enacted and ordain'd, is underſtood to be intended by the Law [f]. *Secondly*, *Ex conſequenti*, (as we phraſe it) Namely, when a Law forbids that which follows, upon ſome certain Points therein laid down and enacted. *Thirdly*, By way of Interpretation, as when we proceed to Conſequences in thoſe Things wherein there is the ſame, or elſe a Parity of Reaſon [g]: Provided always, there be nothing introduced by theſe three Ways, which is contrary to the Common Law [h]. The Law is extended to ſimilar Caſes, either by the Interpretation of a private Man, where the Reaſon thereof lays the Matter open and clear; or elſe by the Prince's Conſtitution, where the Reaſon thereof is dark and obſcure [i]. But what I have noted here, ought only to be obſerv'd when it evidently appears, that the Intention of Laws differ from the Words thereof. But, in a doubtful Caſe, it is far better to obſerve and adhere to the Words themſelves [k]. But what if the whole Sentence be dark and obſcure in itſelf, and by this Means the Deſign and Intention of the Law obſcure? Now ſuch an Obſcurity either conſiſts in an Ambiguity of each particular Word, or elſe in the Conſtruction of the whole Sentence itſelf, where there are indeed two Sentences; or elſe, *Laſtly*, It conſiſts in an Uncertainty of Things or Perſons; where all Rules of Law, which treat of Interpretation, are to be adapted thereunto. In this Caſe we ought, *Firſt* of all, to obſerve what Things go before, and what are ſubſequent thereunto [l]. *Secondly*, We ought to conſider, Whether that which is expreſs'd, be utter'd without any Flaw or Impropriety of Speech [m]. *Thirdly*, We ought to have Recouſe to Cuſtom and former Laws, which is the beſt Interpreter of all Laws [n]. And, *Fourthly*, In doubtful Caſes we ought to prefer the more benign and better Meaning to that which is leſs ſo [o]. 'Tis a general Rule in Law, That whereſoever there is an Enumeration of Particulars of ſeveral Ranks and Degrees, beginning with the higher, and ending with the lower, and in the Cloſe a general Expreſſion (of *others*) is added and joined with them, thoſe *others* muſt not be underſtood to be of a higher Rank, and ſuperior Degree, to that which is laſt mention'd in the Law, but muſt be either of the ſame Degree, or a lower: And thus we have it in my Lord *Coke* [p], as well as in the *Civil* Law. But if the Enumeration goes upwards, beginning with the lower, and ending with the higher Degree, the Caſe is then otherwiſe; as when it is ſaid *Barons*, *Earls*, and *other Peers*, here Marqueſſes and Dukes will be comprehended. When a Law is made in Favour of any one, it ought never to be interpreted

[f] D. 50. 17. 30 and 31. C. 1. 14. 5.
[g] D. 1. 3. 12 and 13.
[h] D. 1. 3. 14 and 15.
[i] D. 1. 3. 12 and 13.
[k] D. 14. 1. 1. 20.
[l] D. 1. 3. 24.
[m] D. 1. 3. 19.
[n] D. 1. 3. 37.
[o] D. 30. 14. 56.
[p] Cok. 2. Rep. pag. 46.

preted in Hatred or Prejudice of him. Interpreters of Laws do make Laws by their Interpretation thereof.

I ſhall next conſider the Buſineſs of *Diſpenſing* with Laws. Now a Diſpenſation is nothing elſe but a Relaxation of the Force of ſome Human and Poſitive Law, either in part or in the whole, for ſome certain Space of Time, upon Cognizance had of the Cauſe, (as ſome will have it) by him who has the diſpenſing Power lodged in him: Though, I think, this laſt part of the Definition ought not to be tacked to it; becauſe a Diſpenſation may be had without ſuch Cognizance. I ſay, of *Human and Poſitive Law*; becauſe the Law of Nature and the Law of God cannot be diſpenſed with by Man: For tho' he may interpret the Law of God, where the Senſe thereof is doubtful to human Underſtanding; yet he cannot diſpenſe with, and exempt a Perſon from the Obligation thereof even in *Foro externo*, where the Senſe of the Text is clear and certain. He may remit the Temporal Puniſhment indeed, but he cannot pardon and take away the Guilt thereof. The Diſpenſing with a Law, is an Act of Juriſdiction; and it ſuppoſes that ſuch Law did oblige before it was diſpenſed with: And ſuch a Diſpenſation is made either to take away the preſent or the future Obligation of ſuch a Law, but it cannot have a Retroſpect to Treſpaſſes committed before ſuch Law was really diſpenſed with; for that would draw Miſchief on the Commonwealth, and might encourage Iniquity. I ſay, in this Definition, *for a certain ſpace of Time*; becauſe if a Law was relaxed or diſpenſed with in Point of Obligation for ever, it would be an Abrogation of ſuch a Law, inſtead of a Diſpenſation. The Prince may grant a Diſpenſation to a whole Community, that they ſhould not be preciſely obliged to obſerve ſuch a Law for a whole Year, and the like; and this is properly a Relaxing of the Force of a Law, but not a Taking of the ſame away: For as ſoon as ſuch Time is expir'd, the Obligation of the Law immediately returns without any other Conſtitution, or Promulgation thereof; and this (I think) may as well be call'd a Suſpenſion of the Law, as a Diſpenſation of it. If the Prince grants to one Perſon, or to another, that he need not obſerve the Law, and call ſuch Grant an *Exemption* from the Law, when it is granted without any Determination of Time, Perpetually, or for Life: For if it be granted for a Definite Time, it will be a partial taking away the Bond of ſuch Law, and will be a mixture of Suſpenſion and Exemption. Sometimes a Diſpenſation is granted in reſpect of one Act only, and then alſo by way of Suſpenſion for a very ſhort Time, unleſs the Act has a permanent and perpetual Effect, as Legitimation, and the like, which are properly Exemptions from the Law, and are reckon'd among Privileges. From whence it follows, that ſee how many Effects the Law has, ſo many Effects may be attributed to a Diſpenſation, according to this Maxim, *viz. Quot Modis dicitur unum oppoſitorum, tot dicitur & reliquum.*

The Perſon, with whom this Diſpenſing Power is lodged, is the Prince or Sovereign Magiſtrate, who ought to exerciſe the ſame with great Caution and Prudence, as a faithful Shepherd of his People: For this Power is reſerv'd to him for great and weighty Reaſons of State alone, and not for private Affection of Perſons, and to the Detriment of the Publick Community; and, therefore, the final Cauſe of Diſpenſing, ought to be juſt and honeſt, *viz.* ſuch as is adequate and proportion'd to the Law. There are ſome Princes that have a full and abſolute Power of making Laws *ſimply* veſted in themſelves, ſuch as the *Roman* Emperors had, and theſe may diſpenſe with all Laws, which only concern *Mala prohibita*, and not *Mala per ſe*; becauſe *ejus eſt relaxare, cujus eſt ligare:* But if there be another Part of the Conſtitution joined with them in enacting Laws, they cannot do

do it without the Concurrence of that Part of the Conſtitution; eſpecially if it concerns the Intereſt of particular Men. As for Inſtance, where the Law gives a Penalty or Forfeiture unto the Prince, and a like Penalty unto the Party that ſues, the Prince may pardon the Forfeiture given to himſelf, but cannot remit that Part of it which is given to the Party. In ancient Times, Diſpenſations were ſeldom or never granted; but, whenever obtain'd, it was upon important and urgent Occaſions: But after the *Canon* Law was introduced, they became frequent by *Non obſtante*'s, and other knaviſh Diſtinctions of the Court of *Rome*, and its Followers, the *Canoniſts*. So that then Princes, learning from ſo ſubtle a Maſter as the Pope, ſoon overbore Legal Inſtitutions by diſpenſing with them, and would no longer be fetter'd with ſuch Cobwebs as theſe. They then ſet up to be Maſters over the Laws, and would no longer be Servants and Miniſters to them, as they ought to be.

As a Law is made for the ſake of the Community, it is in its Nature perpetual, and does not ceaſe through any Defect of the Efficient Cauſe, unleſs it be otherwiſe provided in ſuch Law: For it is not determin'd by the Death of the *Legiſlator* or his Succeſſor; and, conſequently, is not taken away by Succeſſion of Time alone, becauſe it ought to be made and conſtituted indefinitely. But if it be ſometimes made for any definite and certain Term of Time, that is extraordinary: And then ſuch Law has in the Bowels and Conſtitution of it, a kind of Revocation annexed thereunto at the End of ſuch Time. Nor does a Law ceaſe through a Defect of thoſe Things or Perſons for which it was made, unleſs ſuch Defect be perpetual. For the Community of a State or People is in its own Nature perpetual, and is preſerv'd by a continued Succeſſion. And tho' ſuch State or People ſhould be entirely rooted out, which ſeldom happens, and does not come under a moral Conſideration, yet the Laws themſelves remain. And, therefore, a Law can only ceaſe by a change of the Object, about which it is: Which Change (Phyſically ſpeaking) may happen ſeveral ways: But at preſent I ſhall only conſider ſuch Change as may happen in the Matter of a Law in reſpect to the Reaſon of it, which renders it Obligatory: But if the Reaſon of it perſeveres, it ſhall not ceaſe upon a Failure of the Object of it. Where the Reaſon of Things is the ſame, there the Deciſion of the Law ought to be the ſame alſo: For a Diverſity of Law ariſes from a Diverſity of Reaſon: A Parity of Reaſon has more Force than an Argument drawn a *contrario ſenſu*. That which Natural Reaſon dictates, is looked upon as a Law, and is even ſufficient of itſelf, tho' there be no expreſs Law in the Caſe: For the beſt Arguments not only for the Interpretation of a Law, but even for the Deciſion of Cauſes, in Failure of an expreſs Law, are thoſe which are derived from Natural or Right Reaſon. When a new Caſe happens, touching which the Law has made no Proviſion, and a Statute ought to be made thereupon; we ought to have Recourſe to the Prince, who, with the Deliberation of the Senate, ought to proceed to the making of a Law, and then let him cauſe ſuch Statute to be reduced into Writing *. Whoever reads this Imperial Conſtitution in the *Code*, will find it the Senſe of the Emperors in thoſe Days, that the Prince could not make Laws by his ſole Power.

* C. 1. 14. 8.

TIT. V.

Of certain Decrees of the Senate, neceſſary to be known here, for the better underſtanding the enſuing Work, as the Senatuſconſultum, Macedonianum, Syllanianum, Tertyllianum, Trebellianum, Turpilianum, Velleianum, *&c.*

A Decree of the Senate, in *Latin* called *Senatuſconſultum*, was that Law (as I have heretofore obſerv'd) which was made by the *Roman* Senate, on the Recommendation or Requeſt of ſome *Senatorian* Magiſtrate, without the Concurrence of the Populacy: And theſe Decrees had often their Diſtinctions or Titles from the Name of the Conſul or Magiſtrate that recommended them. And hence we have the *Senatuſconſultum, Claudianum, Libonianum, Orficianum, Pegaſianum, Syllanianum, Tertyllianum, Trebellianum, Turpilianum, Velleianum*, &c. from *Claudius, Libonius, Orficius, Pegaſus, Sylla, Tertyllius, Trebellius, Turpilius*, and *Velleius*. Theſe Decrees we frequently meet with in the Books of the *Roman* Law; and as we ſhall have often occaſion to mention them in the following Work, it will not be amiſs to ſay ſomething of them in this Place, in order to prepare the Mind of the Reader. And firſt of the *Senatuſconſultum, Syllanianum*, and *Claudianum.*

By this Decree of the Senate, Legacies are not to be paid unto all Perſons *indiſcriminately:* For it forbids them to be paid unto ſuch as render'd themſelves unworthy of Legacies. And all Perſons are hereby deemed ſo, who have by Mal-engine open'd, publiſh'd, or copied the Will of a Perſon killed by Violence, Poiſon, or any other clandeſtine Means [q], before Enquiry has been made touching the Death of the Perſon, by ſome one of the Family, and before noxious Servants are puniſh'd [r]. By *noxious* Servants, or Bondmen, I here mean ſuch, who either killed, or did not aid and aſſiſt their Maſters according to their beſt Abilities [s]. If an Heir, or Legatary, willingly open'd the Will, before ſuch Enquiry was made, he forfeited the Legacy left him, and it was apply'd unto the Exchequer [t]. But if any other Perſon did it, to whom nothing was bequeathed, he was condemned in one hundred *Aurei*, or Crowns [u]. If the Teſtator was found to be privily murther'd, the Will might be then publiſh'd, and the Heir might take the Heirſhip on himſelf, but yet it was then incumbent on him to proſecute the Crime according to Law, and to bring the Criminal to Judgment, if diſcover'd [x]; and if he neglected to do it, he not only forfeited the Heirſhip, but alſo whatever was bequeathed him in the Will [y]. This Decree, to prevent ſecret and hidden Murther, was not made under the Emperor *Marcus*, as ſome have imagin'd, but in the Time of *Auguſtus*, when *Dolabella* and *Syllanus* were Conſuls: For the Decree of the Senate, mention'd in the 13th Law [z], was later than the Time of this *Syllanus.*

[q] D. 29. 5. 1. 17 & 18.
[r] D. 29. 5. 3. 17.
[s] D. 29. 5. 1. pr. & L. 19.
[t] D. 29. 5. 5. 1.
[u] D. 29. 5. 25. 2.
[x] D. 29. 5. 5. fin.
[y] D. 29. 5. 15.
[z] D. 29. 5. 13.

The *Senatuſconſultum Claudianum* was made in the Reign of *Claudius Cæſar.* But why it was called by the Name of that Emperor, I am at a loſs to know, (for it is not clear) becauſe the Decrees of the Senate were not ſtiled from the Name of the Emperors, but from the Names of the Conſuls [a], as aforeſaid. But we read in *Tacitus*, that *Claudius* preferr'd a

[a] I. 1. 2. 5.

Law

Law unto the Senate, touching the Puniſhment of Women, that joined themſelves unto Bondmen in Marriage, or otherwiſe [b]: And the Senate hereupon decreed, That a Woman of an *ingenuous* Condition, who ſo fell in Love, without the Knowledge of the Bondman's Maſter, thereby ſeem'd to become his Bondwoman, and that the Children born from thence ſhould be look'd upon as *Liberti*. By this Decree of the Senate, therefore, the Maſter of the Bondman, after three Intimations given to the Freed-woman, that ſhe wou'd not marry his Bond-man, might lay theſe three Intimations before the *Prætor*, and requeſt him, That he would, by his Decree, aſſign the Woman over to the Maſter, with all her Goods and Chattels; and thus the Maſter acquir'd the Woman, with all her Subſtance [c]. This Decree of the Senate was afterwards aboliſh'd by a Law of *Juſtinian*, which permitted the Maſter to give his Bond-man due Correction, and to ſeparate him from ſuch Freed-woman. And this was good Law, in reſpect of a Woman that marry'd or joined herſelf unto another's Bond-man: But if ſhe marry'd, or had carnal Knowledge of her own Bond-man, ſhe was puniſh'd in a ſeverer Manner [d]. But, by the modern Law, a Woman neither loſes her Liberty, nor her Subſtance, by ſuch a Conjunction, but is rather permitted to contract Matrimony with her Bond-man or Servant; and ſuch a Bond-man ſhall become a Free-man and a Citizen of *Rome* [e]. But now all this Buſineſs of Bond and Free is become obſolete, and taken away by the Chriſtian Law.

[b] Tacit. l. 12.

[c] C. 7. 24. 1.

[d] C. 9. 11. 1.

[e] Arg. C. 7. 6. 1.

Touching the *Senatuſconſultum Tertyllianum* and *Orficianum*, it is to be obſerv'd, That the Law of the Twelve Tables gave no Right unto the Mother and her Children, of ſucceeding each to the Inheritance; becauſe they are not joined unto each other by any Kindred or Tie of Agnation. But afterwards, by the *Senatuſconſultum Tertyllianum*, (which was made in the Reign of the Emperor *Adrian* [f]), it was provided, That the Mother, if ſhe was a Perſon of an *ingenuous* Diſpoſition, and had three Children, and a *Libertine*, if ſhe had four Children, ſhould be admitted to ſucceed to the Goods of her Inteſtate Children [g]. And ſo, on the other hand, by the *Senatuſconſultum Orficianum*, (which was made in the Time of the Emperor *Marcus* [h]), theſe Strictneſſes of Law, in reſpect of Succeſſion, were taken away, and Sons and Daughters were admitted to ſucceed the Mother: And afterwards, by the Conſtitutions of the Emperors, Grandchildren of each Sex ſucceeded the Grandmother [i]. Before theſe two Decrees were made, the Law of the Twelve Tables was ſo ſtrict, that it only preferr'd the Males, and excluded thoſe of the Female Sex.

[f] I. 3. 3. 2.

[g] I. 3. 3. 2.

[h] I. 3. 4. pr.

[i] I. 3. 4. 1.

The *Senatuſconſultum Turpilianum* has a reſpect to Judicial Matters of a criminal Nature, either on the Part of the Accuſer, or elſe on the Part of the Accuſed. On the Part of the Accuſer, it reſpects Calumny, Tergiverſation, and Prevarication [k]. A Calumniator is ſaid to be him, who knowingly and with an evil Purpoſe charges another with falſe Crimes [l]: But he who, *bona fide*, accuſes another, does not immediately become a *Calumniator*; becauſe he fails in the Proof of ſuch a Crime [m]. For an Enquiry into the Matter, is left to the Judge who takes Cognizance thereof, who ought, upon Acquitting the Defendant, to conſider the Purpoſe of the Accuſer, and enquire with what Intention the Accuſer was led to proceed to ſuch Accuſation; and if he finds him to be juſtly miſtaken in the Matter, he ought to acquit him: But if he finds him guilty of evident Calumny, he ought to puniſh him [n]. The Puniſhment of Calumny, heretofore, by the *Lex Rhemnia*, was Pecuniary [o]: But afterwards, by this Decree of the Senate, (which is now grown out of Uſe), the Perſon, who was thus guilty of Calumny in Matters of Judicature, was render'd infamous [p], and was to undergo a Retaliation; that is to ſay, he was to ſuffer the ſame Puniſhment as the Defendant ſhould have done, if he were convict [q]. But all Accuſers were not puniſh'd as Calumniators; for there were ſome Perſons, touching

[k] D. 48. 16. 1. pr.

[l] D. 48. 16. 1. 1.

[m] C. 9. 46. 3.

[n] D. 48. 16. 1. 3.

[o] I. 4. 16. pr. & 1.

[p] C. 9. 46. 3. & 8.

[q] D. 48. 16. 18.

whoſe Calumny no Enquiry was ever made, as a Mother who proſecuted the Death of her Child [r], and a Son who avenged the Death of his Father [s], and the like Perſons. A *Tergiverſator*, is he who entirely deſiſts from his Accuſation; or he who delays the ſame, tho' he does not deſiſt [t]. Thoſe Perſons, who were guilty of Tergiverſation, were, by this Decree of the Senate, fined in Five Pounds of Gold [u]. A *Prevaricator*, is he who conceals Crimes that are true, by Colluſion had with the Defendant, or Perſon accuſed, who admits of falſe Excuſes, and ſuppreſſes his own Evidence [x]: And ſuch an Accuſer was ſeverely puniſh'd, as I have elſewhere noted, under the Title of *Calumny and Prevarication.* But the Puniſhment of this Decree of the Senate ceaſed in reſpect of a *Tutor*, who, on the Death of his Pupil, deſiſted from the Accuſation, which he had commenced on his Pupil's Account [y]. It alſo ceaſed in him, who deſiſted from an Accuſation, upon the Death of the Perſon accuſed, if his Crime was ſuch as was ended by Death [z]. And, laſtly, it ceaſed, if the Crime was pardon'd [a]. But more of this Decree of the Senate hereafter.

[r] C. 9. 46. 2.
[s] C. 9. 46. 4.
[t] D. 48. 16. 6. & 13.
[u] D. 47. 15. 3.
[x] D. 47. 15. 1. D. 50. 16. 212.
[y] D. 48. 16. 14.
[z] D. 48. 16. 15.
[a] D. 48. 16. 13. 1.

The *Senatuſconſultum Trebellianum* had its Name from *Trebellius Maximus*, who was Conſul with *Annæus Seneca* in the Reign of *Nero* [b]: And it relates to Heirſhips given in Truſt. *Ulpian* gives us the Words of this Decree, in the *Digeſts*; whereby it is provided, That Actions which are uſually given to or againſt Heirs, ſhould be given to and againſt them, after the Heirſhip is reſtored to them by Virtue of a Truſt, or *Fideicommiſſum*, as it ought to be by Virtue of the Teſtator's Will [c]. Hence it appears, that, by Virtue of this Decree, an Action lies for and againſt a *Fideicommiſſarius*, or an Heir in Truſt; that is to ſay, the Judge or *Prætor* may admit him to bring his Action, and likewiſe compel him to defend a Suit commenced againſt him. Before this Decree of the Senate, even written Heirs did not care to take the Heirſhip on themſelves, either through Fear of Law-ſuits, or ſome other Pretext [d]; eſpecially Heirs in Truſt, who were often demanded, either to reſtore the whole Inheritance; and therefore, theſe Truſts were extinguiſhed. In the Time of *Veſpaſian*, when *Pegaſus* and *Puſio* were Conſuls, the Senate permitted a Perſon, on whom a Demand was made to give up the Heirſhip, to reſtore the ſame to the real Heir; but he might retain a fourth Part, even out of thoſe Things which were left by way of Truſt, in order to indemnify himſelf [e]: And this Decree was ſtiled the *Senatuſconſultum Pegaſianum.* But afterwards *Juſtinian* transferr'd the Force of this Decree into that of the *Senatuſconſultum Trebellianum*; which gives the ſimple Heir, as well as the Heir in Truſt, a Fourth of the Inheritance, to indemnify himſelf againſt the Actions of Creditors [f]. This *Trebellius*, the Author of this Decree, is mention'd by *Cornelius Tacitus*, in the 14th Book of his *Annals* [g]. I ſhall next ſpeak of the *Senatuſconſultum Velleianum.*

[b] D. 36. 1. 1. 1.
[c] D. 36. 1. 1. 3.
[d] D. 36. 1. 1. 3.
[e] I. 2. 23. 5.
[f] I. 2. 23. 5.
[g] Poſt med.

And here it is to be noted, That Women contracting in their own Name, and on their own Account, are effectually obliged, by the *Civil* Law, to perform and ſtand to ſuch Contracts in their own Perſons, even tho' they are in a State of Marriage: But if they intervene and become Sureties for others, they are not liable to an Obligation, according to the *Senatuſconſultum Velleianum*, by reaſon of the Weakneſs and Frailty of their Sex [h]. And the Law not only relieves them, if they are circumvented and deceived, but it alſo relieves their Sureties, Proctors, and ſuch as act for them [i]: But it does not give ſuch Sureties and other Agents Relief, if a Demand is made upon them, by bringing an Action againſt ſuch Women, but it renders the whole Obligation void, and diſallows thereof [k]. But if Women themſelves are guilty of Fraud, and deceive other Perſons, this Law or Decree gives them no Help, of what high Order or Quality ſoever they be; for their high Rank and Order ſhall be no Protection unto Fraud [l]. Not only one, but every *Species* of Contract, is comprehended under this Decree of the Senate,

[h] D. 16. 1. 12. 1. & 2.
[i] D. 16. 1. 6.
[k] D. 16. 1. 16. fin.
[l] D. 16. 1. 30.

Senate, and in what manner ſoever they have thus interven'd, at their own Peril, by taking on themſelves another Perſon's Obligation [m]. If a Woman be convened upon ſuch an Intervention or Obligation, ſhe may plead this Decree by way of Exception: But if ſhe has paid any Sum of Money to her own Wrong, by means of the like Interceſſion of Suretiſhip, or has perform'd any Promiſe or Stipulation in the Behalf of others, ſhe muſt have a Perſonal Action to recover the ſame again, together with the Fruits and Profits thereof [n]. This Exception was introduced not only in Favour of married Women, but alſo in Favour of others [o]. But a Woman is not aided by this Exception, if ſhe ſhall within two Years after ſuch Interceſſion or Binding herſelf, oblige herſelf again, and the like; becauſe then ſhe cannot be ſaid to do this by any kind of Levity, but fraudulently, if ſhe has once pleaded this Exception [p]. Nor ſhall ſhe be relieved, if ſhe does either *judicially* or *extra-judicially* renounce the Benefit of this Decree; provided the Notary puts her in Mind of this Benefit belonging to her. This Interceſſion or Obligation, is alſo reſcinded by an Action in Equity before the *Prætor*. This Title of the Law, touching this Decree, is abrogated in *France*, by a Royal Edict, and alſo by a Municipal Law at *Thoulon*. See *Tholoſani Syntagma juris* [q]. But in *Holland* it ſtill obtains, unleſs a Woman renounces the Benefit thereof, or publickly exerciſes Trade and Merchandize [r]. A Woman cannot renounce the Benefit of this Decree, unleſs it be by the means of a Publick Inſtrument; which Practice is ſtill obſerved in *Friezeland*, tho' not in *Holland*.

[m] D. 16.1.2.4. D. 16. 1. 9.
[n] D.16.1.32.1.
[o] D. 12. 6.40.
[p] C. 4. 29.22.
[q] Lib. 24. c. 3.
[r] Groenv. de LL. abr. in C. 4. 29.

The *Senatuſconſultum Macedonianum*, was ſo called from one *Macedo*, an infamous Uſurer, who was the principal Occaſion of making the ſame. For he (among other Things) was accuſtom'd to lend Money unto Children, under the Power of the Father, to ſupply their Luxury and riotous Courſe of Living; and hence adminiſter'd Occaſion to them often to kill their Fathers, when they had not wherewithal to pay their Debts. By this Decree of the Senate, no Action or Demand could be made on the Account of ſuch a Loan, even after the Father's Death [s]; provided the Creditor knew, or might know, that the Perſon to whom he lent Money was under the Power of a Father [t]. For if ſuch Creditor was deceived by a juſt Simplicity or Ignorance, as becauſe the Perſon borrowing (perhaps) affirm'd or pretended to be the Father of a Family [u]; or if a Minor lent Money to a Minor, the Force of this Decree of the Senate ceaſed [x]. And ſo likewiſe did it, if a Son under the Power of a Father had what we call the *Caſtrenſe Peculium*, *viz.* an Eſtate gotten in the Wars, and the like, ſo far as ſuch *Peculium* extended: For in that Reſpect he repreſented the Perſon of a *Pater-familias* [y]. This Decree of the Senate had a Reſpect to both Sexes under the Power of a Father [z], and of what Dignity ſoever the Perſons borrowing were [a]. And it did not only give Relief to ſuch a Son borrowing Money, but even to his Surety: So that an Action, which accrued on the Account of ſuch a Loan of Money, might be defeated by an Exception, or pleading of this Decree in bar thereof [b]: And thus the Creditor did not ſeem to have any Right of Action, ſince he might be ouſted of it by a perpetual Exception [c]. But this Decree only obtain'd in reſpect of Money lent, and not in regard to other Concerns, if there was no Fraud committed therein, in order to render this Decree vain and eluſory [d]. This Decree of the Senate does not only give Relief unto a Son under the Power of the Father, but alſo to the Father, and Heir, and Surety [e], who ſtood upon the ſame Bottom with the Borrower. It was of great Service to the State at the Time when made.

[s] D. 14. 6. 1.
[t] D. 14. 6.16.
[u] D. 14. 6. 3.
[x] C. 4. 28. 1. & 2.
[y] D. 14. 6. 2.
[z] D. 14. 6 9.2.
[a] D. 14. 6. 7. pr.
[b] D. 50. 17. 112.
[c] D. 14.6.3.3.
[d] D. 14.6.9.3.
[e]

TIT. VI.

Of Rules and Principles of Law, commonly called Maxims; *and in what Manner they are limited and reſtrained by Exceptions.*

THIS Title, touching the ſeveral Rules and Principles of the ancient Law, is borrow'd from ſeveral Parts of that Law, contained in the Books of the ancient Lawyers. For a *Rule*, in the Senſe of the Word, as I ſhall uſe it here, is collected from the Law itſelf, and is nothing elſe but a ſhort and comprehenſive Manner of letting Perſons into the Knowledge of the Law, and whereby ſome Deciſion of Law is declar'd and laid open to us. Wherefore, we may define it to be a ſhort Deciſion of Law, which in itſelf comprehends ſeveral Caſes of Law: Or elſe it may be thus defin'd, *viz.* To be a brief and general Determination of Law; namely, When many Caſes of the like Nature are concluded in a ſhort Sentence of Law, not by a ſpecial Recital of the Caſes, but by Aſſigning the Reaſon of the ſame; as I ſhall ſhew by ſome Examples hereafter. So that from what has been ſaid, a Rule of Law is that, which declares the Law to be what it is: Not that a Law is taken from a Rule, but becauſe it becomes a Rule, from a Law that is previous thereunto. It is uſually conceived either under an *univerſal* [a], or elſe under an *indefinite* [b] Sign, which is equivalent to an *univerſal* [c]; or laſtly, under ſuch Words, which if they do not comprehend all Things, yet they comprehend many Things, which happen often and for the moſt part.

[a] D. 50. 17. 39. 68. 90 & 175.
[b] D. 50. 17. 2 & 3.
[c] D. 31. 1. 44.

It has been ſaid, that a Rule does not make a Law, becauſe it is taken from a Law, that has already a good Exiſtence [d]: Which is true in Reſpect to thoſe Things which precede the Rule, and from whence the Rule is formed; but 'tis otherwiſe in Reſpect of other Caſes, which are not found determin'd before the Rule ſubſiſted, in all which Caſes a Rule makes a Law [e]. And thus the *Regula Catoniana* makes a new Law; which Rule ſays, That Legacies, which are ineffectual *ab initio*, are not confirm'd by any Tract or Courſe of Time, tho' the Cauſe of the Impediment be removed [f]. So that from what I have juſt now hinted, it appears, that in ſuch Caſes as are not already determin'd and adjudg'd, he is ſaid to have founded his Intention, who has a Rule that makes for him [g]; and a Sentence ought to be pronounced according to ſuch a Rule or Maxim in Law; unleſs it be proved, that the Caſe does not come up to ſuch Rule. Yet a Judge may recede from ſuch a Rule, as I have already remember'd under the Title of *Equity*, when Equity perſwades him ſo to do; that is to ſay, when there is an Exception againſt it, and it is faulty in ſome particular Point [h].

[d] D. 50. 17. 1.
[e] Arg. D. 7. 5.
[f] D. 34. 7. 1. D. 31. 1. 41. 1.
[g] Gloſ. in L. 211. D. 50. 17.
[h] D. 50. 17. 1.

But a Rule loſes its Force and Power, as ſoon as an Exception is propounded, which deviates from a Rule; for there is no Rule, which is ſo firm and general, but that it ſometimes admits of an Exception in ſome few Caſes, and that Exception in thoſe Caſes vitiates the Rule: As that the Preſident of a Province may puniſh a Perſon with Death [i], and not with Deportation or Baniſhment [k], tho' the Puniſhment of Death or the Sword be a greater Puniſhment than Baniſhment. And thus a Mother or Grandmother may be a Guardian [l], tho' Tutelage or Guardianſhip be an Office belonging to Men, not to Women [m]. And as an Exception tolls the

[i] D. 48. 19. 8. 1.
[k] D. 48. 19. 2. 1.
[l] Nov. 118. c. 5.
[m] Bart. in L. 12. D. 33. 7.

the Force of a Rule, ſo it alſo confirms it in all Caſes not excepted [n]. A Perſon, that alledges an excepted Caſe, ought to prove the ſame; becauſe it is not preſumed, where there is a Rule of Law. And, therefore, when there is a Rule, that a Perſon contracting in a certain Place, ſhould be conven'd and impleaded there, if he may be found, and there is this Exception, *viz. unleſs the Perſon that has contracted ſhall withdraw himſelf*; the *onus probandi*, that he did withdraw himſelf, lies on him that aſſerts it; becauſe this is an Exception againſt a Rule [o]. Thus a Statute, which declares the Validity of a Will without Witneſſes to it, when it is ſubſcribed and ſealed, requires the Perſon to prove ſuch Will to have been ſealed, if the Seal be deſtroy'd, becauſe his bare Averment is not good againſt a Rule of Law, which requires Witneſſes to the Will. A Rule is known from an Exception, by an Order or Diſpoſition of Law, being either General or Special: Becauſe, if the Enacting or Diſpoſitive Words of a Law be General, it may be ſaid to be a Rule; but if they are Special, as when the Law ſpeaks by the Word *Quædam*, *Quandoq*; and the like, or in a Special Manner, then it is not a Rule. But as the Words *Interdum*, *Quandoq*; *&c.* do make an Exception, or exclude a Rule, according to *Bartolus* [p]; ſo the Word *Plerumq*; or the like, expreſs'd in a Law, makes a Rule. And, therefore, when the Law ſays, That Fire *for the moſt part* happens through the Fault of Inhabitants [q], or Tenants, it makes it ſo far a Rule in Law, that Fire is preſum'd to happen through the Fault of an Inhabitant.

[n] Bart. ut Sup.

[o] Alex. Conſ. 89. lib. 7.

[p] In L. 5. D. 20. 4. pr.

[q] D. 1. 15. 3. 1.

A Rule collects and infers the like Caſes, by a ſhort Narration of Law, *viz.* when it propounds a General Method, which Lawyers follow in the Deciſion of various and ſeveral Cauſes [r]; or when (for Memory's ſake) it collects certain particular Matters, which occur in divers Places of the Law, into one Head or Sum: And, therefore, *Sabinus* calls it [s] *cauſæ conjectio*: Borrowing the Metaphor, or Expreſſion, from Orators or Pleaders of Cauſes, who, in the Beginning of their Pleadings, briefly declare and lay before the Judge the Sum and Subſtance of their Harangues, that they may render the Judge more attentive, and thereby better inſtruct him in the Cauſe itſelf. It is a certain Rule in Law, that every Perſon ought to confine himſelf to the Buſineſs of his own Profeſſion, and not raſhly involve himſelf in the Affairs of other Men, which do not belong to him, leſt Human Offices ſhould be diſturbed by the promiſcuous Acts of Men, which often create Diſcord and Confuſion [t]. Of this Rule we have an eminent Inſtance in a Perſon, who of his own Accord, and without a Commiſſion or Proxy, defends a Minor in a Court of Judicature, and is condemned in the Cauſe: For he may be convened in an Action *ex Judicato*, and cannot defend himſelf by an Exception, that *he did this on the Minor's Account*; becauſe he meddled with that which did not belong to him, and therefore muſt blame himſelf.

[r] D. 50. 17. 206. D. 50. 17. 10.

[s] D. 50. 17. 23.

[t] C. 6. 23. 23.

It is a Rule in Law, That a Benefit or Favour cannot be conferr'd on a Man againſt his Will [u], ſince every one may renounce a Right or Favour introduced in Favour of himſelf [x]. Thus a Woman may renounce the Benefit of the *Senatuſconſultum Velleianum*; and a Minor may omit Reſtitution *in integrum*, if he be injur'd [y]. This Rule obtains in Benefits granted unto any one by Law, meerly in reſpect of his own Perſon: But it admits of a Limitation, if it be granted to a Man in reſpect of other Perſons as well as himſelf; for then it may be conferr'd on a Man againſt his Will. Thus if a Man pays a Sum of Money unto a Creditor in the behalf of a Debtor againſt his Will, it is a Limitation of this Rule, becauſe it is the Intereſt of the Creditor to receive his Due, as well as it is that of the Debtor to be diſcharged from the Debt [z]: But he who pays a Debt for a Debtor againſt his Will, ſhall not recover the ſame again on the Debtor, but

[u] D. 50. 17. 69.

[x] C. 2. 3. 29.

[y] D. 4. 4. 41.

[z] D. 46. 3. 23. & 53.

[a] D.17.1.40. but muſt blame himſelf, that he thus paid it [a]. Again: Thus a Perſon may, againſt his Will, be elected unto Honours and Dignities in the State; becauſe it is the Intereſt of the Publick to confer Honours and Rewards [b] D.50.4.3.15. on deſerving Perſons [b]. And hence it is alſo receiv'd, that any one may appeal for a Perſon unjuſtly condemn'd to a capital Puniſhment, even againſt the Will of the Perſon condemn'd; becauſe no one is to be heard who is willing to deſtroy himſelf; and it is the Intereſt of one Man to [c] D.49.1.6. preſerve another, if poſſible, by an Affection of Kindneſs [c].

Again: It is a Rule in Law, That every Man, according to the firſt Principles of Nature, has a Right to defend himſelf; and ſuch a Legal [d] D.1.1.3. Right ought not to be taken away [d]: And therefore, a Perſon judicially impeached may defend himſelf againſt the Plaintiff's Action, even by divers [e] D.44.1.8. Exceptions of Law [e]. But this is otherwiſe, if the Law forbids ſeveral Exceptions to be propounded, which it does *in pœnam mendacii*: For the Law puniſhes a Perſon, who is guilty of a Lye or Falſhood in his exceptive Pleading, and will not ſuffer him to have Recourſe to the Aid of a ſecond Exception, if he gives in a falſe Plea at firſt. As when the Defendant denies himſelf to be a Debtor upon a Bond; and the Bond being proved, he would have Recourſe to a Pact *de non petendo*: In this Caſe, he ſhall not be admitted to his ſecond Defence, if he ſhould plead ſuch Pact, or [f] C.4.30.4. Auth. contra. Payment of the Debt [f]. And 'tis the ſame thing in reſpect of him, who firſt denies a Debt, and then would plead Compenſation of ſuch Debt, in a Matter not Liquid. Again: He, who has deny'd a Pawn to be the Property of the Debtor, ſhall not afterwards, by way of Exception, ſay, that he has [g] C.8.18. Auth. Poſſeſſor. a prior Obligation in reſpect to ſuch Pawn [g].

2*dly*, Whenever any Doubt or Ambiguity occurs in human Dealings, we ought to have recourſe to this Rule for the Interpretation thereof; *viz.* Firſt, We ought to conſider and follow that which is acted and agreed upon between the Parties contracting: For, regularly, that is ſaid to [h] D.33.10. 7.1. be done, which the Parties Words do point out [h]; ſince no one is preſumed to have utter'd that, which he has not firſt conceiv'd in his Mind; and we ought to abide by the Words, 'till ſuch time as the Mind of the [i] D.50.16.219. D.32.1.69. Perſon that utters them appears to be contrary to them [i]. In Matters that are obſcure, we ought to conſider that which is more probable, or that which is wont to happen for the moſt part: For if the doubtful Intention of the Parties contracting connot be inferr'd from the Signification of Words, then we are wont to interpret that which is done from the Nature of the Contract, from the Quality of the Thing, the Condition of the Perſons, and to infer it from other Circumſtances. Thus, among Perſons contracting, that is preſumed to be done, which, according to the Nature of the Contract, [k] D.12.1.3. is wont to be done or given [k]. Therefore, if old Wine be lent, it is not lawful to return new Wine for old Wine; becauſe it is tacitly imply'd in the Contract of a Loan or *Mutuum*, that the *Mutuum* ought to be return'd [l] D.45.1.41. pr. in the ſame Kind, Goodneſs, and Quality as it was lent [l]. Secondly, The doubtful Intention of the Parties dealing, may be interpreted according to the Cuſtom of the Place where the Act is done and executed: For, as Cuſtom is the beſt Interpreter of Laws; ſo it is alſo of all Contracts and other Buſineſſes whatſoever. Hence it is, that if any Doubt ariſes what and how much the Seller ought to pay on the Score of Eviction, who has ſimply given Caution touching Eviction, without expreſſing the Sum or Quality, we ought immediately to have recourſe to the Cuſtom of the [m] D.21.2.6. Country wherein the Thing was purchas'd [m]; becauſe in Actions *bonæ fidei* [n] D.21.1.31. 20. there is a tacit Implication, that we ought to be govern'd by Cuſtom [n].

3*dly*, It is a Rule or Maxim in Law, That thoſe Things which are of no Advantage when they are ſingle, are of no Service when they are [o] D.27.1.15. 11. multiplied [o]; which Rule obtains, in the excuſing of Tutors and Curators; becauſe

becauſe Pupils are much favour'd in Law: But it is otherwiſe in the Buſineſs of Proof, which ought not to be reſtrained, according to *Anchoranus* [p] And thus, what I have already ſaid in this Title, being ſufficient, as I purpoſe to ſhew the Nature of a *Rule*, and its Limitation, I ſhall haſten to the Title, touching the Uſe and Authority of the *Roman* Civil Law: But, firſt, of *Equity*.

[p] Conſ. 276. n. 4.

TIT. VII.

Of Equity *in General, both* Natural *and* Civil; *and how it is diſtinguiſh'd from the Rigour of a Written and Poſitive Law.*

SINCE Judges do ſometimes, according to the Laws, make uſe of meer Juſtice and Rigour of Law, and ſometimes of Equity, as the Circumſtances of the Cauſe, Perſon, Time, Place, *&c.* require; I ſhall therefore here ſpeak of Equity, which an upright Judge ought always to have in view, when he is not commanded to follow ſtrict Law. Now *Equity* is nothing elſe but a Mitigation made of ſome Written Law, whereby we follow and execute the Intention, Reaſon, and Will of the Law, upon a Diſcovery thereof, by laying aſide the ſtricter Letter of it, and having recourſe to Natural Juſtice only: For we do hereby remit the literal and grammatical Senſe of it, and either reſtrain or extend the ſame, as the Cauſe and different Circumſtances thereof require [q]. So that Equity is nothing but Juſtice temper'd and ſweeten'd with Mercy; or, according to others, a rational Method of Proceeding founded upon Mercy, and not on Rigour of Law; for, ſometimes, ſtrict Law is a great Injury unto the Litigant, or Perſon contending: And thus Equity is the Correction of a Law, made in that Part where the Facts will admit of it. As when an Act of Parliament is made, That whoſoever ſhall do ſuch a Thing, ſhall be a Felon, and ſuffer Death; yet if a Mad-man, or an Infant of tender Years, that has no Diſcretion, ſhall commit the ſame, they ſhall not be adjudged Felons, nor ſuffer Death therefore; becauſe Laws are adapted to thoſe Things which frequently happen, and not to thoſe which ſeldom happen [r]. From hence appears the Difference that is between *Law* and *Equity*: For *Law* is a Deciſion of Right, which is made according to the ſtrict Rules of Law; but *Equity* is a Temperament of Mercy, receding from the common Rules of Law. There was a Law among the *Romans*, That every one, who ſcaled the Walls of the City in the Night-time, ſhould be condemned to Death; and in Time of War, it happen'd that a certain Perſon thus ſcaled the Walls, in order to diſcover the Enemy to the *Romans*; and, by the Judgment of all the Senate, he was not only diſcharged from the Sentence of Death, but had a great Reward for it; and yet he had broken the Words of the Law, but not the Intent thereof, as the wiſe Fathers adjudged it. Thus, by the Laws of *England*, Breaking of Priſon, is Felony in the Priſoner, if he be committed for Felony [s], according to the Statute *De Frangentibus Priſonam*: yet if the Priſon be ſet on fire or burn'd, and they which are therein ſhall break Priſon, in order to ſave their Lives, this ſhall be excuſed by the Law.

[q] D. 47. 9. 4.

[r] D. 1. 3. 5.

[s] Plowd. Com. 4. Edv. 6.

Now, *Equity* is two-fold, *viz. Natural* and *Civil*. I call that by the Name of *Natural* Equity, which depends on, and is ſupported by Natural

Reaſon; and that I call *Civil* Equity, which is deduced from, and govern'd by ſuch Civil Maxims, as are adapted to the State of any Commonwealth, whether it be *Roman* or any other whatſoever [t]. *Civil* and *Natural* Equity do ſometimes claſh and interfere with each other, and *Civil* Equity prevails over the other, as in *Uſucapions* and the like. Some have divided Equity into a *Written* and an *Unwritten*, Equity: But this Diviſion I ſhall not meddle with in this Place, having taken Notice of it elſewhere. Equity not only corrects a Law, which ſavours of Iniquity, or when the Law in ſuch a particular Caſe commands an Act which is founded upon Iniquity; but alſo, when it commands a Thing, which is too difficult and hard to be fulfilled: As when it commands Faſting, and Sickneſs would enſue to the Perſon that thus faſts in compliance with the Law; for in each Caſe the Law is or may be peccant, by commanding an Evil, or a Thing immoderately ſevere. Therefore, in both theſe Caſes the Judge ought to paſs by the Words of the Law, and to follow the Intention of the Legiſlator, which is not preſum'd to be unjuſt, or cruel. *Equity* has Place not only in *Affirmative*, but alſo in *Negative* Precepts. As for Example, There is a general Prohibition in the Laws of *England*, that it ſhall not be lawful for any one to enter into another's Freehold, without Leave of the Owner, or without Authority of Law; yet this Exception lies in Equity from the ſaid Prohibition, according to Reaſon, *viz.* If a Man drives Beaſts on the Highway, and they happen to get into his Neighbour's Corn, and he, to bring the ſaid Beaſts out again, that they do not any Hurt, goes into the Ground and fetches them out, he may, in this Caſe, juſtify his Entry into the Ground by Law. Again, Notwithſtanding the Statute of *Edward* the Third, whereby it is ordain'd, That no Man ſhall upon Pain of Impriſonment give any Alms unto any ſturdy Beggar, that is well able to labour: Yet if a Man meets with a ſturdy Beggar in very cold Weather, and ſo lightly apparelled, that if he has not Cloaths given him, he muſt probably periſh with Cold, and he gives him Cloaths to ſave his Life, he ſhall be excus'd. See *Doctor* and *Student* [u].

[t] D. 16. 3. 32. Vult. in L. 1 & 2. I. 1. 1.

[u] Cap. 16.

In *Oppoſition* to Equity, we have what the Lawyers call *Strictum Jus*: Which Phraſe, according to *Budæus*, is peculiar unto Lawyers; denoting ſuch pure and exact Law as is full of Rigour, and almoſt amounts unto Iniquity itſelf; and this is ſometimes ſtiled *Strict Law*, ſometimes a *Subtlety of Words*; and ſometimes the *Quirks* or *Fineſſes* of the Law, in *Latin* term'd *Apices Juris* [x]. Again, Rigour of Law is ſometimes called *Strict Reaſon*, and a *Subtlety* of Law, and alſo *Nimia Subtilitas* [y]: But the Comedian ſays, that this *Summum jus* is *Summa injuria*; and *Columella*, in his Book *de Re Ruſticâ*, calls it *Summa Crux*: Wherefore, by ſeveral Texts of Law, we ought to prefer *Equity* unto ſtrict Law [z]. *Servius Sulpitius* and *Gallus Aquilius* are highly extolled by ſeveral of the Lawyers, becauſe they would have Matters adjudged according to Equity. See *Duaren. Weſembeck*, and others. But a Judge ought not, generally ſpeaking, to recede from a Written Law on the Account of an Unwritten Equity; becauſe a Judge ought not to ſeem to be a Perſon of greater Clemency than the Law itſelf. Sometimes Rigour of Law, and the Law itſelf, are put for one and the ſame; and then this laſt Concluſion holds good: But when they are different Things, and when a Rigour of Law is put for an Exceſs of Right, it is otherwiſe; as when, for ſome Reaſon or other, and in Terror of Offenders, it exceeds the common Rules of Law.

[x] D. 17. 1. 29.

[y] D. 28. 2. 13.

[z] D. 28. 2. 13.

The Lawyers give us Three Rules, in order to ſhew us when Equity ought to be obſerv'd, and when not, *viz. Firſt*, When there is no ſuch Thing as a Written Law, or a Written Equity ſubſiſting. *Secondly*, When we have one of theſe in Writing. And, *Thirdly*, When both of theſe is in Writing. In the Firſt Caſe, when neither of them is in Writing, the Judge

Judge ought moſt certainly to follow Equity. In the Second Caſe, when only one of them is in Writing, that which is in Writing ought to be obſerv'd, if poſſibly it may be done with good Conſcience. *Thirdly*, If the Law be written in General Terms, that is to be obſerv'd which is written in Special; becauſe *Species derogat generi*; and ſo *e converſo*: But if both are Specially or Generally reduced into Writing, *Equity* does not obtain in reſpect to the Law of Nature, ſimply and properly ſo called; but only in regard to the Law of Man, or ſome poſitive Law: For the Law of Nature is an immutable Law, and cannot be changed by the Sentence of the Judge or Prince. But it may well enough be extended to a poſitive Law: For though it be forbidden by a poſitive Law for a Man to marry his Siſter; yet he may do this for the Preſervation of his *Species*.

TIT. VIII.

Of the Rubricks *and* Titles *of Laws; and how they ſerve to explain the Laws themſelves.*

A *Rubrick*, in the common Uſage of Speech, denotes the Title or Inſcription of any Law or Statute; becauſe anciently the Titles of Laws and Statutes were wont to be drawn and painted *rubro colore, viz.* in red Letters; and hence, among the Ancients, the Word *Rubrick* was uſed to ſignify the Law or Text itſelf, as in *Perſius*.

Excepto ſi quid Maſuri Rubrica vetavit.

Others think it ſo called from the *Prætor*'s inſcribing his *Album*, or Book of Records, with red Letters. The Lawyers, ſays *Quintilian* [a], referred themſelves, *ad Album & Rubricas*. And hence *Juvenal* expreſſes himſelf, *viz.*

[a] Lib. 12.

———*Cauſas age, perlege rubras*
Majorum leges.

A Rubrick is uſually added for Demonſtration ſake: And as a Rubrick is alſo in *Latin* called an *Index*; ſo in *Greek* it is ſtiled Ἔλεγχος. A Rubrick ought not to introduce any new Ordinance or Diſpoſition of Law, or Fact, leſt it be taken *præter voluntatem Authoris, viz.* not according to the Will of the Author or Legiſlator: For Rubricks, of their own Nature, ſeeming to relate to the ſubſequent Text, do therefore receive a Reſtriction or Declaration from the Text [b], and not the Text from the Rubrick, generally ſpeaking. And if at any Time we obſerve a Rubrick to have an ordaining or diſpoſitive Quality, ſuch Quality proceeds not from the proper Nature of the Rubrick, but from ſome Reaſon extrinſically accruing. As for Example, as often as the Context is not entire, as it is not in ſeveral Titles of the *Code*, to which *Code* the Emperor *Juſtinian* has added and ſubjoin'd many *Greek* Laws, at this Day not to be found and met with therein. For it being probable, that the Rubrick did agree with the Text, we may draw a probable Inference from the Rubrick, touching what was heretofore in the Text, as *Bartolus* argues from a *Species* not unlike hereunto. Again, 'tis the ſame Thing, when the Rubrick agrees with the Text, and both Text and Rubrick are extant: For then nothing hinders, but that the Text and Rubrick may be quoted for Law. Beſides, whenever the Rubrick of any Law or Statute is clear from the generality of the Words thereof, but the ſubſequent Context is doubtful and obſcure, ſuch Context ſhall then be declar'd and expounded by the Words of the Rubrick

[b] D. 28. 5.

[e] D. 18. 2. 16. Rubrick c. For one Part of the Law explains another: And as Things ſubſequent are beſt interpreted by Things precedent; ſo the Law itſelf receives an Underſtanding from its Rubrick, when ſuch Rubrick is clear and perfect. And that Interpretation ought to be made uſe of, which is moſt conſonant unto, and beſt agrees with the Rubrick.

The Pope order'd this Method to be obſerved in compiling the Laws and Canons of the Church; and, therefore, they were diſtinguiſh'd by Rubricks: But 'tis not lawful to argue from the Rubricks of the *Decrees*, which are the firſt Part of the *Canon* Law; becauſe they are not Authen-

[d] 3. Q. 9. tick d, nor were thoſe Rubricks publiſh'd by *Gratian*, but by ſome other Hand; and, moreover, becauſe ſome of thoſe Rubricks are found to be falſe and corrupted. But, in the *Decretals* and *Clementines*, Rubricks are ſaid to have a Force and Authority, when they have what the Lawyers and Logicians term *perfectam orationem*, *viz.* when they make a perfect Sentence or Propoſition: And an Argumentation drawn from ſuch a Rubrick is lawful and valid, if it proves and ſhews the Legiſlator's Intention. A Rubrick to any Law, containing Caſes not expreſs'd in the Text, makes the Text to be underſtood in a more extended and comprehenſive Manner, and it amplifies the Text.

A General Rubrick is the Cauſe, that the Text ought to be underſtood in a General Senſe: But a Rubrick, having a Special or Particular Text, is not underſtood in a General Senſe, unleſs it be in Caſes wherein the ſame Reaſon appears. Tho' a General Rubrick be looked upon as a Law, ſo far as it agrees with the Reaſon of the Text; yet ſuch General Rubrick ought to be reſtrain'd by the Text, whenever any Iniquity would reſult from the Generality thereof. A Rubrick, that makes a perfect Sentence or Propoſition, is ſufficient Proof for the Deciſion of Cauſes, tho' it has no Text now found belonging to it: But whenever a Rubrick is found to be contrary to the Text, or Body of a Law, the Text itſelf is to be regarded.

TIT. IX.

Of the Roman *Civil Law; how far it prevails in* England, *and wherein we are abridg'd and put beſide the Uſe and Practice thereof by the Common Law, even contrary to the ancient Uſage of it, and the true Meaning of the Laws of this Realm, and the Statutes in this behalf provided: And laſtly, wherein we might be admitted to the Practice of many Things in the* Civil *Law, without any Prejudice to the Common Law; and ſo both Laws might know their proper Bounds, and not one be jumbled and confounded with the other, (as at this Day) to the great Vexation of the Subject.*

AMONG the ſeveral excellent Titles of the *Roman* Civil Law, ſo full of Wiſdom, and of ſuch great Variety in reſpect of the Matters contain'd under them, ſo well adapted for every Moment and Purpoſe of State, both in Peace and War, as nothing can be more neceſſary for the Service of a People, the Profeſſors thereof have very little Uſe of this Law within

within this Part of the Realm, call'd *England*; unleſs it be in the two Univerſities of this Land, *viz.* that of *Oxford*, and alſo that of *Cambridge*: to whom our Kings have granted a larger Liberty in the Practice of this Law [e], than to any other Place in the Kingdom, for the ſake of training-up young Men there in a riper Knowledge of this Profeſſion; that, going Abroad, they might be the more ready in all Matters of Negotiation and Commerce, when the State or Prince ſhould have Occaſion of them to treat with foreign Nations, when they are called thereunto; the Laws of this Nation being of no Uſe at all in theſe Matters, by reaſon of the Difference there is between their Law and ours. So that now a very few Titles are left to the Practitioners of the *Civil* Law to deal in, and moſt of them very ſeldom, and rarely in Uſe, unleſs it be in the two Univerſities aforeſaid, and in the Court of Admiralty, as I ſhall obſerve in the Sequel of this Work. Wherefore, I ſhall here, under this Title, ſhew wherein the Practice of the *Civil* Law, ſo far as it is in Uſe amongſt us, may be increaſed to the Benefit of the Subject, and the Profeſſion itſelf enlarged without any Prejudice to the Common Law, which I much reverence in many Particulars.

[e] Anno 14 *H.*8.

Now, the *Civil* Law, as received here among us, has reſpect either to the ordinary Cognizance of *Marine* Matters, ſome of which are of a Civil, and others of a Criminal Nature; or elſe to the Cognizance of *Martial* Cauſes, which are alſo of a Civil and Criminal Kind; tho' the Civil Law has been much reſtrain'd of late by the Statute Law, in reſpect to the Cognizance of *Martial* Cauſes. I ſhall, *Firſt*, ſpeak of *Marine* Civil Cauſes of ordinary Cognizance among us, according to the Rules of the *Civil* Law. By *Civil* Matters, here, I mean ſuch as concern either the free Uſe of the Sea itſelf, or elſe the Rights that Men have to Trade and Traffick thereon, or the Bargains, Sales, or Contracts, both *proper* and *improper*, that are made or done beyond or upon the Main Sea, or any Creek thereof, or within as much Space from the Sea as the greateſt Winter-wave runs over, upon the Account of any Matter belonging to any Negotiation or Merchandize, or any other Thing appertaining to Trade and Shipping. And,

Firſt, for the Sea itſelf; The Law holds it to be Common, and that every one has a Right to Trade and Traffick thereon [f]; provided it be done without any Prejudice to the State or Prince unto whoſe Territory the Sea is adjoining. The like may be ſaid for the Shore itſelf, that it be either for the refreſhing of themſelves with Water or Victuals, or for the repairing of their Ships, or buying any Thing neceſſary, or elſe it be for the uttering of any Commodity they have, or for the buying of any Thing of the People upon whoſe Land they touch. In all which Caſes it were barbarous to repel any one coming in a peaceable manner; tho' it may happen, upon ſome Jealouſy of the State, that Reſiſtance may be made, either becauſe the State has ſome great foreign Enemy, whoſe continual Invaſion they fear, or becauſe the Sea-coaſts are much infeſted with Pirates: But when it is made manifeſt by Flag, or otherwiſe, that they are no other but Friends, or well-meaning Men, they are to be admitted and entertain'd with all Kindneſs. More of which hereafter, under the Title of *Ships*, &c.

[f] D. 14. 2. per tot.

In reſpect to Contracts in *Marine* Cauſes, ſome are Contracts indeed, or *proper* Contracts; and others are *improper*, or, as it were Contracts. *Proper* Contracts are, all Bargains and Sales whatſoever, made between Merchant and Merchant, for any Commodity, Freight or Traffick in the Ship, or any Sale or Bargain made of the Ship, or any Thing thereunto belonging, as Maſts, Cordage, Anchorage, Victuals, or any other Thing of the like Nature neceſſary for the employing of the Ship. But thoſe Things come under the Name of *improper* Contracts, which are ſuch perpetual Rights as

are between the Purſer or Maſter of the Ship, and the Paſſengers; or between one Paſſenger and another. The perpetual Right, which is between the Purſer or Maſter of the Ship, and the Paſſengers, is, That the Purſer or Maſter be anſwerable for all ſuch Wares or Goods as are brought into the Ship, whether deliver'd to himſelf, or any of his Mariners: For he ought not only to be juſt and honeſt himſelf, but likewiſe to employ the
[g] D.4.9.7.4. miniſtry of honeſt People about him [g]; and therefore, the Maſter of the
[h] D.14.1.1.2. Ship is no leſs bound for their Perſons, than for his own [h]. The Paſſengers, again, are honeſtly and readily to pay the Maſter of the Ship their Freight-money, and all ſuch other Charges of Diet, and other Proviſions, as they have put to; wherein, if there be any Default of any Side, the Law
[i] D.14.1.1.7. & 17. affords an Action call'd *Exercitoria* [i], whereby the one or the other may be relieved. Theſe, and many other Matters, do belong to *Marine* Cauſes, eſpecially if they are tranſacted on the Sea: But, by Prohibitions, the Courts of *Weſtminſter* have got ſome of thoſe Cauſes within their Juriſdiction, how juſtly I ſhall enquire by and by. And ſo much at preſent, of ſuch Civil *Marine* Matters, whereof the *Civil* Law here in *England* uſually holds Plea and Cognizance, or (at leaſt) ought to do. I ſhall next ſpeak of Criminal *Marine* Matters, which belong to the Court of Admiralty, but ſtill by way of Commiſſion from the Prince: And the Firſt of theſe Cauſes is that horrid Crime of *Piracy*, deteſted of God and Man; the Actors wherein,
[k] Lib.3. Offic. *Tully* [k] calls Enemies to all Mankind, and to whom neither Faith nor Oath is to be kept.

Now, a *Pirate* is a Sea-Robber, who, to cheriſh himſelf, either by Subtilty, or open Force, ſets upon the Merchants and others trading by Sea, and diſpoſſeſſes them of their Goods and Lading, if he gets the Upper-hand, and ſometimes deprives them of their Lives, and ſinks their Ships. But here we muſt note, That Matters of Repriſals are no Piracies, though often-times there happens no leſs Outrage in them, than in the other Caſe; for that Repriſals are done by the Prince's Commiſſion granted to the Subject, for a Redreſs of ſome Injury done to Himſelf, or his Subject, by ſome foreign Prince; and tho' Amends have been requir'd by Law, yet cannot be had; whereupon Licence is given to the Subject to relieve himſelf, by what way he can, againſt the other Prince, or any of his Subjects, by taking ſo much Goods of his, as himſelf was endamaged: Which Courſe of Proceeding is held, among Princes, lawful, for the take
[l] Bart. in L.14. C.1.9. of bringing them to do Juſtice, where it is lawfully demanded [l]. Before 27 *Hen.* 8. *cap.* 4. all Treaſons, Murders, and Felonies done on the High Sea, or in any Haven, River, Creek, Port, or Place where the Admirals have or pretend to have any Juriſdiction, were to be determin'd according to the Courſe and Direction of the *Civil* Law: But by this Statute, and that of 28 *Hen.* 8. *cap.* 15. all thoſe Offences committed upon the Sea, or in any other Place where the Admiral claims to have Juriſdiction, ſhall be now enquir'd into, try'd, heard, and determin'd in ſuch Places and Counties within the Realm, as ſhall be limited by the King's Commiſſion, in like manner as if ſuch Offences were done at Land. And ſuch Commiſſions (being under the Great Seal) ſhall be directed to the Lord Admiral, his Lieutenant or Deputy, and to three or four ſuch others as the Lord Chancellor ſhall name. The ſaid Commiſſioners, or three of them, have Power to enquire of ſuch Offences, by twelve Men of the County, ſo limited in their Commiſſion, as if ſuch Offences were done at Land within the ſame County; which Way of Trial by Twelve Men, is according to the *Feudal* Laws of *Lombardy*, from whence this Method of Trial by Juries ſeems to have been borrow'd. And every Indictment ſo found and preſented ſhall be good in Law; and ſuch Order, Proceſs, Judgment, and Execution ſhall be uſed, had, done, and made thereupon, as againſt Offenders for Murder

Murder or Felony done at Land. Alſo, the Trial of ſuch Offences (if they be denied) ſhall be had by Twelve Men of the County, limited in the Commiſſion, (as aforeſaid), and no Challenge ſhall be had for the Hundred: And ſuch as ſhall be Convict of ſuch Offences, ſhall ſuffer Death, without Benefit of Clergy, and forfeit Lands and Goods, as in Caſe of Felonies and Murders done at Land. But this Act ſhall not prejudice any Perſon or Perſons (urged by Neceſſity) for taking Victuals, Cables, Ropes, Anchors, or Sails out of another Ship that may ſpare them, ſo as that they pay either Ready Money or Money-worth for them, or give a Bill for the Payment thereof, *viz.* if they be taken on this Side the Streights of *Morocco*, within four Months; but if beyond, within twelve Months. When any ſuch Commiſſion ſhall be ſent to any Place within the Juriſdiction of the *Cinque Ports*, it ſhall be directed to the Warden of the the ſaid Ports, or his Deputy, with three or four ſuch other Perſons as the Lord Chancellor ſhall name: And the Inquiſition and Trial of ſuch Offences there, ſhall be made and had by the Inhabitants of the ſaid Ports, and the Members of the ſame. The 28. *Hen.* 8. *cap.* 15. is Verbatim the ſame with the 27 *Hen.* 8. *cap.* 4. ſave only that it extends as well to Treaſons, and all other capital Offences, committed within the Admiral's Juriſdiction, as unto Felons, Robberies, and Murders there done.

So that, from what has been ſaid, it appears, That the Juriſdiction of the Court of Admiralty, as the Matter and Proceedings therein, are now confined, by the Laws of this Realm, to Things done upon the High Seas only, as Depredations and Piracies committed thereon; (touching which, I ſhall hereafter give the Reader a particular Title); Offences of Maſters and Mariners upon the High Sea; Maritime Contracts made and to be executed upon the High Sea; the Captures of Prizes, and Matters of Repriſal upon the High Sea, and the like. But touching Contracts or Things done within the Bodies of *Engliſh* Counties, or upon the Land beyond the Sea, tho' the Execution thereof be in the ſame meaſure upon the High Sea; as Charter-parties, or Contracts made even upon the High Sea, touching Things which are not in their own Nature Maritime, as a Bond or Contract for the Payment of Money; ſo alſo of Damages in Navigable Rivers within the Bodies of Counties, Things done upon the Shore at Low-water, Wreck of the Sea, *&c.* theſe Things, I ſay, now belong not to the Admiral's Juriſdiction: And thus the Common Law, and the Statutes of *Richard* the Second [m], confine and limit the Juriſdiction of the Admiralty to Matters of a Maritime Nature, and ſuch only as are done upon the High Sea.

13 Ric. 2. cap. 15. 15 Ric. 2. cap. 3.

Some of our common Lawyers will not have the Court of Admiralty to be founded on the Authority of the *Civil* Law, but that it had its Power and Juriſdiction from the Laws and Cuſtoms peculiar to this Realm, in ſuch Matters as are proper for its Cognizance; and, they ſay, this appears by the Proceſs of this Court, *viz.* the Arreſt of the Defendants Perſons, and the Attachment of their Goods; and likewiſe by thoſe Cuſtoms and Laws Maritime, whereby many of its Proceedings are directed, and which are not, in many reſpects, conformable to the Rules of the *Civil* Law; ſuch are thoſe ancient Laws of *Oleron*, and other Cuſtoms introduced by the Practice of the Sea, and the Stile of the Court. But theſe Men are much miſtaken in their Judgments and Imaginations, perhaps from the little Knowledge they have in the Hiſtory, or from a leſs Acquaintance with the *Civil* Law, (as I ſhall evince in another Title, when I come to treat of the Court of Admiralty in a more particular manner). And thus much of the Cauſes, which do ordinarily belong to the allow'd Cognizance of the *Civil* Law within this Land.

It

It now follows, that I ſhould ſay ſomewhat of thoſe Things, wherein the *Civil* Law deals incidently, and by Authority of the Prince, and is not the *ordinary* but *extraordinary* Object of the *Civil* Law; however, they cannot be well manag'd by ſuch as have no Knowledge in this Law, whereof there are three Sorts. The Firſt concerns Matters of Foreign Treaties between one Prince and another. The Second is the ordering of Martial Cauſes, whether they be Civil or Criminal in an Army. And the Laſt is the Proceedings and Judgments had upon Coats of Arms and Enſigns of Honour, and the Deciſions made upon Challenges of the Rights of Honour and Precedency, where any of them is in Controverſy. For in reſpect of the firſt, whereas all other neighbouring Nations round about us, and with whom we have to do, are govern'd by the *Civil* Law, and as all Treaties are to be decided by Law, (both in regard to thoſe Things which are in Diſpute, and to be concluded by Law, and in reſpect of ſuch Matters as are to be determin'd by Conſultation and Agreement) ſurely no one can be ſo proper as a *Civilian*, to whom their Law is known, as well as to themſelves: And if (perhaps) he underſtands not their Language, yet he underſtands the Language wherein the Laws themſelves are written, and is the fitteſt Tongue for Treaties between Princes and Princes, becauſe it is a common Language to be learn'd by all the Weſtern Part of the World; and hereby every Prince retains his own Majeſty in Parlying, as it were, in his own Language, and not be forced to ſpeak in another Prince's Tongue, which, no doubt, is a great Diſadvantage to him that ſhall treat; becauſe every Nation has ſome proper Idiom, not ſo well diſcern'd by the Book-ſpeaker, as perceiv'd by the Natives of the Country where it is ſpoken, and wherein a Stranger may eaſily be deceiv'd. How much Foreign Princes eſteem the Skill of a *Civilian* in theſe Matters, may be eaſily underſtood hereby, *viz.* That for the moſt part they never ſend any Embaſſy for treating upon any League or Matter of Commerce, but one or more in the Embaſſy are *Civilians*. And if the Care of theſe Things be ſo great with them, ſurely we ought not to have a light Regard thereunto: For by what Laws their Leagues and Negotiations are wont to be directed, by the ſame muſt ours be order'd; ſo that in this Point one kind of Learning muſt ſerve for both; for otherwiſe one Nation will not be convinc'd by the other what their Capitulations are. And certainly ſuch as, over and beſides their own Experience, have the Knowledge of the *Civil* Law, have a double Advantage above another Man that wants the ſame Help. *Firſt*, Their own Underſtanding, which for the moſt part is of like Proportion with that of other Peoples: And, *Secondly*, Their Skill in the Laws themſelves, which are the Quinteſſence of Wiſdom above other Human Learning, and were wholly compos'd on the mature and deliberate Reſolutions of ſuch Emperors as then govern'd the World, or elſe were the Judgments of ſuch wiſe Men as were moſt eminent for Knowledge in worldly Affairs under them. But who, when he ſees a Sword in its Scabbard, knows whether it will cut or not, tho' the Form thereof be a Preſumption that it will? But draw it out, and try the Blade thereof, and you will then ſee the Sharpneſs of it. I make no Application hereof, ſince my Meaning may be well enough known by my Words. But in theſe Matters the Wiſdom of the State knows beſt what is to be done, and I only remember what other Nations do, leaving the reſt to the grave Conſideration of thoſe who are to furniſh out, and ſend Embaſſies.

The Second Court, wherein the *Civil* Law has its Uſe in this Kingdom, is the Court Martial, or Military Court, anciently held before the Conſtable and Marſhal, as the ordinary Judge in this Caſe, or otherwiſe before the King's Commiſſioners of that Juriſdiction, as delegated Judges. The Matter of their Juriſdiction is declar'd and limited by the Statutes of the 8th

8th of *Richard* the Second, Cap. 5. and by the 13th of *Richard* the Second, Cap. 2 [n]. And not only by those Statutes, but their Jurisdiction is also declar'd and limited by the Common Law itself, as it is said, as follows, *viz. First*, Negatively: For they are not to meddle with any thing determinable by the Common Law. And, therefore, since Matter of Damages, and the Quantity and Determination thereof, is of that Cognizance, the Constable and Marshal's Court cannot, even in such Suits as are proper for their Cognizance, give Damages against the Party convicted before them; but at most can only order Reparation in Point of Honour, as by ordering the Convict *Mendacium sibi ipsi imponere*, to give himself the Lye: Neither can they, as to the Point of Reparation, in Honour, hold Plea of any such Words or Things, wherein the Party is relieveable by the Courts of the Common Law. *Secondly*, Affirmatively: For their Jurisdiction extends to Matters of Arms, and Matters of War, *viz. First*, As to Matters of Arms or Heraldry, (for by Arms I here mean Heraldry,) the Constable and Marshal had the Cognizance thereof, *viz.* touching the Right of Coat-Armour, Bearings, Crests, Supporters, Pennons, *&c.* And also touching the Rights of Place and Precedence, in Cases where either Acts of Parliament, or the King's Patent, (he being the Fountain of Honour) have not already determin'd it; for in such Cases they have no Power to alter it. Those Things were anciently allow'd to the Cognizance of the Constable and Marshal, as having some Relation to Military Affairs; but so restrain'd, that they were only to determine, and give Reparation to the Party injured in Point of Honour, but not to repair him in Damages. But of this Part of this Court, which relates to Coats of Arms, and Points of Honour, I shall speak hereafter under a Title by itself, and only here discourse of Matters of War.

[n] 8 *Rich.* 2. c. 5. 13 *Rich.* 2. c. 2.

And, therefore, *Secondly*, as to Matters of War, it is to be observ'd, That the Constable and Marshal had a double Power, *First*, A *Ministerial* Power, as they were two great ordinary Officers, *anciently*, in the King's Army: The Constable being, in effect, the King's General, as the *Magister Militum* was among the *Romans*, and the Marshal, or *Comes*, (as the *Civilians* stile him) was employ'd in marshalling the King's Army, and keeping the Lists of the Officers and Soldiers therein; and his Certificate was the Trial of those whose Attendance was requisite. See *Littleton* [o]. By the *Roman* Law, he was the General's Companion. But this Power is now at an end with us; and, therefore, I will say no more about it. Again, *Secondly*, The Constable and Marshal had also a *Judicial* Power, or a Court wherein several Matters were determinable, as the *Magister Militum*, or General, had among the *Romans*, and the *Comes Militum* was his Assessor. As, *First*, Appeals of Death, or Murder committed beyond the Sea, were heard before him, according to the Course of the *Civil* Law. For Martial Causes are either Civil or Criminal, as already related, and both are determinable by the *Civil* Law in other Countries, tho' only the latter with us in a Court Martial. *Secondly*, The Rights of Prisoners taken in War, were anciently adjudged in this Court of the Constable and Marshal, tho' this is now grown out of Use among us also. *Thirdly*, The Offences and Miscarriages of Soldiers, contrary to the Laws and Rules of the Army, were of the Cognizance of this Court: For, preparatory to an actual War, the Kings of this Realm, by the Advice of the Constable (and Marshal,) were always wont to compose a Book of *Rules* and *Orders*, for the due Order and Discipline of their Officers and Soldiers, together with certain Penalties to be inflicted on the Offenders, and this was called *Martial* Law. We have extant in the Black Book of the Admiralty, and elsewhere, several Exemplars of such Military Orders, and especially that of the 9th of *Edward* the Second, composed by the King, with the Advice of the Duke of *Lancaster*,

[o] Sect. 102.

and others. But touching the Buſineſs of Martial Law, tho' we have copied the *Romans* much, theſe Things are to be obſerved; *viz.*

Firſt, In Truth and Reality it is not a Law, as the *Roman* Law was, but ſomething indulg'd, rather than allow'd as a Law; the Neceſſity of Government, Order and Diſcipline in an Army, is that only which can give thoſe Laws a Countenance: *Quod enim neceſſitas cogit, defendit. Secondly*, This indulged Law was only to extend to Members of the Army, or to thoſe of the oppoſite Army, and was never ſo much indulged, as intended to be (executed) or exerciſed upon others: For others, who were not liſted under the Army, had no Colour of Reaſon to be bound by Military Conſtitutions applicable only to the Army, whereof they are not Parts; but they were to be order'd and govern'd according to the Laws to which they were ſubject, tho' it were a Time of War. *Thirdly*, That the Exerciſe of *Martial Law*, whereby any Perſon ſhould loſe his Life, Member, or Liberty, may not be permitted in Time of Peace, when the King's Courts are open for all Perſons to receive Juſtice, according to the Laws of the Land. This is, in Subſtance, ſaid by the Petition of Right, in
[p] 3 Car. 1. King *Charles* the Firſt's Reign [p], whereby ſuch Commiſſions and *Martial Law* were repealed, and declared to be contrary to Law: And accordingly was that famous Caſe of *Edmund* Earl of *Kent*, who, being taken at
[q] 15 Edv. 2. *Pomfret* [q], the King and divers Lords proceeded to give Sentence of Death againſt him, as in a Kind of Military Court, by a ſummary Proceeding;
[r] 1 Edv. 3. which Judgment was afterwards reverſed in Parliament [r].

In this Military Court, commonly call'd a *Court-Martial*, or *Court of Honour*, if it be concerning Armorial Enſigns, *&c.* the *Civil* Law has been uſed and allow'd in ſuch Things as belong to their Juriſdiction, as the Rule and Direction of their Proceedings and Deciſions, ſo far forth as the ſame is not controlled by the Laws of this Kingdom, and thoſe Cuſtoms and Uſages which have obtained in *England*, which, even in Matters of Honour, are in ſome Points derogatory to the *Civil* Law. But this Court has been long diſcontinu'd, according to my Lord Chief Juſtice *Hales*, in
[s] Pag. 42. his *Hiſtory of the Law* [s], upon great Reaſons of State.

As to *Civil* Martial Cauſes, which I do not find here were ever determinable in this Court here in *England*, they are where either the Captain or the Soldier demands ſomething that is due, and with-held from him, as his Stipend, his Apparel, which, among the *Romans*, was due twice a Year, *viz.* the Summer Apparel from the Firſt of *April* to the Firſt of *September*, and the Winter Suit from thence to *April* again: His Diet, which, among the *Romans*, was two Days hard Biſket, the third ſofter Bread; one Day Wine, another Day Vinegar; one Day Bacon, and two Days Mutton. I ſhall have Occaſion to ſpeak of thoſe Things more largely under the Title of *Soldiers*, where I ſhall handle their Privileges and Immunities, and ſpeak of their Faults as proper to themſelves, and common to others. But to return to the *Roman* Civil Law, as it may or ought to be receiv'd in this Kingdom: And thus, in the next Place, it follows, that I ſhould ſhew wherein the Practice of the *Civil* Law may be increaſed, to the Benefit of the Subject, without any Prejudice to the Common Law.

I ſhall begin with the Piety of Fathers towards their Children, and the Duty of Children towards their Parents, which is the Beginning of all Commonwealths: For even Nature itſelf has taught us that, not only in the moſt brutiſh People that are, but has even ſettled it in the moſt ſavage Kind of Beaſts that are, the one to cheriſh that which it has brought forth, and the other again to love that which has brought it forth: And yet, what Law is here in *England*, which provides for the one or the other, unleſs it be the 43d of Queen *Elizabeth?* and that Law only concerns poor Folks Children, (whereas otherwiſe they muſt be a Burthen to the Pariſh):

Pariſh) : But for the Parents themſelves, or other Children that are caſt off, either by the Negligence or Unnaturalneſs of one towards the other, there is no Proviſion at all made : yet, by the *Civil* Law, there is a Purveyance made, whereby both the Father is compelled to acknowledge his Child, [t], (if there be any Variance between the Husband and Wife, upon any Jealouſy or Suſpicion of Adultery, if the ſame cannot be proved by the Woman's own Confeſſion, by Witneſſes, by the Act itſelf, or ſome other violent Preſumption [u]), and to nouriſh and maintain the ſame : but if the Fault appears againſt her, and it be ſo ſentenced by the Judge, then he may refuſe both the one and the other. But for other Children, touching whom there is no ſuch Doubt, the Parents may be conſtrain'd to maintain, cloath, and feed them, and to ſet them out a Portion of their Goods, according to the Eſtate and Faculty of their Parents, and according to the Merits of their Children. And as the Father is in this manner bound unto the Child ; ſo the Child again is obliged unto the Parents, to provide for their Suſtenance, as far as his Ability will extend : for it is very unnatural that the Parents ſhould want, ſo long as the Children have Means to relieve them. In both which Caſes, if either the Parents refuſe to admit of their Children, or the Children refuſe to yield Comfort unto their Parents, the Judge may, by the Interpoſition of his Authority, enjoin each to maintain the other according to their Ability, and as it ſhall ſeem meet in his Diſcretion : Which, if either of them ſhould deny to yield, the Judge may, by a Diſtreſs of their Goods, taken and ſold to the Value thereof, compel them to perform his Order ; and yet that only in caſe of Maintenance, and not to diſcharge Debts, wherein either of them ſtand bound unto their Creditors.

[t] D. 25. 3.

[u] D. 25. 4.

If a Man here in *England* dies, and leaves his Wife his Executrix, ſhe, upon her after-Marriage, may carry away all his Eſtate unto her ſecond Husband, who gives and ſpends thereof as he pleaſes, without any Regard had to the Children of the firſt Husband, by whom all or moſt of thoſe Goods came ; inſomuch, that often-times thoſe Children, when they come of Age, and are gone abroad into the World, have nothing to begin the World withal, whereby many of them come to Beggary, and others to more fearful Ends ; (for Neceſſity is a hard Weapon) ; nor is there any Means within this Realm to relieve this Miſchief, for ought I can learn : But by the *Civil* Law there is a very good Remedy [x] ; for, by that Law, neither the Woman ſurviving her Husband, nor the Man ſurviving his Wife, having Iſſue between them during the Marriage, have the Property of thoſe Goods which either of them brought the one to the other, and are left behind by the Deceaſed ; but the Property is veſted in the Children of the Deceaſed : The Perſon that ſurvives, had only the Uſe and Benefit of them during his or her natural Life. Which Courſe, if it were taken here in *England*, many poor Fatherleſs and Motherleſs Children wou'd be in a better Condition than they are at preſent ; for then, tho' their preſent State were hard, their future would be better, as being ſecured to enjoy their Fathers and Mothers Right. Nor could ſuch Men or Women which marry, or are married with Perſons of this ſort, much complain if this Law was eſtabliſh'd here : For tho' they have not a Perpetuity in another's Eſtate by this Means, yet they will have a long and beneficial Fruition thereof, even ſo long as the Party, in whom they were intereſted, did live. But, for the Return thereof unto the right Owners, the Law is ſo ſcrupulous, that if the Husband or Wife marry, it will have him that is to marry the Widow, bound, with good Sureties, for due Reſtitution of the Part of the Deceaſed, to be made unto the Children of the former Marriage.

[x] C. 5. 9. t. t.

Another

Another Inconvenience there is in Executors among us, Couſin-german to the former, which goes altogether uncontrouled, whereby I conceive there is no Law in this Land to correct it, *viz.* The Trifling of Executors in paying of Legacies and Bequeſts, under Pretence of Debts unknown, which they pretend they muſt provide for, in order to indemnify themſelves: Whereby many Legacies are never paid, but ſtand (as it were) ſuſpended till the Day of Judgment. Againſt this the *Civil* Law has provided two Remedies: One by exacting Bond of the Executor, that he [y] will pay the Legacies without Fraud or Deceit [y], according to the Will of the Deceaſed: The other, that if he refuſes ſo to do, the Judge may then [z] put the Party Complainant into the Poſſeſſion of that which is demanded [z]. For it is not enough for the Heir or Executor to pretend a Debt, to the end that he may ſtay the Legacy which he has in his Hands, but he muſt make it plain and manifeſt to the Judge, that there is ſuch a Debt owing, and that a Suit thereupon is either already begun, or very likely to be begun in a ſhort Time, without Fraud or Colluſion, otherwiſe many of [a] thoſe Pretences may be vain and eluſory [a]. And in caſe there be any ſuch juſt Cauſe of Fear indeed, or there be ſuch a Suit in Truth commenced on the ſame, the Executor may ſecure himſelf or his Surety from the Legatary, *viz.* That in caſe the Debt be evicted of him, he ſhall repay to the Exe- [b] cutor what he has received [b]. Wherein, though it may be ſaid to be ſafer for the Executor to ſecure himſelf, by keeping the Legacy ſtill in his Hands, than to truſt it upon Surety, or other Caution, becauſe thoſe Proviſions are often frail: Yet ſince this kind of dealing is injurious to the Legatary, and the with-holding thereof, for the moſt part, has no honeſt Defence, it becomes the State that ſuch ill Dealing be redreſſed. For by this Means, Mens Wills, which are their laſt Ordinances, ſhall have that End which the Teſtators themſelves intended; which if they had known in their Life-time, their Executors would not have perform'd, they would [c] never have put them in Truſt as they did [c]. Beſides, hereby the Names of Executors, which are now charged with manifold Imputations by the ill Dealing of ſome, will be reſtor'd to their former Credit, which was to diſcharge the Truſt repoſed in them by the Perſon deceas'd: For the Will of the Deceaſed cannot be defrauded without great Sin.

[y] D. 36. 1 3. 1. 2 & 3.

[z] D. 35. 3. 4.

[a] D. 50. 17. 184.

[b] D. 35. 3. 3.

[c] D. 28. 5. 4.

Another Miſchief there is in Executors and Adminiſtrators, not only uncontroulable by the Law of this Land, but rather allow'd and juſtify'd by it; and that is, when they have once got the Authority into their Hands, and appraiſed all at the loweſt Rate, they will ſell off all at the higheſt Price they can, and anſwer the poor Children and Legataries (for whoſe Good they were appointed Executors) at the Value in the Inventory only, contrary to all Right and Reaſon. For by the Law, an Executor is to ſell nothing of thoſe Things which are left unto the Children or Legataries, but ſuch Things only which by keeping cannot be kept, or which being kept will be chargeable to the Heirſhip; or otherwiſe the Teſtator was ſo indebted, that his Eſtate muſt be ſold for the ſatisfying of his Creditors; or laſtly, that he himſelf order'd by his Will that ſomething ſhould be ſold. But for ſuch Things as may be kept, and by keeping will not grow worſe, he ought preciſely to preſerve them, eſpecially where the Teſtator has bequeathed any Thing in Kind. And if he ſells any of thoſe Things which he ought not to ſell, he muſt ſell it by the Order of the Judge interpoſed in this behalf, and upon juſt Cauſe proved before him; wherein, if it after appears that the Judge was abuſed by any falſe Allegation or corrupt Teſtimony, the Sale is void, and the Minor, when he comes to his full Age, or within five Years after, may reverſe and recover that which is thus ſold by Colluſion, out of the Hands of him to whom it was ſold, as being done againſt the Authority of the Law. And

that

that we may the better underſtand how preciſe the Law is in this Point, and what Things it allows may be ſold without the Decree of the Judge, I will ſet down the Words of the Law itſelf, ſpeaking of Tutors and Governors of Pupils, whoſe Place is ſupply'd by Executors and Adminiſtrators, ſo far forth as they have the Tuition and Government of Minors during their Non-age. And it is a Law of *Conſtantine* [d], reproving a former Law of *Severus* the Emperor, which gave leave to Tutors and Curators to ſell all the Gold, Silver, precious Stones, Apparel, and other rich Moveables the Teſtator had, and to bring the ſame into Money, which turn'd greatly to the Diſadvantage of many Orphans: Whereupon *Conſtantine*, after he had firſt order'd, that nothing ſhould be ſold of the Pearl, precious Stones, Utenſils of the Houſe, and other neceſſary Stuff and Ornaments of the ſame, ſays thus, *viz.* Neither ſhall it be lawful for them, (meaning Tutors or Curators) to ſell the Houſe wherein the Father died, and the Child grew up; for it is ſufficient Woe to the Child not to ſee his Anceſtor's Images not faſten'd up, or elſe pull'd down: Therefore, let the Houſe, and all other his moveable Goods, remain ſtill in the Patrimony of the Child; neither let any Edifices or Buildings, which came in good Repair with the Inheritance, ſuffer Decay or Ruin by the Colluſion of the Tutor: But rather, if the Father, or he whoever the Minor was Heir unto, has left any Building in decay, let the Tutor, both by the Teſtimony of the Work itſelf, and the Faith of many Men, be compell'd to repair it. For by this Means the yearly Rent will bring in more Profit to the Minor, than the Price of the Things being deceitfully ſold will do the Minor any good. Nor does the Law only make Proviſion againſt Tutors, but alſo againſt immodeſt and intemperate Women, that of entimes engage unto their new marry'd Husbands, not only their own Eſtate, but even the Eſtate and Lives of their Children. Further, it croſſes the Courſe of putting the Childrens Money to Uſury, (tho' it was anciently thought, that therein conſiſted all the Strength of the Patrimony.) For that Courſe is ſeldom long, ſcarcely ſtable and continual, and that thereby many Times the Money being loſt, the Childrens Eſtate came to nothing: And, therefore, his Concluſion is, that the Tutor ſhould ſell nothing without the Order of the Judge, ſaving the Teſtator's old Apparel, or thoſe Things which by keeping could not be kept from Corruption, and ſuch Cattle as were ſuperfluous. Whereby it appears, how careful that Age was, not to give Way to Executors by Sale of the Teſtator's Goods to make Gain of Orphans. Neither is this Age better than that; but that which was feared then, may be provided for now by the like Authority as was then.

[d] C. 5. 37. 21.

In this Land, a Man dying, and leaving Legacies to his Children, and his Wife Executrix, or dying Inteſtate and taking Letters of Adminiſtration, and in her ſecond Marriage bringing all the firſt Husband's Eſtate, and her Childrens Portions, unto her ſecond Husband, and then dying; I ſay, there is no Remedy by the *Engliſh* Law againſt the Husband, to recover the ſaid Legacies, and Portions due to the Children, out of his Hands; becauſe he is neither Executor nor Adminiſtrator, and that he came not to thoſe Goods by Wrong, but by the Delivery of the Executrix whom he marry'd. But yet, by the *Civil* Law, there is a Remedy [e], and that by this Claim that the ſaid Goods came unto his Hands, and that there is no Reaſon any one ſhould be made rich by my Goods againſt my Will. For Legataries have no Action againſt any as Adminiſtrators in their own Wrong, or as Hinderers of the Performance of the Laſt Will of the Deceaſed, but Executors only, and they then alone, when the Party having it, holds it by Wrong, and not by lawful Delivery, which in this Caſe is otherwiſe.

[e] D. 12. 1. 32.

Again, By the Law of this Realm, there is no Proviſion to preſerve the Eſtate of a Prodigal Perſon from Diſſipation, unleſs the Father provides againſt this Miſchief, by ſome other good Order in his Life; but he is ſuffer'd to ſpend and waſte his Goods, till there be nothing left, (as tho' the Prince and State had no Intereſt in ſuch a Subject, to ſee that he did not waſte his Eſtate, and abuſe his Goods) whereby many great Families come to Ruin; and many Children, whom their Fathers have carefully provided for in their Life, come to Shame and Beggary. This ſeems to be a great Diſcouragement to Trade and Induſtry; for who will labour and take Pains for a riotous Son? But the *Civil* Law has given a Remedy againſt ſuch Profuſion of Expences. For that Law counts a Man thus impotent in his Deeds, however ſenſible he may be otherwiſe in his Words, to be like unto a Madman, and ſets a Curator over him [f], for preſerving and well-ordering of his Eſtate, as if he were a Child or a Madman; and ſuch Curator has Power over him and his Eſtate, until he returns to a ſober way of Life, and then the Office of a Curator ceaſes. This is practis'd in wiſe Countries, to diſcourage Riot, Luxury, and Profuſion, which muſt end in the Ruin of every State ſooner or later. The like does the *Civil* Law to a Widow or ſole Woman, who lives in a riotous Manner, having no Regard to her Fame or Eſtate [g].

[f] D. 27. 10.

[g] D. 27. 10.

I find an old Practice anciently uſed in our Eccleſiaſtical Courts, for reſtraining of Executors or Adminiſtrators from dealing covenouſly in an Executorſhip or Adminiſtratorſhip, when there are more Executors named in a Will than one, or more Adminiſtrators deputed by the Ordinary in the Adminiſtration than one; which Practice were well, if it were recover'd and brought back to its former Uſe again. For now, as Things ſtand, oftentimes one knaviſh Fellow named an Executor in a Will, or appointed Adminiſtrator by the Ordinary, with ſome other well-meaning Perſons, by getting a Start of the reſt in the Buſineſs, ingroſſes all into his own Hands, and without the Privity or Concurrence of the others, ſells, releaſes, and diſpoſes all at his own Pleaſure, contrary to the Mind either of the Teſtator, or the Ordinary, who would not have named ſo many in the Will or Adminiſtration, but to the Intent that all might or ſhould execute and adminiſter, and one communicate their Acts to the other. The contrary whereof is many Times very prejudicial, to thoſe who are to take Benefit by the ſaid Will or Adminiſtration, who for want of a due Performance of this kind of Proceeding, are defrauded of all that which in Right or Reaſon ſhould have come to them, either by the Teſtator's Will, or by the Benefit of the Law. And yet there is no Remedy for this in Law, as far as I know: For that all theſe making but one Perſon in Law, the Law gives no Action to the one to ſue the other. But yet the ancient Practice of the Eccleſiaſtical Law, founded on the *Civil* Law, has given a Remedy, which would redreſs all this Grievance or Miſchief, if it were called again into Uſe, and might go without Controlment, as the Equity of the Cauſe requires. And the Remedy is this, *viz.* That other of the Executors or Adminiſtrators as are interverted thus from the Execution of the Will, or the Adminiſtration, by the Subtlety of any like Executor or Adminiſtrator, ſhould implore the Aſſiſtance of the Judge, and pray him, by Virtue of his Office, to call in ſuch meddling Executor or Adminiſtrator, and order him, under a ſevere Penalty, not to proceed any further in the ſole Execution thereof, but communicate all his Acts and Dealings to the reſt of his Co-executors, *&c.* Which, if it were ſo order'd, would cauſe many Mens Wills and Adminiſtrations to be better perform'd than they are at preſent; and render many poor Orphans Eſtates more ſure and certain, than commonly they are in ſuch Executors or Adminiſtrators Hands.

And

And certainly, in this Caſe, there is ſome good Uſe of Superviſors in dead Mens Wills, (which ſeveral make a meer Jeſt at, by calling them the *Candle-holders*; as tho' they could do nothing elſe in the Execution thereof, but hold the Candle whilſt the Executors tell over the Money of the Deceas'd), if they might be permitted to put in Practice that Authority which the Law gives them; and that is, when they find any Executor to deal fraudulently in the Execution of the Teſtator's Will, wherein they are named Superviſors, or to engroſs all the Eſtate of the Deceaſed into his Hands, they may call him to a particular Account, that it may be ſeen how the Adminiſtration ſtands, and that each Executor may communicate unto the other all particular Receipts and Diſburſements: Which if any one ſhall refuſe to do, then may the Superviſor complain thereof to the Judge, as tho' ſuch Executor dealt not honeſtly in the Execution of his Office, who tho' (perhaps) in the Beginning, they could not take hold of him for the true Execution of the Will; becauſe the Teſtator had made choice of him, and therein approved of his Honeſty, and for that no Man hath requir'd Caution for any Legacy bequeathed in the Will, (in which Caſe the Judge might take Bond of him for ſuch Legacies as are bequeathed in the Will); yet the Judge may, in this Caſe, if he finds him juſtly ſuſpected of Fraud and Deceit, remove him, according to a Parity of of Law [h]. For neither the Teſtator himſelf, if he were living again, would endure him in this Caſe, but would blot his Name out of his Will: Nor ought the Judge to ſuffer him, whoſe Care it is to ſee that dead Mens Wills take Effect according to the Teſtator's Meaning. All which Things the *Civil* Law has provided for, and infinite other Things of the like good Order, wherein the *Engliſh* Law is defective, if the *Civil* might be allow'd to be put in Practice without Impeachment. And thus far touching thoſe Things wherein the *Civil* Law might be encouraged, without Prejudice to the Common Law, becauſe the latter Law has no Cognizance thereof. And yet I do not produce theſe as the only Cauſes, wherein the *Civil* Law may be licenſed to deal, over and above the Practice of thoſe Things which it has already obtained; but that theſe are few, among many others that might be ſorted out, if our Legiſlators thought fit to enlarge the Profeſſion of the Civil Law.

[h] I. 1. 26 t. t.

The laſt Thing I ſhall conſider, is, The Neceſſity of retaining the Practice of the *Civil* Law within this Land, as now uſed, or ought to be uſed. It is a Matter confeſſed on all Hands, that, in every Government, two Things ſway the whole State, *viz.* Peace at Home, and War Abroad: which, as they have their Seaſons, ſo they have their Cauſes and Effects; the one from Counſel at Home, and the other from Diſcipline Abroad: neither can the one or the other of theſe be maintain'd, without their proper and peculiar Laws. Beſides, every one knows, That in Peace, there is as much need of Vent by Sea, for the Advantage of the State, either by an Importation of thoſe Things which we want at Home, or by an Exportation of thoſe with which we abound; neither of which can be had or enjoy'd without their proper Laws fit and appertaining to a foreign Trade. And what Law is there, that orders theſe Matters, but the *Civil* Law alone, which gives a Form to Navigation, and all Occurrences that happen by Sea, whether they be in or about Navigation itſelf, or Maritime Contracts that are made in, or upon, or beyond the Sea? For Foreigners will not traffick with us on the Bottom of our own Municipal Laws, which are unknown unto all other States; and therefore it is neceſſary to eſtabliſh ſome more univerſal Law; and we have no ſuch extant beſides the *Civil* Law, or the Law of Nations, to be found in the Books of the *Civil* Law.

As a Form of Law is requiſite in Peace at Home, and Marine Affairs Abroad, that every Thing may have its due Effect, according to the Right thereof;

thereof; ſo it is alſo neceſſary on Warlike Exploits on the Sea; that every Action ſhould have its Bounds and Limits, whereby Juſtice may be adminiſter'd. And if this is to be obſerved, where lawful War is held between Prince and Prince, that every one be not left to his own arbitrary Will and Pleaſure, it is much more expedient to be put in Uſe in Piracies, and other Sea-robberies, where the Innocent is ſpoiled, and the Spoiler is enriched; the Redreſs whereof is only to be had by the Law of the Admiralty, unto which the Princes of this Land have granted that Authority: But by the Means of monſtrous Fictions, and other Subtleties of Law, which are of Credit unto no Court, tho' they may ſometimes bring Griſt to Mill, we have had our Court of Admiralty often reſtrain'd in former Times, by very unwarrantabte Prohibitions from the Common Law Courts. But it is to be hoped, that from the preſent Wiſdom and Knowledge of the Sages in the Law, this Abuſe will be leſs frequent for the future. For if Juriſdictions are thus confounded by an arbitrary Power, it will not only diſparage the Authority of the Law, which ought always to be ſupported with Honour and Juſtice; but it will be a Burden and Grievance to the poor Subject, who knows not where to have Recourſe for Relief in caſe of Need. And thus I have finiſhed this Title, which I have dwelt the longer on, by reaſon of the great Importance of it.

TIT. X.

Of Words, *and the proper Signification of Them and Things, as uſed in the Books of the* Civil *Law, and other Municipal Laws.*

WORDS are invented and made uſe of to expreſs and declare
[i] X. 2. 28. 41. the Mind of the Perſons that utter them [i]; and therefore, in the firſt Place, we ought to conſider what his Will and Intention is: And this is beſt known, from that which the Words themſelves point out to us, by the Acceptation of them. For Words, of themſelves, are meer Sounds deſtitute of all Notion and Idea: And theſe Sounds or Words we make uſe of, to denote that Thing which is the Principle of Thought in us; and we ought to make uſe of them as they are commonly taken and underſtood. Therefore the Signification of Words, is either taken from the common Uſage of Speaking, or elſe from the Propriety of the Words themſelves,
[k] D. 32. 1. 96. or, laſtly, from the Intention of the Party that utters them [k]. But,
pr. D. 33. 7. 18. 3. according to ſome, Words are taken in a four-fold manner, or four ſeveral Ways. 1*ſt*, ſtrictly, and according to the Propriety of them: 2*dly*, according to the common Uſage and Cuſtom of Speaking: 3*dly*, improperly, and according to the Abuſe of them: and 4*thly*, by way of Interpretation. The firſt Species is to be thus underſtood, *viz.* That in every Matter or Cauſe whatever, even in a Penal Caſe, Words ought to be ſo far extended
[l] D. 28. 1. 26. and underſtood, as the Propriety of the Diſcouſe will bear and admit [l]; unleſs we may preſume, that the Author did not ſo intend to have them underſtood; for then they may be reſtrain'd by open Conjecture. And, ſecondly, this Aſſumption is made good upon ſeveral Acounts. 1*ſt*, from the Thing itſelf; as when the Matter in Controverſy is of ſo light a Nature and Importance, as that it is not worth while to obſerve a general Diſpoſition

Diſpoſition of Law: 2*dly*, from the Perſon; as when the Laws inflict a certain Penalty on an Offence committed; and it would be an Act of Iniquity, if Men of the higheſt Rank and Degree ſhould be reſtrain'd and coerced by it [m]. For as there are ſeveral Things ordained upon the Score of Friendſhip, Affinity, Hatred, Poverty, great Excellence, *&c.* ſo there are ſeveral Caſes wherein we recede from the general Rules of Law: 3*dly*, from the Quality and Nature of the Buſineſs; as when Neceſſity perſwades, or when there is any Danger in Delay, or any Abſurdity would follow from thence, or if the Matter ſhould come to that Pitch which the Author very much abhors and deteſts, and the like. And in all theſe the foregoing Caſes, Words may be taken improperly. And, in this Part of an improper abuſive Signification of Words, are contain'd even thoſe, which are figuratively ſpoken; becauſe Figures belong to the Organ of Speech, and are coherent to the Propriety of it. *Thirdly*, It is to be obſerv'd, That the common Way or Uſage of Speech is even of more Force and Validity than the Propriety of Words [n]: For Words are Declaratory, and made uſe of to know the Mind and Intention of the Perſon that utters them [o], as above-remember'd. And hence it is, that we ought not ſo far to adhere and abide by the Words of the Law, as to depart from the Mind and Intention of the Perſon that expreſſes them: For the Mind of the Law-giver ought rather to be conſider'd, than the Words of the Law itſelf. And as this common Uſage has obtain'd, through the Stile and Converſation of learned Men, it ought, without doubt, to be received: And hence it may be ſaid to be proper, on the Account of their Authority. Otherwiſe it has reſpect either to an Abuſe and Impropriety of Speech; or elſe is liable to an Interpretation of Words: Of which next of all.

[m] Rom. Rep. §. Viro.

[n] D. 50. 16. 134.

[o] X. 5. 40. 6, 7, & 8.

Now, the Interpretation of Words, is a Declaration of the ambiguous and obſcure Will of the Perſon that makes uſe of them. See *Alexander*, in his *Conſilia Juris* [p]. Tho' every Man is the beſt Interpreter of his own Words; yet, where Words are doubtful and ambiguous, we always interpret them againſt the Perſon that utter'd them; becauſe he might have expreſs'd himſelf in a more clear and certain manner. But if any Obſcurity of Terms happens in Judicial Matters, the Interpretation is to be made in the Plaintiff's Favour. But an Interpretation of Words, ought to be made, as near as poſſible, according to the Mind and Intention of the Party that utters them: Yet where a Witneſs expreſſes himſelf in an ambiguous manner, the Judge ought to interpret his Words againſt the Party producing him. The Words of a Statute ought to be taken and expounded according to the common Way and Mode of Speaking; tho' it ſhould be provided by ſuch Statute, that they ſhall be taken according to the Letter. Verbs of the Subjunctive Mood, which may be verify'd in the Preterperfect and Future Tenſe, and are doubtful and ambiguous in this reſpect, are in Laws and Statutes, and in Laſt Wills and Teſtaments, taken in the Future Tenſe. And if any ambiguous Word ſhall be placed in one Part of a Laſt Will and Teſtament, it ſhall receive and have its Interpretation from the ſame Word more fully and expreſly declared in another Part of the ſame Teſtament; ſince one Part of a Laſt Will and Teſtament is ever explain'd, in a doubtful Caſe, by another Part thereof. The Words of a Laſt Will and Teſtament ought to be underſtood in a large, and not in a ſtrict Senſe, unleſs the Teſtator ſpeaks ſtrictly and properly. And the Words of a Laſt Will and Teſtament, if they be utter'd and expreſs'd in a general manner, ought to be reſtrain'd according to the probable Meaning and Intention of the Teſtator; and ought alſo to be underſtood, by obſerving a right Way and Method of Speech, and in the better Acceptation of them. Words, in a doubtful Signification, ought to be underſtood in a Natural, and not in a Civil Senſe; and we

[p] Conſ. 78. n. 12. lib. 5.

recede from the Propriety of Words, in order to follow the Mind and Intention of him that utters them, as already hinted. Words put in the Singular Number, ought only to be referr'd to one ſingle Caſe: but Words in the Plural Number may alſo be verify'd in the Singular. *Verbal* Nouns, that is to ſay, ſuch Nouns as are derived from Verbs, have a two-fold Signification, *viz. Active* and *Paſſive*: And thus the Word *Violenter* may be underſtood either in an *Active* or *Paſſive* Signification, according to the Qualities of the Perſons to whom it relates, and alſo according to the Nature of the Thing touching which it is utter'd and made uſe of. I have ſaid, That Words in the Plural Number may alſo be verify'd in the Singular: And hence the Word *Perſon*, ſignifying a Community or Body Politick, is not comprized according to the proper Signification of the Term: And hence it is, that Notaries in Procuratorial Inſtruments ſay, *Contra quamcunque perſonam vel univerſitatem.* Words in a Laſt Will and Teſtament, ought to be underſtood in a Natural, and not in a Civil Senſe: For ſince the Mind of Man is Natural, the Teſtator's Words, in a doubtful Caſe, ought to be reduced to a Natural, and not a Civil Underſtanding. Nor is it Equity, that a Fiction or feigned Senſe ſhould be introduced to overthrow the Teſtator's Will: For a Fiction is not regarded, when the Matter in Controverſy is touching the Interpretation of the Teſtator's Will. The Words of a Teſtator and a Legiſlator do admit of the like Conſtruction in Law. All Words ought to be underſtood in the ſame manner as they are ſpoken and utter'd, and ought to be taken *cum effectu*: But yet the Thing itſelf ought to be well conſider'd, and look'd more upon, than the Words which expreſs the Thing; for the Senſe is more to be regarded than the Words [q], as already obſerved.

[q] D. 50. 16. 219.

Words ſpoken or utter'd, generally ought to be underſtood in the general Signification of them [r]: And ſuch general Words comprehend every particular Species contain'd under them; that is to ſay, they are verify'd in their particular Species, and diſtributed by each Species [s]; as the Word *Animal*, which is a general Term, is diſtributed by Man and Beaſts, *&c.* General Words, that are obſcure, are declar'd and explain'd by precedent Words that are clear: And Words are ſaid to be clear, when the true Senſe and Meaning of them is eaſily underſtood. General Words put by way of Acceſſory, are reſtrain'd by their Principal. Words, which are general and univerſal, and even ſuch as are negative, ought not to be taken and underſtood indiſtinctly: For there is no Word ſo univerſal, which may not, from due Circumſtances, be taken in a Civil Senſe and Meaning, and receive a Limitation and Reſtriction. Thus Words, how general ſoever they be expreſs'd and ſet down in a Contract, ought to have Operation only according to the Nature of the Contract, and the Nature of the Thing deduced in the Contract. When there is any Ambiguity, Obſcurity, or Generality in the Words of a Contract, or Laſt Will, theſe Words may be reſolved by the daily and conſtant Uſe of ſuch Words or Terms. Confuſed and indeterminate Words are made clear, and have a determin'd Senſe, from the Nature of the Subject of them; and ſuch general Words are reduced and reſtrain'd to the Underſtanding and Terms of the Common Law. When a Law or Statute expreſly requires any Thing to be done, then ſuch general Words, from whence we may neceſſarily infer ſuch Thing to be done, are ſufficient: But if a Law or Statute requires any particular Tenor or Words, or a certain formal Way of Expreſſion, that ſpecial Form and Tenor of Words ought to be obſerv'd; it being not ſufficient that the Thing be done by Terms equivalent, and *per viam intellectus.* And thus, ſometimes, a ſpecial Form of Words is required, and ſometimes included in the Generality of Words. Words put *ſimply*, ought to be taken *in meliori ſenſu*: And an equivocal

[r] D. 37. 4. 1. D. 1. 18. 3.

[s] D. 32. 1. 78. pr.

equivocal Term, in a doubtful Caſe, ought to be underſtood in *digniorem partem.* We ought to abide by general Words, if they are ſo general that they cannot be reſtrain'd without a manifeſt Calumny or Abſurdity [t]. [t] D. 46. 4. 6.

Diſpoſitive Words, that is to ſay, Words that *directly* affirm a Thing, ought to be regarded and believed; but not *Narrative* or *Enunciative* Words, *viz.* ſuch Words as affirm a Thing *indirectly* by the Bye, and by way of Incident, have not ſo much Weight laid on them. For Example, If I affirm, That *Titius*, who is the Son of *Sempronius*, owes me One Hundred Pounds: Theſe Words, Titius *owes me One Hundred Pounds*, is the Subſtance of what I affirm *directly*, and are the *Diſpoſitive* Words: But thoſe Words, *who is the Son of* Sempronius, are the *Narrative* and *Enunciative* Words, which are ſpoken *indirectly*, and by the Bye; and it may be to the Purpoſe, whether that be true or falſe. *Enunciative* Words are Proof in favour of a Dower, and of a *pious* Cauſe; and in Contracts, as well as Laſt Wills, they Ordain and Diſpoſe. The *Narrative* Words of an Epiſtle, are Proof in Prejudice of the Perſon who wrote the ſame. *Enunciative* Words do induce a Diſpoſition beyond the proper Signification of them: Nor do *Enunciative* Words, that are pronounc'd or utter'd *conditionally*, induce any Diſpoſition or binding Act [u]. [u] D. 28. 5. 19.

I ſhall next conſider the Signification of Words in Reſpect of *Copulatives*, *Disjunctives* or *Alternatives*, and *Negatives*; becauſe the Lawyer has frequent Occaſion to uſe them, and they often occur in Laws. And firſt of *Copulatives.* Now it is the Nature of a *Copulative*, that both Parts thereof ſhould be verify'd: But in Reſpect of a *Disjunctive*, it is ſufficient if either Part thereof be true. But theſe Words, *Et*, *Vel*, and the like, are ſometimes uſed improperly: A *Copulative* being reſolv'd into a *Disjunctive*, and a *Disjunctive* ſometimes reſolv'd into a *Copulative*, if the Subject Matter imports or requires it. For Words ought to be ſubſervient to the Intention of the Party that utters them, and not the Intention be bound up by the ſtrict and rigid Signification of Words, as before hinted. If the *Copulative*, *&*, or any other *Copulative* Word, be placed between Things impoſſible, ſo that both of the Things copulated cannot be true together and at the ſame Time, the *Copulative*, *&* or *and*, is then reſolv'd into a *Disjunctive.* As for Example, If a Teſtator ſhould ſay, *viz. I would have my Will to be valid* Jure Teſtamenti & Jure Codicilli, (for it is certainly valid *Jure Codicilli*, if it be not valid *Jure Teſtamenti*:) Here it is impoſſible, that it ſhould be valid as a Teſtament and a Codicil both; becauſe in a Teſtament the Appointment of an Heir is neceſſary, but ſuch an Appointment is not requir'd in Codicils. Or elſe, *Secondly*, A *Copulative* is placed between two Things or more, which may be together true, and then the Extreams which are copulated are not entirely of different Natures: And, if ſo, then the *Copulative* is properly placed there, becauſe it is the Nature of a *Copulative* to join Things altogether different; and that each Thing copulated principally comes into the *Copulative*, and happens true. Or, if the Extreams are of a different Nature or Kind, then if one of them accrues to the other as an Accident, the *Copulative* is thereby reſolv'd into an *Expoſitive*, ſo that the Subſtantive is expounded like the Adjective; as *Pateris Libamus & Auro*, that is to ſay, *in aureis Pateris.* And 'tis the ſame Thing, when a *Copulative* happens as a Determination of ſomething going before: As when it is ſaid, that a Pact is *duorum placitum & conſenſus*, where the Word *Placitum* is expounded *actively*, viz. *Placitus conſenſus duorum.* But if one Thing be not added to another by way of Accident, or a *Copulative* be placed between a *Genus* and a *Species*, or between a *Species* and an *Individual*, or is placed between two Things ſeparate, and yet common, and is then either uſed extrajudicially, or in Things altogether voluntary: I ſay, in all theſe Caſes the *Copulative* ſtands properly, and 'tis neceſſary

neceſſary that each of the Things copulated be verify'd and render'd true. As when I promiſe you Ten Pounds, if *Titius* ſhall be made a General of an Army, and *Sempronius* a Count: I am not bound by my Promiſe, unleſs both Things come to paſs [x]. And this is to be underſtood, when the *Copulative* is made *Affirmatively:* But it is otherwiſe, if it be made in the *Negative*; becauſe then it is requiſite, that neither of them happen. As for Inſtance, I promiſe you Ten Pounds, if *Titius* ſhall not be made a Conſul, nor the Emperor come into *Italy* [y]. But if we are judicially impleaded, and it is then doubtful whether the Judge or Prince commands two Things *copulatively*, or if the Party has propounded any Thing *copulatively* in Judicature in his Libel or Articles, ſhall both the Extreams then be requir'd to be true? In this Caſe we ought to diſtinguiſh, *viz.* That either many Things copulated tend to the ſame Effect, or have different Effects in Tendency: If they tend to procure different Effects, then one of thoſe Things copulated is not ſufficient to obtain and comprehend all Effects: But if many Things copulated tend to obtain one and the ſame Effect, then the Party is either obliged to prove both, and it is not enough to prove one of them, though otherwiſe it had been ſufficient of itſelf; becauſe he ought to blame himſelf, that he has bound himſelf to prove both [z]. And this is true, unleſs the Intereſt and Advantage of the publick State be concern'd in the Controverſy; becauſe a Party cannot oblige himſelf to both, when the Right of the Publick may be prejudiced thereby. So that, if he ſhould be then compelled to prove both, the Judge, in virtue of his Office, is to oppoſe the ſame, by declaring that it ſhall be ſufficient for him to prove one of them: And this proceeds *ex Officio Judicis.* Or elſe he has not oblig'd himſelf to prove both of the Things thus copulated: And then, when either of them accrues as a Quality to the other, it is enough to prove either [a]. 'Tis alſo the Nature of a *Copulative* to require the Concurrence of all Perſons and Things copulated. For Example, If any one promiſes to arreſt *Stichus*, and *Damas*, and *Erotes*, and if he does not arreſt them, he promiſes to forfeit or pay One Hundred Pounds: If he does not arreſt them all three, he then entirely forfeits the penal Stipulation; becauſe he ſtipulated, or made his Promiſe *copulatively.*

[x] D. 45. 1. 63.

[y] D. 45. 1. 63.

[z] D. 22. 3. 14. D. 42. 1. 33.

[a] Bart. in L. 33. D. 42. 1.

A *Disjunctive* is that Term which is placed between two Contraries, by the granting or affirming of one of which you take away the other, and by taking away one of them, the other ſtands good and is affirm'd: And this is done by the help of theſe Words, *Aut*, *Vel*, or the like. But a *Sub-Disjunctive* is that Term, which divides different Things, whether they may ſtand together or not. *Contraries* are thoſe Things, which are repugnant and diametrically oppoſite to each other, without any *Medium:* But what we call *Diverſa*, or different Things, are thoſe which have a *Medium*; as to ſit and walk, for the *Medium* is to lye down or ſtand. And 'tis the ſame Thing, if they are mutually repugnant; as the *active* and *paſſive* Quality in a Man. But whenever the Senſe is join'd together, whether the Words are disjoin'd or not, it is a *Sub-Disjunctive*, according to *Bartolus* [b]. A *Disjunctive*, placed between a *Genus* and *Species*, is taken for the ſame as, *id eſt:* And ſometimes it is taken for a Conjunctive, when it happens between a *Genus* and *Species* [c]. A *Disjunctive* or *Alternative*, is ſometimes pronounc'd by the Law; and ſometimes it is pronounc'd by Man. When it is pronounc'd by the Law, it is either an *Alternative* of ſeveral Facts or Terms, thro' the Means of which ſome certain Thing is principally order'd by the Law; and then it ſtands properly in its own Nature, and is verify'd in each Part of itſelf: Or elſe it is an Alternative of ſeveral Qualities or Puniſhments in reſpect of the ſame Fact, or Thing, order'd; and then ſuch *Alternative* either contains a Repugnancy, and is

[b] In Rub. C. 11. 1.

[c] Bart. in L. 10. D. 34. 2.

is then taken *improperly*. But when it does not contain a Repugnancy, it then ſtands properly, and is verify'd in one Thing alone. And this Diſtinction proceeds in an *Alternative* pronounc'd by the Common Law. But in that *Alternative* which is pronounc'd by a Statute, it is to be noted, that it ſtands *properly* and *ſtrictly* in its own Nature; becauſe Statutes are Matters of *ſtrict Law*, and ought to be underſtood *properly*, as the Words import. In the ſecond principal Caſe, *viz.* When an *Alternative* is pronounc'd by Man, it is then either put between Things or other Qualities on which a Diſpoſition is made, or elſe between Perſons on whom a Diſpoſition is conferr'd. In the firſt Caſe, it is either uſed *disjunctively*, which in its own Nature disjoins both the Senſe and the Words, as the Word *vel*, or the like, and then it ſtands *properly*, and, regularly ſpeaking, it is enough if one of the *Alternatives* intervenes; or it is put as ſuch a *Disjunctive*, which, tho' it disjoins the Words, yet it conjoins the Senſe, as the Words *ſeu* or *ſive* do.

Words of the Preſent Tenſe are not extended to Things future d. *Flavius* leaſed or demiſed unto *Hermes* his Vineyard for ten Years, on Condition that *Hermes* paid him ten *Scudi* every Year. Three Years after *Flavius* ſtipulated with *Hermes* in this Manner, *viz. Do you promiſe to pay what you owe on the Account of the Vineyard demiſed to you? Hermes* anſwer'd, *I do promiſe it.* In this Caſe only thirty *Scudi* are due for the three Years paſt, and not a future Penſion. For if I would ſtipulate for a Penſion or Rent of the Years to come, I ought to ſay in the Stipulation, *Do you promiſe to pay that which you ſhall owe on the Account of ſuch a Demiſe?* Or, *Will you be a Debtor to me on ſuch an Account?* And then, by an Anſwer made in the Affirmative, a future Penſion will be included.

[d] D. 41. 1. 89.

The Relative *qui*, or *who*, is ſometimes *Reſtrictive* and ſometimes *Declarative*. *Reſtrictive*, When it is ſaid, That all Perſons *who* are govern'd by Laws; meaning, as if there were ſome Perſons that were not govern'd by Laws, but by Cuſtoms. That Relatives reſtrain, we learn from the Law here quoted e. That Scholars *who* carry Arms are puniſhable: Here the Relative *qui*, or *who*, is put *declaratively*. Which, that you may the better underſtand, conſider two Words. *Firſt*, That the Relative *qui* does not reſtrain, but is declarative in a Sentence, if the *Relative* Quality accrues in all the Verbs, as in the Law cited in the Margin f, *viz.* when the Emperor ſpeaks of Chriſtians, ſaying, *Cunctos Populos quos una fides.* The Relative *quis* or *qui*, join'd to a Verb of the future Tenſe, induces a Condition, unleſs it be when the Intention of the Party ordaining has a reſpect *ad eſſe*: But if it be join'd to a Verb of the preſent Tenſe, it includes a Demonſtration g.

[e] D. 32. 1. 46.

[f] C. 1. 1. 1.

[g] D. 30. 1. 6.

The Maſculine Gender very often includes the Feminine; and thus it reaches to both Sexes h, not according to the Propriety of Speech, but by Extenſion. And becauſe this Extenſion is receiv'd by common Uſe, this Rule is obſerv'd almoſt in every Caſe; unleſs when it appears, that the Intention of the Speaker was or is otherwiſe; for *diverſa ratio diverſum jus ſuadet*. Therefore, if the Children of baniſh'd Men, under the Name of *Filii*, be expell'd the State or City, this does not affect the Daughters, but only the Sons; for there is no Danger from theſe, by reaſon of the Imbecility of their Sex i. The Word *Homo*, a Man, is a common Name, and comprehends both the Maſculine and Feminine Gender; though, generally ſpeaking, the Feminine Gender is comprehended under the Maſculine, as juſt now ſaid, yet this is not always true, eſpecially in penal and odious Caſes: For in theſe Caſes a Woman is not included under a Word of the Maſculine Gender, unleſs the Act, or Offence, be of an indifferent Nature, which may be equally committed by a Woman as well as a Man; for then a Woman ſhall be compriſed under a Word of the Maſculine

[h] D. 50. 16. 195.

[i] Bald. in L. 1. D. 11. 4.

Gender. Again, The Word *Parens*, a Parent, is a common Name; and as it comprehends both Genders, it denotes a Father and Mother: But ſometimes this Word is taken in a larger Senſe, and then it ſignifies the Father, Grandfather, Great-Grandfather, and ſo onwards of all ſuperior Relations in a right Line; and it alſo includes a Mother, Grandmother, Great-Grandmother, *&c* [k]. Yet, in a ſtrict Acceptation of the Word *Parents*, only ſuch Perſons are included, as are *uſque ad Tritavum*, to the Grandfather's Great-Grandfather; and the reſt are ſtiled *Majores* [l], or Anceſtors. But by the Name of *Parents*, according to the common Meaning of the Word, we only underſtand the Father and Mother: And thus it is underſtood in reſpect of that Diligence, which they ought to exerciſe over Children or Infants baptized, in bringing them to be confirm'd by the Biſhop. But if theſe Perſons are negligent or wanting (perhaps) in their Duty, the *Canoniſts* will have this Office, or Duty, to be extended even to the Great-Grandfather's Great-Grandfather, eſpecially, ſince the Care of Children belongs to all Perſons within that Degree, ſo long as Children ſhall remain in their Power.

[k] D.50. 16.51. D. 2. 4. 4. 2.

[l] D. 38. 10. 10. 7.

We have three *exceptive* Terms, or Words, in our Law-Books, *viz. Præter*, *Niſi*, and *Præterquam*; which are all Conjunctions: But the Words *ſine* and *abſque* are not *exceptive*, but do rather import a certain Separation than an Exception; as you read the Law *abſque Petro*, without *Peter*, that is to ſay *ſeparately* from *Peter*, which does not imply, that *Peter* does not read it. And 'tis the ſame Thing in reſpect of the Word *ſine* [m]. 'Tis to be obſerv'd, there is this Difference between *exceptive* and *taxative* Words, *viz.* That a *taxative* Word propounded affirmatively, points out the *Species*, or one *Individuum*, and removes the whole other *Genus*: As, only *Peter* reads; that is to ſay, that *Peter* and no other reads. But *Exceptive* Words, on the contrary, do make a *whole*, becauſe they only remove one *Species*, or one *Individuum* from the *Genus*: As when I ſay, *No Man runs, unleſs it be Peter*; for this Univerſal remains true in all but *Peter* only.

[m] D.48. 8. 22. D. 26. 7. 32.

TIT. XI.

Of Definitions, Diviſions, *Genus*, *Species*, Difference, *and the* Qualities *of Things, very neceſſary for a Lawyer to be acquainted withal.*

IT has been already obſerv'd in a foregoing Title, That Words are the Organ or Means of conveying one Man's Thoughts and Intention unto another; and as all Languages are full of Words of the ſame Nature, which not having more than one Sound, yet the Signification of *Ideas* are entirely of a different Kind: So that from hence ariſes an Equivocation of Words; and as this Equivocation of Words, and the confounding of Terms which bear a different Senſe, are often the Occaſion of great Error in the Mind of Man, the *Logicians* have, therefore, found out an Expedient to prevent this Miſchief; which Expedient they ſtile by the Name of a *Definition*. Therefore, for the ſake of young Students in the Law, and others who have not made themſelves acquainted with the Artificial *Logick* of the Schools, I will here give them a Title of *Definition*, *Diviſion*, *Genus*,

Genus, *Species*, &c. ſo far (perhaps) as it is neceſſary for them to know, that they may not be impoſed upon by the Fallacies and Chicanery of other Men. By an Equivocation of Words, as above hinted, I mean, when one and the ſame Word ſignifies one or more Things; and by confounding of Terms, I underſtand the uſing one Term for another; both of which are frequently practis'd, eſpecially by ignorant and wrangling Diſputants.

A *Definition*, according to *Accurſius*, is a Part of Speech, which denotes and points out the Subſtance of a Thing to us; and it properly conſiſts of a *Genus* and a *Difference*. The *Genus* is that, which may be affirm'd or predicated of many Species or Particulars contain'd under it: As Man is a rational Animal; where *Animal* is the *Genus*, and *Rational* the *Difference*: For as ſeveral particular living Creatures are comprehended under an Animal, ſo Rationality diſtinguiſhes a Man from all other Animals. There are ſeveral Kinds of *Definition*; one of which is call'd a *nominal*; and another of which is ſtiled a *real* Definition, or a Definition of the Thing. But it is noted, that a *nominal* Definition goes before a *real* Definition: For you cannot define a Dog, unleſs you firſt ſettle, whether you ſpeak of an Animal, or of the Dog call'd the *Dog-ſtar*; for the Word *Dog* is an equivocal Term. Here the Definition of the Word, call'd a *nominal* Definition, and made uſe of by *Geometricians* with much Benefit, is cautiouſly to be diſtinguiſh'd from the Definition of the Thing. The Definition of Words are at Pleaſure, as Words themſelves are, provided they be explain'd to us by a Definition of them. But Definitions of Things are not ſo, becauſe they have a certain determin'd Idea annex'd to them. For every Sound being of itſelf and in its own Nature indifferent, to ſignify any Thing, it is lawful for me, for my own particular Uſe, provided I adviſe others of it, to determine a Sound of any Thing preciſely without the Mixture of any Thing elſe. But it is quite otherwiſe with the Definition of Things. For it does not depend upon the Pleaſure of Men, that *Ideas* ſhould include whatever they wou'd have them include: Becauſe if, in defining of *Ideas*, we add any Thing which they do not comprehend, we fall into inevitable Error. For an Example of one and the other: If, in deſpoiling of a *Parallelogram* of all other Signification, I apply it only to denote a *Triangle*, I may do this without any Error in doing it; provided I only take it in this manner; and I may affirm, that a *Parallelogram* has three Angles equal to two right Angles. But if I leave the vulgar *Idea* annexed to this Word, to ſignify a Figure whoſe Sides are parallel, and yet affirm that a *Parallelogram* is a Figure conſiſting of three Lines, in regard this would be a Definition of the Thing, it would be abſolutely falſe; it being impoſſible that a Figure conſiſting of three Lines only, ſhould have its Sides parallel. But Contentions ought not to be raiſed about the Definitions of Words, becauſe Words are arbitrary; and the Perſon ought rather to explain his Meaning, than to wrangle about them. For you cannot deny, that a Man has not given the Signification to a Sound, which, he ſays, he has, after he has given Notice of it, nor that it has not that Signification according to the Uſe he makes of it. But we may contend about the Definition of Things, becauſe they may be falſe, (as already ſhewn).

In every Definition, the Eſſentials or Subſtantials of the Thing deſigned ought to be inſerted [n]; otherwiſe it may be rather ſtiled a *Deſcription* than a *Definition*: And hence it ought to contain the *Genus*, under which the Thing is defined, (as before remember'd). And, *ſecondly*, it ought likewiſe to contain the *Differences*; that it may thereby appear, that it differs from other Species contained under that *Genus*: As appears in all Laws, wherein a Definition is put as a *Genus*. Things Fictitious and Imaginary cannot be defined in a proper manner; becauſe a Definition is

[n] Bart. in L. 1. D. 28. 1.

is an Oration or Sentence explaining the Nature and Eſſence of the Thing defined: And therefore, if the Thing to be defined has not any true and real Eſſence and Nature, it cannot properly be defined. And this, moreover, is confirm'd; for that a true and accurate Definition ought to conſiſt of a *Genus* and a *Difference*, as aforeſaid: But Fictitious and Imaginary Entities have no proper *Genus* and *Difference*. And hence we may infer, that Privations and Negations cannot properly be defin'd; becauſe they are not true and real Entities, nor have they any proper *Genus* and *Difference*. Every good Definition ought to agree with the Thing defined [o], and to be convertible with it. A Definition in Law is very dangerous; and therefore, the ancient Lawyers rather choſe to make uſe of *Deſcriptions* than *Definitions* [p]: A Deſcription being an imperfect Definition, and not according to the Rules of a Definition. A Deſcription gives us ſome Knowledge of the Accidents or Qualities that are proper to it; and ſo determines it, that we may frame ſuch an *Idea* or Notion of it, as diſtinguiſhes it from other Things. Thus we deſcribe Plants, Fruits and Animals, by their Shape, Bulk, Colour, and the like Accidents: And theſe are the Deſcriptions moſt uſed by Poets and Orators. There are alſo Deſcriptions made by the Cauſes, Matter, Form, and the End, *&c.* as when we define a Clock to be an Engine compos'd of ſeveral Wheels, whoſe regular Motion limits the ſeveral Hours.

[o] Bart. in L. 13. C. 9. 2.

[p] D. 34. 7. 1. D. 4. 3. 1.

There are Three Things neceſſary to make a Definition good; *viz.* It ought to be Univerſal, Proper, and Clear. *Firſt*, It muſt be Univerſal; that is, it muſt contain the whole Thing defined: Wherefore, the common Definition of *Time*, to be the Meaſure of Motion, is not good: For 'tis very probable, that Time may be the Meaſure of Reſt, as well as Motion; ſince we ſay, a Thing has been ſo long at Reſt, as well as, that it has been ſo long in Motion. *Secondly*, It muſt be Proper; *viz.* It muſt agree with the Thing defined, as foreſaid: Wherefore the Definition of an *Element* to be a *ſimple corruptible Body*, is erroneous: For the heavenly Bodies are no leſs ſimple Bodies than the Elements, by the Confeſſion of the Philoſophers; and therefore, we have no Reaſon to believe but there are Alterations in the Heavens, analogous to thoſe that happen upon Earth. *Thirdly*, It muſt be Clearer than the Thing defined; *viz.* it ought to render the *Idea* of a Thing defined, more plain and diſtinct, and make us, as much as may be, underſtand the Nature of it, and conduce to give us a Reaſon of its chief Properties; which is that which is principally conſider'd in Definitions, and which is wanting in the greateſt Part of *Ariſtotle*'s. And thus much is ſufficient touching *Definitions*: Wherefore I ſhall next ſpeak of *Diviſion*, the Second Thing propos'd to be handled in this Title.

Diviſion, is the Partition of the Whole into all that it contains: But as there are two Sorts of the *Whole*, ſo there are two Sorts of *Diviſions*. There is one *Whole*, compoſed of ſeveral Parts, which are really diſtinct, whoſe Parts are called *integral* Parts; and the Diviſion of this *Whole* is properly call'd *Partition*. As when we divide a Houſe into its Apartments, a City into its Wards and Quarters, a Kingdom into its Provinces, Man into Body and Soul, and the Body into Members. The only Rule, for making this Partition as it ought to be, conſiſts in the accurate numbring of the Parts, ſo that nothing be omitted. The other *Whole* is call'd by another Name, *All*; and its Parts are ſubjective or inferior Parts: For that this *All*, or *Omne*, is a common Term; and its Parts are the Subject contained in its Extent. As the Word *Creature* is the *All* of that Nature, whoſe inferior Parts, as Man and Beaſt, which are comprehended in its Extent, are ſubjective Parts. This Diviſion properly retains the Name of Diviſion, of which there are Four Sorts; *viz.* 1*ſt*, When the *Genus* is divided by its *Species*:

Species: As, that *all Subſtance is either Body or Spirit*, and the like. 2*dly*, When the *Genus* is divided by *Differences:* As *every Animal is either rational or irrational.* All Numbers are either even or odd, *&c.* 3*dly*, When a common Subject is divided by the oppoſite Accidents, of which it is capable; or according to the Diverſity of Accidents and Times: As *all Bodies either move, or ſtand ſtill. All Men are either ſick or well*, &c. 4*thly*, When the Accident is divided into various Subjects: As when *Happineſs is divided into that of the Mind or Body.*

In this Diviſion, theſe Rules are to be obſerved; *viz.* 1*ſt*, It ought to be entire; and the Members of it muſt contain the whole Extent of the Term divided. Thus *Even* and *Odd* comprehend the full Extent of Number; there being no Number which is not Even or Odd: Nor is there any Thing that plunges us more into falſe Argumentation, than want of obſerving this Rule; and that which deceives us, is, That, many times, there are Terms, which appear ſo oppoſite, that they ſeem to admit no *Medium*, when really they do: Thus between Ignorant and Learned, there is a certain Mediocrity of Knowledge, that excepts a Man from the Rank of the Ignorant, tho' it does not advance him among the Learned: Between Night and Day there is Twilight; and ſo of other Things. The 2*d* Rule is, That the Members of the Diviſion be oppoſed; as *rational* and *irrational.* However, it is not neceſſary, that all the Differences that make the Diviſion, ſhould be poſitive Members; it's ſufficient that one be ſo, and that the other be the *Genus* alone, with the Negation of the other Difference; for from hence ariſes the moſt certain Oppoſition of the other Members. Thus a Beaſt is diſtinguiſh'd from Man, only by Want of Reaſon, which is nothing poſitive. The 3*d* Rule being a Conſequence of the 2*d*, is, That one of the Members be not ſo incloſed in the other, that This may be affirm'd of That, tho' (perhaps) it may be included another Way. For a *Line* is included in the *Superficies*; and the Term of the *Solid*, as a Term of the *Solid.* But this does not hinder, but that the Extent may be divided into *Line*, *Surface*, and *Solid:* For it cannot be affirm'd, that a *Line* is a *Superficies*, nor that the *Superficies* is a *Solid.* *Laſtly*, It is to be obſerv'd, That we do not make too many Diviſions; for that confounds and amuſes the Underſtanding. *Whatever is cut into Duſt, is confuſed.*

Since the *Civil* Law often mentions a *Genus* and a *Species*, which the Doctors (notwithſtanding) in reſpect of Obligations, do either explain in a very frigid manner, or elſe do confound and blend them together in ſuch a way, as, on this Account, we find ſeveral Errors ſcatter'd up and down in their Expoſitions; I will therefore here, in a more diſtinct and perfect manner, treat of this Matter, for the Benefit of all Lawyers whatſoever. Now a *Genus*, according to the Acceptation which *Porphyry* gives of it, in his Introduction to *Logick*, and as much as tends to the Knowledge of the Law, may be taken in a four-fold Senſe or Manner. *Firſt*, It is ſaid to be that, which has no certain Name affixed to it; and being tied to no determinate Quality, it is left as an anonymous Thing. For thus a Laſt Will is found in a *Genus*, which is neither a Teſtament, properly ſpeaking, nor a Codicil, nor a Donation *Mortis Cauſa:* Nor is it called by any other ſpecial Name, but is ſimply left under the general Appellation of a *Laſt Will*; which the *Gloſs*, on the Law here quoted in the Margin [q], makes mention of. And thus the Word *Genus*, in the Books of the *Civil* Law, is not ſtrictly taken, in a Logical Senſe and Manner, to comprehend ſeveral *Species*, but often uſed for a certain *Quality* or *Difference*, and for an Accidental *Circumſtance:* And if that Quality be a Quality of an effuſed Nature, it then comprehends ſeveral Things; and is, among Lawyers and Rhetoricians, ſtiled a *Genus.* But if the Qualities and Differences be leſs general, then they aſſume and take the Name of

[q] C. 2. 3. 19.

a *Species*. Among the Rhetoricians, that is call'd a *Theſis*, which the Lawyers term a *Genus*. An *Hypotheſis* is a Quality founded upon a Suppoſition which rather comes nearer a Fact: And this we call a *Species* of the Fact, after the manner of a more determinate Quality. 2*dly*, A Logical *Genus* properly taken, is, whatever is predicated *de pluribus in ſpecie differentibus* * ; that is to ſay, whatever contains ſeveral Things in itſelf, which differ in their *Species*, when this happens by a Term of Univerſality, as a *Flock*, *Inſtrument*, *Peculium*, and the like ; or by adding ſome univerſal Sign, as *Omnes reas meas*, where the Word *Omnes* denotes an Univerſal. A *Genus* is put in the Definition of every *Species*, (as before remarked) ; and by a *Genus*, every *Species* is repreſented in its diſtinct Kind. A *Genus* only differs from a *Species* in Quantity, becauſe a *Genus* includes more than a *Species*. As the Word *Animal*, which is a *Genus*, includes both Man and Beaſt, which are the *Species* of an Animal. Thus the Diſpoſition of a Statute, which includes a *Genus*, includes alſo its *Species*: And a Diſpoſition, which enumerates ſome *Species* after a *Genus*, includes alſo ſome other *Species*, which are not expreſs'd, when ſuch an Expreſſion is made by Words of *Ampliation*, or by the Word *Maximè*. Yet the Expreſſion of a *Genus* has not a greater Operation than an Expreſſion of particular *Species* ; becauſe a *Genus* is reſolved into particular : But it is otherwiſe in an Univerſal, or in the expreſſing of ſome Univerſal. But, *Thirdly*, A *Genus*, among Lawyers, is often taken for a *Predicable* ; and a *Species* for an *Individuum* ; tho' ſometimes a *Species*, even with them, is alſo taken for an inferior *Genus*: For a *Genus*, among them, may be ſaid to be that, which, among Logicians, is called a *Species*. Thus Lawyers call'd a *Quality* by the Name of a *Subſtance*, which, among Logicians, is only a Matter *Secundæ Intentionis*. A *Genus* cannot periſh by Fire, or any other fortuitous Accident † : For a *Genus* is neither a moveable, nor an immoveable Thing, but only exiſting in the Underſtanding : But a *Species* may ſo periſh, becauſe it may exiſt *extra Intellectum*, as in a Thing moveable. A *Genus* cannot be the *Difference* of a *Species* ; nor is a *Genus* predicated of a *Difference*: For a *Difference* is poſterior unto a *Genus*, and prior unto a *Species*. A *Genus* is predicated of all the *Species* contained under ſuch *Genus* ; and whatever is affirm'd or predicated by the *Genus*, is alſo affirm'd and predicated of its *Species*. A *Genus* is prior unto a *Species*, and alſo of a larger Extent : And therefore tho' a *Genus* contains its *Species*, yet the *Species* does not contain the *Genus*. Tho' by denying the *Genus*, the ſeveral *Species* of ſuch *Genus* be alſo denied thereby ; yet by affirming the *Genus*, the *Species* of the *Genus* are not thereby affirm'd. A *Genus* and a *Species* are in the ſame Predicament ; and the whole Nature of a *Genus* is contain'd in every *Species* ; nor has a *Species* any Thing which is repugnant to a *Genus*. A *Genus*, which cannot be verify'd, unleſs it be a *Species*, does not induce any Uncertainty.

* Bart. in L. 12. D. 33. 7. 46.

† Curt. Jun. Conſ. 239.

Now a *Species* is ſaid to be that, which is predicated of many Things, which differ in Number ; or elſe that which contains in itſelf ſeveral Things, which differ in Number, tho' the Lawyers, ſometimes, improperly call this Logical *Species* by the Name of a *Genus*. 'Tis to be obſerved, that a *Genus* which follows an Enumeration of divers *Species* or Particulars, is reſtrain'd to the like *Species* there expreſſed ; and thus the preceding *Species* reſtrain the following *Genus*, (as I have already related). For Example : If I give a certain Farm or Eſtate unto *Titius*, and all the Appurtenances thereunto, or all Things which I have there, Spiritual Rights are not thereby comprehended in ſuch a Gift or Grant ; becauſe they are not of the ſame or like Nature with the Things granted : But this Generality ought to be reſtrained to Temporal Things alone, on the Account of the preceding *Species* of Temporalities. For in a ſtrict Matter,

as

as a Gift is taken, Words are not underſtood in ſo large a Senſe as to deviate from the proper Signification of them [r]. And tho' in Teſtaments we admit of a larger Interpretation than in Gifts; yet a *Genus*, that follows an Enumeration of *Species*, is reſtrain'd to *Species* equal to, and of the ſame Nature with the *Species* expreſs'd. Thus, if a Teſtator bequeaths Wines and Sweets, all Sweets of another Nature than Wine are excepted, and in nowiſe included in ſuch a Legacy by reaſon of the preceding *Species*; as Sweet Wines, and the like; and only Sweet Potables are therein comprehended [s]. But it is otherwiſe, where a *Genus* is pronounc'd or utter'd without a *Species* following the ſame. But it is not univerſally true, That a *Species* adjoin'd to a *Genus*, reſtrains a *Genus*; for the Text is ſometimes againſt it: As where it is ſaid, that if I bequeath unto any one a Fee or Farm ſtocked, and expreſs ſome *Species* contain'd under that *Generality*; in this Caſe, I ſay, that *Species* does not reſtrain the *Genus*, but it only ſeems to be inſerted *ex Superabundanti:* And that it is a Cauſe or Means only of tolling a Doubt. But yet this is a Matter of much Weight and Difficulty, becauſe the *Civil* Law ſeems to treat of it ſeveral Ways.

[r] Abb. in L. 15. X. 1. 3.

[s] D. 33. 6. 16.

A *Difference* is that, whereby one Thing is diſcern'd or diſtinguiſh'd from another: And it is either *accidental* or *eſſential*. An *accidental* Difference is that, whereby Things differ from each other in reſpect of their Accidents or Qualities, either from other Things, or even from themſelves. An *eſſential* Difference is that, which, being added to a *Genus*, conſtitutes a *Species*, and diſtinguiſhes that *Species* eſſentially from all other *Species*. And as a *Difference* conſtitutes the *Species*, and diſtinguiſhes it from other *Species*, it ought to have the ſame Extent with the *Species:* And, therefore, *Difference* and *Species* ought to be predicated of one another; as thus, *whatever thinks, is a Spirit; becauſe every Spirit thinks.* For every *Genus* has under it two *Species* at leaſt; as *Body* and *Spirit* are the two *Species* of Subſtance. Therefore, there muſt be ſomething more in the *Ideas* of Body and Spirit, than in the *Idea* of Subſtance, to diſtinguiſh them by. And that which we ſee more in *Body*, is *Extenſion*; and what we ſee firſt in *Spirit*, is *Thought*. Hence the *Difference* of *Body* will be *Extenſion*; and of *Spirit*, *Thought*. But it often happens, that in ſeveral Things there is no Attribute that offers itſelf, which agrees ſo fully with the whole *Species*, as to agree only with that *Species*, and no other. In this caſe, the way is to join together ſeveral Attributes; and the Aſſemblage not being to be found in any other *Species*, it conſtitutes the Difference. *Laſtly*, It is to be obſerv'd, that it is not always requir'd that both the Differences dividing the *Genus* ſhould be poſitive; it being ſufficient that only one be ſuch. Thus two Men are ſufficiently diſtinguiſh'd, if one be ſaid to follow an Employment which the other does not. Again, Thus Man is diſtinguiſh'd from Brutes; for Man is a Creature *endued with a rational Soul*; but Brutes are *meer Animals:* Yet the *Generical Idea* of Brutes contains nothing in it *poſitively*, which is not found in Men; only we add to that *Idea* a Denial of that to be in them, which is in Man, *viz.* a *rational Soul*. *Porphyry* makes a *Difference* to be threefold, *viz. common*, *proper*, and *moſt proper*. The firſt is, when a Thing differs by ſome Accident which may be ſeparated, either from another Thing, as when we ſay, that *Titius* differs from *Mœvius*; becauſe *Mœvius* ſits, but *Titius* ſtands; the one is ſilent, but the other talks. Or elſe from itſelf; Thus, *Hector* ſeem'd to *Æneas*, when he appear'd in a Dream, to differ from that *Hector* who return'd laden with the Spoils of *Achilles*. A *proper* Difference is that, when a Thing differs from a Thing by an inſeparable Accident, as by its Property which always adheres to it. Thus a Crow differs from a Swan, becauſe the one is White, and the other is Black: And each of theſe may be ſtiled an *accidental* Difference. But *the moſt proper* Difference, according to *Porphyry*, is what

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we call the *eſſential* Difference: As when a Man that is endued with Reaſon, is ſaid to differ from Brute Animals.

The Word *Quality* is in our Law-Books uſed in ſeveral Senſes, *viz.* For that Difference in Things, which declares the *Species* thereof, and makes a Thing to be certain and determinate [t]. *Secondly*, It is taken for the State and Condition of an Argument, or any Buſineſs, according to the Subject of it [u]; and in this Senſe it is uſed among Pleaders and Orators. *Thirdly*, It points out the *Species* and Value of Money [x]: And, *Fourthly*, It declares the Nature and Heinouſneſs of any Crime. In Pleading, there are ſome Qualities that are neceſſary, and others that are not ſo. The former are to be expreſs'd in every Libel or Action; as, I demand of ſuch a Pupil Ten Pounds, becauſe I lent him ſo much with the Authority of his Tutor: And this Quality is neceſſary to obtain a Victory in the Suit. But touching ſuch Qualities as are not neceſſary, as they do not render the Proceſs void, if they are omitted; ſo if they are expreſs'd, and not prov'd, they do not vitiate a Proceſs [y]. Theſe Qualities in a Cauſe, are often ſtiled the Circumſtances of a Suit. When a Quality is inherent to a Thing, according to the Nature thereof, it is not neceſſary to deduce and ſet forth that Quality in the Libel: But a Libel, being founded upon a certain Quality, falls to the Ground, if that Quality be not prov'd. Again, A Puniſhment inflicted on the Account of ſome Quality in the Offence, when ſuch Quality ought to be preſent and appear, is not incurr'd, if ſuch Quality be abſent, tho' ſuch Quality ſupervenes *ex poſt Facto:* As when a Puniſhment is inflicted on a Man, that *knowingly* contracts Wedlock with his Aunt, ſuch Puniſhment is not incurr'd, if he thus contracts Marriage with her through Ignorance, or not knowing her to be his Aunt, though he ſhould afterwards know her to be ſuch, and yet perſeveres in the Contract. If the Quality of a Thing be changed, it diverſifies the Thing itſelf: But it is well enough, if ſome Things do agree in the *Genus*, tho' they differ in Quality. Where the two Qualities concur, *viz.* a *Permiſſive* and a *Prohibitive* Quality, the *Permiſſive* Quality is always preferr'd.

[t] D.28.1.21.1.
[u] D.22.5.21.
[x] D.28.5.78.
[y] D.14.3.13.

Though every Quality be an Accident, yet every Accident is not a Quality, taken in a Logical Senſe: For among *Logicians* there are Nine ſorts of Accidents, of which a Quality is one; and it denominates a Man or Thing to be ſuch as it is, as White or Black, Learned or Ignorant, *&c.* Now an Accident is nothing elſe but a Circumſtance; and it is called an Accident, becauſe it may be preſent and abſent to a Thing, without deſtroying its Subject; as Whiteneſs or Blackneſs may be preſent or abſent to a Thing, and the Thing ſtill remain. So a Dowry may be preſent and abſent to Matrimony, without deſtroying the Subject, which is Matrimony. Again, *Profit* and *Loſs* are the Accidents of Partnerſhip; for Partnerſhip may be carry'd on without either. And thus I have done with the Principles or *Præcognita* of the Law, and ſhall proceed in the next Book to ſpeak of Perſons, the firſt Object of the Law.

The End of the FIRST BOOK.

BOOK

BOOK II.

Of PERSONS, the first Object of the Law.

TIT. I.

Of the State, Quality, and Condition of Man in his natural Capacity.

AS Facts, from whence the Law ariſes, do ſometimes reſpect Perſons, ſometimes Things, and ſometimes Actions, I ſhall, therefore, with the Lawyer *Caius* [a], divide the whole Law into theſe three chief Heads, and treat of them ſeverally in the following Work: For we may refer the whole Law, which we make uſe of, to theſe three Heads or Objects. But *Apellus*, no mean Lawyer among the reſt, thinks, that the firſt Head is not a proper Object of the Civil Law, and will have it to be nothing elſe but a Circumſtance; as Time, Place, Quantity, Quality, Event, and the like are. I will not here canvaſs his Opinion, but rather chuſe to follow the Doctrine of the *Imperial* Inſtitutes, which divide the Law into theſe three Objects.

[a] D. 1.5.1.

I will here begin with the Right of Perſons, which the *Digeſt* [b] terms *Status hominum*, or the State and Condition, which Mankind is found to be in, in reſpect of Liberty or Slavery, *&c.* For the word *State* ſignifies nothing elſe but the habitual Quality or Condition of a Perſon, as that he is either a Freeman or a Bondman, a lawful Son, or a Baſtard, or a Perſon *ſui* or *alieni juris*, and the like. And thus *Donatus* upon *Terence* obſerves, That the word *State* has a reſpect to the Habit of a Man's Perſon, as the word *Stature* has a regard to his Body: So that the State of a Man, properly ſpeaking, appertains to that Condition of his Perſon, wherein he was born, and ſtood as it it were *ab Origine* [c]. Of this State there are three things to be conſidered: The firſt relates to the Liberty or Freedom of a Man; the ſecond concerns his Family; and the third reſpects the Nation or Country, unto which he belongs, as a Subject or Citizen [d]. And in theſe three ſeveral Conditions I ſhall conſider Man, either *abſolutely* or *relatively*, in the following Titles. I ſhall here ſurvey him firſt *abſolutely* or *ſimply*, as he is a Man in his natural Capacity, without any regard had to Domeſtick or Civil Society. And then in the five next Titles I ſhall take a View of him in relation to others, as he has both a natural and a civil Capacity.

[b] D. 1.5. per tot.

[c] D. 28.1.15. Gloſſ. *ib.*

[d] D. 12.1.41. Gloſſ. in v. *ſtatus.*

Now under the word *Man* or *Perſon*, in reſpect of Sex, we reckon both
[c] D.50.16.15. Man and Woman to be comprehended, (for ſo the word *Homo* [c] in the Text ſignifies,) and likewiſe an Hermophrodite, who, according to the Pre-
[f] D. 1. 5. 10. valency of its Sex, is deemed to be a Man or Woman [f]: And in a doubtful caſe, Hermophrodites are reputed as Males; and, according to *Bal-*
[g] In l. 12. l. 6. *dus* [g], they are capable of *feudal* Eſtates. The Law further takes notice of
55. n. 10. 11. & 12. the Male Sex, whether caſtrated, or frigid and impotent: But of this hereafter. A Man is ſaid to be *perfect*, that wants nothing in his Form, which is common to human Nature; and *imperfect*, if he ſuffers, or be an Eunuch
[h] I. 1. 11. 9. born [h]. Monſters, that are not born according to human Shape, as having two Heads, and the like, are not reckoned as Children in regard to their
[i] D. 1. 5. 14. Parents Eſtates [i]: But yet they are of advantage to the Mother in reſpect to
[k] D. 50. 16. 135. the *Jus trium Liberorum* [k]. Thoſe Perſons that are in the Womb, are looked upon as Perſons already born, whenever any Benefit accrues to
[l] D. 1. 5. 7. & 26. them, or comes in queſtion [l]; for Life begins from the firſt Infuſion of the Soul, and even when the Infant is in the Womb: But yet Children in the
[m] D. 1. 5. 7. Womb are of no advantage unto other Perſons [m]; becauſe perſonal Privi-
[n] D. 24. 3. 13. leges are only extended to thoſe to whom they are granted [n]. The Birth of a Child is by Law adjudged to be *legitimate*, if it comes within the
[o] D. 1. 5. 12. & Gloſſ. ib. tenth *Lunar* Month, or forty Weeks, and after the Month complete [o]. It is alſo allowed, that a Woman may have five Children at a birth; becauſe ſhe has ſo many Receptacles in her Womb. The Condition of Women is worſe
[p] D. 26. 7. 42. than that of Men in ſeveral Particulars [p]: For that the Mother has not the
[q] D. 1. 5. 9. power over her Children as the Father has [q]; nor can Women adopt Children, unleſs it be through the Indulgence or Grant of the Prince in com-
[r] I. 1. 11. 10. fort to them for the loſs of Children in the Wars [r], *&c.* nor can they bear
[f] D. 50. 17. 2. publick Offices in the State [f], and the like, unleſs there be a Cuſtom or peculiar Privilege in favour of them. But in ſome reſpects their Condition
[s] C. 2. 45. 2. is better than that of Men [s]: Of which more largely hereafter under the Title of Women in their civil Capacity.

The Life of Man is of ſo great a Value, that the Law pardons every
[t] D. 48. 1. 1. thing which is done in Defence and Preſervation of it [t]. The Term of a Man's Life is uſually computed to the ſpace of a hundred Years: And we have a pretended Reaſon given by *Dioſcorides* the Phyſician, why this Term of Years ſhould be looked upon as the longeſt ſpace of Man's Life, *viz.* becauſe the Heart of Man, for the firſt fifty Years, grows two Drachms every Year; and from fifty to a hundred decreaſes as many, ſays he: And hence, according to him, it happens, that the Life of Man does not exceed a hundred Years. This ſeems to me to be a meer Figment and Invention of his own Brain; becauſe the contrary is true in Fact; Men living to a much longer Period of Time: And yet the *Egyptians*, as re-
[u] Lib. 11. c. 37. corded by *Pliny* [u], were of the ſame opinion with this eminent Naturaliſt. And *Varro* likewiſe obſerves [v], that this Term of a hundred Years
[v] Varr. de Ling. Lat. was thought by the *Romans* to be the longeſt Period of Man's Life; inſomuch as the Cryer at the *Ludi Sæculares* was wont to call the People to thoſe Sports and Paſtimes, *which no Man yet had ever ſeen*, nor ever would ſee again. Theſe Sports were held but once in a hundred Years.

The next thing, which I ſhall contemplate, is, the Age of Man in reſpect to its ſeveral Degrees or Stages. Now the word *Age* in *Latin* ſtiled *Ætas*, does not only belong to Perſons, but even to Things and Seaſons, as will appear from what I ſhall add hereafter. In reſpect of Perſons, according to the Imperial Conſtitutions, and the Lawyers, this is called Age, which includes *Infancy*, *Childhood*, *Puberty*, *Youth*, *Manhood*, and *Old Age*; or, according to others, Man has ſix Ages. The firſt is ſtiled *Infancy*, *quaſi fandi impos*, for in the Law the Infant is ſuppoſed not to

ſpeak

ſpeak till he is ſeven Years of Age, becauſe he underſtands not what he ſays: And thus *Infancy* ends in the ſeventh Year complete, both in Male and Female. The ſecond is the *Pupillary* Age, in *Latin* ſtiled *Pueritia* or Childhood: And this in Females determines in the twelfth, and in Males at the fourteenth Year complete. The third is termed *Puberty* or *Ætas adulta*, that is to ſay, the growing Age: And this, according to the *Civil* Law, is compleated at twenty-five Years, and is then called full Age [w], and not before. But, by the Grant or Indulgence of the Prince, a Man may become a Major at twenty Years of Age, and a Woman at eighteen [x]: Yet in ſome particular Caſes a larger Term of Years is required in Men; as thirty [y], forty [z], fifty [a], ſixty [b], or ſeventy [c]. According to the Laws of ſome Countries, regularly ſpeaking, full Age is at twenty-one, as in *England* and *Scotland*; in other Countries at eighteen, as in the Kingdom of *Naples* and *Sicily*, by a particular Conſtitution. See *Joh. Arnono de Different. Juris Cæſar. & Regn. Sicil.* and in ſome other Countries not till the twenty-eighth Year of their Age. The fourth Age is ſtiled *Youth* or *Juventus*: And this is bounded at fifty Years. The fifth Age is ſtiled *Manhood* or *Ætas Senilis*, which I will interpret *Gravity*: And this continues from fifty to ſeventy. And the ſixth Age we may properly call *Senectus* or *Old Age*: which is not limited by any Term of Years. Puberty may be ſaid to be threefold. For the Time of *Puberty* is in our Books ſometimes ſaid to be *plenum*; as when a Perſon arrives at fourteen Years of Age [d]. *Secondly*, it is ſaid to be *plenius*; as when a Perſon comes to ſeventeen Years of Age: At which time he may be an Advocate, if he thinks fit [e]. *Thirdly*, the time of *Puberty* is ſometimes ſaid to be *pleniſſimum*; as when any one is willing to adopt or arrogate a Perſon into his Family. A Perſon is by the *Civilians* ſaid to be *Pubertati proximus*, or *to border upon Puberty*, who is ten Years and a half old [f]; and ſuch a Perſon is capable of a malicious Deſign, and of doing an Injury [g], and may be liable to an Action of *Deceit*: For *in Delictis*, ſuch a Perſon is deemed as a Perſon of full *Puberty* [h], but then he ought to be more gently puniſh'd than one of riper Years. But ſome of the Doctors think, that this Matter in reſpect of a Pupil's Malice, ought to be left to the Diſcretion of the Judge; ſince in Children, one Perſon comes to Ripeneſs of Underſtanding before another; and ſuch as are educated in the City, ſooner learn the Buſineſs of Fraud and Subtlety than ſuch as are bred up in the Country [i], and one Country or Climate produces Children more verſute and cunning than another [k]. The Ancients judged of *Puberty* in Males, not only by the Number of their Years, but alſo by the Habit and Diſpoſition of their Bodies, as the *Canoniſts* do now in reſpect of Matrimony. But the Emperor *Juſtinian*, looking upon it as an immodeſt thing even in old Women to have the Inſpection of Mens Bodies, did therefore order, that *Puberty* in Males ſhould begin immediately after fourteen Years of Age compleat, and in Women after twelve Years complete [l].

[w] D. 50.5.2.
[x] C.2.45.2.
[y] Nov. 137. c. 2.
[z] C. 1.3.4.
[a] D. 38.1.35.
[b] D. 50.6.3.
[c] C. 10.31.10.
[d] I. 1.22.6.
[e] D. 1.1.3.v. *Pueritiam.*
[f] Gloſſ. in l. 9. I. 3.20.
[g] D. 50.17. 111.
[h] D. 47.2.23.
[i] Dec. in l. 111. D. 50.17.
[k] Gloſſ. in l. 4. D. 41.3.
[l] I. 1.22. pr.

Servius Tullius, the ſixth King of the *Romans*, according to the Teſtimony of *Aul. Gellius* [m], divided the Age of Man only into three different Degrees or Stages of Life, *viz.* into *Childhood*, *Youth* or *Manhood*, and *Old Age*. The firſt extended to ſeventeen Years of Age: And when a Perſon was of this Age, and fit (as he conceived) for the Service of the State, he entred him on the military Liſt; and thus he continued till he was forty-ſix Years of Age, and was called a young Man or a Junior; but after this laſt Age, he was ſtiled an old Man or an Elder. So that, according to his Diviſion of Age, Perſons were term'd *Pueri* till ſeventeen Years of Age, *Juvenes* till forty-ſix, and after that during the Remainder of their Lives they were called *Senes*. The Lawyer *Ulpian* [n] follows the Diviſion

[m] Lib. 10. c. 28.
[n] D. 2. 15. 8. 10.

ſion of *Servius Tullius.* But, generally ſpeaking, among the *Romans*, the Diviſion of Age was into *Youth* and *Old Age*. *Youth* being from the Age of ſeventeen, till the Age of forty-five, called the *military* Age; and *Old Age* after forty-five, till the End of a Man's Life. And as the firſt of theſe is ſometimes ſtiled a *robuſt* [o] Age; ſo the other is ſometimes termed the Age of *Infirmity* [p]. *Varro* will have the Diviſion of Age to be according to the following Degrees or Stages of Life, extending the firſt to the Age of fifteen; the ſecond to the Age of thirty; the third to the Age of forty-five; the fourth to the Age of ſixty; and the fifth to the End of every Man's Life. The firſt he calls the Age of *Puerility*. The ſecond the Age of *Adoleſcence*, or the *growing Age*, from the *Latin* Word *Adoleſcendo*; becauſe during that time, Man's Body is always growing. The third he ſtiles *Juventa*; becauſe till the Age of forty-five Men are able *juvare Rempublicam*, to aid and aſſiſt the Commonwealth in the Buſineſs of War. The fourth he terms *Senium*, from the *Latin* Verb *ſeneſco*; becauſe the Body of Man begins to grow old. And the fifth he calls *Senectus*; becauſe at that Age the Body ſinks and labours under the weight of old Age. But in the Sequel of this Work I ſhall rather follow the Lawyers than the Grammarians and Phyſicians; and divide Age into the ſix aforeſaid Periods of Life. The Age of *Puberty*, *Ulpian* ſtiles *Ætas Prætextata* [q]: For from fourteen till ſeventeen Years of Age the Children of all Perſons of Quality wore the Robe or Gown called the *Prætexta*, which at the laſt Age they changed for the *Toga Virilis*, or the Habit of a Man. The Age which follow'd *Puberty*, was the *juſt Age* [r], ſometimes called *lawful*, and ſometimes *perfect* or *full* Age; though the *Ætas juſta* is ſometimes taken for the Age of *Puberty* [s]. On the other hand, Non-Age or the Age of a Minor, is in *Latin* ſtiled *Ætas imperfecta* [t].

[o] D. 48.5. 15.6.
[p] D. 30.1. 122.
[q] D. 43.30. 3.6.
[r] D. 50.5.2. pr.
[s] D.12.4.8.
[t] C.2.41.5.

There are many Advantages accruing to Age: As Precedency in ſome reſpects; and Exemption from Offices, and the like in others, hereafter to be noted. Both the *Civil* [u] and *Canon* Law give great Deference and Submiſſion to old Age: nor ought we to wonder at it, though it be deſpiſed in ſome Countries, ſince old Men may be well preſumed to have more Prudence and Wiſdom than raw young Men, having acquired Knowledge unto themſelves by long Uſe and Cuſtom, and from the Experience of Things. And this is ſo far true according to the *Code* [v], That if any one ſhall ſay, that an old Man has not more Prudence than a young one, he is bound to prove it by fifteen Witneſſes [w]. Hence it is, that if ſeveral Witneſſes are found contrariant to themſelves in their Depoſitions, thoſe ſhall be preferr'd by the Judge, who excel the others in Point of Age, provided they be of equal Integrity [x]. *Secondly*, among the Privileges of old Age, we may reckon this as one, *viz.* That old Men cannot upon any account be put to the *Rack* or *Queſtion*, nor vexed with any kind of *Torture*; yea, not even with the *Ferula* [y]: For if an old Man has *de facto* been put to the *Rack* or *Torture*, and has thereby made a Confeſſion of ſome Crime, ſuch Confeſſion ſhall not affect or prejudice him [z]. The *Lacedemonians* had ſo great a regard for old Age, that even their Ambaſſadors would not ſit down in the Preſence of an old Man ſtanding.

[u] C.12.19.7.
[v] Alex. in l.3. D.1.21.
[w] Abb. in c.5. x.2.20.
[x] D.29.5.3.
[y] Marſ. in l.8. D.48.18.

The Age of a Perſon may not only be proved by Witneſſes, but alſo by Inſtruments, according to the Gloſs [a]: And a Regiſter-Book makes a full Proof of a Perſon's Age, eſpecially if it be ſworn, that ſuch Regiſter is faithfully kept. Though a Mother may be admitted to prove the Age of her Child; yet ſhe does not make the Proof, which another Witneſs does [b]. A Perſon, who affirms himſelf to be a fit and qualified Perſon in reſpect of Age, to obtain any Office, and the like, ought to prove his Age: and a Man may prove his Age by the Teſtimony of a Neighbour or a Kinſman,

[a] In l.2.l.2.45.
[b] D.22.3.16.

if

if he be older than himself. Though, generally speaking, every Person is presumed to be a Minor, unless the contrary be proved [b]; yet in the case of Restitution *in integrum*, a Person is presum'd to be a Major, unless he proves himself to be a Minor; and the Reason is, because his Minority is the Foundation of his Intention, which every one ought to prove. So again, if a Person be condemned of a Crime by the Aspect of his Body, which is a good Presumption of a Man's Age, he ought to prove himself not to be of a proper Age for such Condemnation, if he would excuse himself [c].

[b] D. 44.43.

[c] D. 44.25.

The fourth thing I shall here observe regarding a Man in his natural Capacity, is his State of Health, which may be lost two several ways, *viz.* by a Distemper of the Mind, and a Disease of the Body. A Man may be said to be disordered in Mind three several ways. As *first*, by *Ideocy* or an entire want of Understanding, as the Fool is; which may happen to a Person either by Nature, or by some vehement Sickness or Indisposition of Body, which affects the Mind, and destroys the Faculties of the Understanding. *Secondly*, by *Madness*, which is also a Disease of the Mind, and is usually occasion'd by some irregular and impetuous Hurry of the animal Spirits, commonly called a *Frenzy*. *Celsus* says, there are three Kinds of Frenzies. The first is that which happens from a Fever, in which case the sick Person rambles in his Discourse, and talks he knows not what, without speaking his own Thoughts. The second proceeds from Grief and great Trouble of Mind, without any Fever at all. And the third Kind, is, when Men grow fanciful and whimsical by false Images or Appearances of Things, and lose their Understanding; as in the Spleen and deep Fits of Melancholy. But of this by the bye. *Thirdly*, A Man may be said in Law to lose his Understanding by *Prodigality*, (for the Law likens a *Prodigal*, who knows no End or Measure of his Expences, unto a *Madman*; and makes almost the same Provision for him, as it has done for a *Madman* or an *Ideot*, interdicting him the Administration of his Estate [d]; and the Judge assigns him a Curator till he becomes prudent and discreet [e].) The Law nulls all Obligations, Alienations, and Contracts, which he is engag'd in, unless it be such as tend to his advantage [f]: In which respect his Condition is better than that of a *Madman*; because a *Madman* has no Will or Understanding at all, but is like a Man that is absent or asleep, or like an Infant [g]: whereas the *Prodigal*, as a Minor, has some Seeds of Discretion in him, and is only compar'd to a *Madman*, when he acts like one by squandering away his Estate. There are two sorts of real *Madmen*; those that are *continually* out of their Senses, who are not allowed to do any Act, and are never punish'd for the commission of any Crime, or Breach of the Laws [h]; and those whose Madness does sometimes abate, and admit of *lucid* Intervals. These are under the same Circumstances with other Men, and during that time have all the Advantages of the Law [i]. They have power, during an Intermission of their Madness, to make a Will and all legal Contracts, notwithstanding a future Return of their Madness. But of *Madmen*, *Prodigals*, and *Ideots* I shall hereafter more fully discourse under a particular Title.

[d] D. 28.1.18.

[e] D. 27.10.1.

[f] D. 45.1.6.

[g] D. 50.17.5.

[h] D. 1.18.13. & 14.

[i] D. 28.1.20. 4.

A Person is said to be diseased or unsound in respect of his Body, who labours under any *Disease* or *Imperfection* of Body, (for the Law distinguishes between *Morbus* and *Vitium Corporis*, making the word *Morbus* to signify a temporal Imbecillity of Body, but the word *Vitium* to denote a perpetual Impediment:) and thus an Imperfection is rather a perpetual Defect of some natural Organ or Faculty of the Body, than a Disease. *Cicero* in the fourth Book of his *Tusculan* Questions, makes this distinction, saying, that the word *Morbus* signifies a Corruption of the whole Body: But the word *Vitium* points out an Illness, when some Parts of the Body

are attended with ſome Defect or Weakneſs; as Blindneſs, Deafneſs, Lameneſs, *&c.* See alſo the ſecond Book of *Galen*'s Therapeuticks [k], and the fourth Book of his Symptoms [l]. *Sabinus* the Lawyer defines a Diſeaſe to be a Habit of Body contrary to Nature; rendring the Body unfit for the End and Uſe which Nature deſign'd it for [m]. But this only by way of Criticiſm. A Diſeaſe may be ſaid to be either *ſontick*, or not. A *ſontick* Diſeaſe is that, which renders a Man unfit for any Buſineſs [n]; as a Fever, Palſy, *&c.* And ſuch a Diſeaſe is a good Plea or Excuſe for a Man's not obeying the Judge's Summons. A Diſeaſe which is not ſontick, as Deafneſs, Dumbneſs, Blindneſs, Lameneſs, *&c.* does not afford ſuch an Excuſe, if a Proctor or Defenſor may be had. A Diſeaſe not *ſontick* is perpetual, or for a time only [o]. If the three firſt Defects are perpetual, they hinder a Man from doing ſome Acts of Law, as I ſhall obſerve hereafter in its proper place. And thus much for the preſent, touching Man in his natural Capacity.

[k] Cap. 3.
[l] Cap. 1.
[m] D. 21. 1. 1. 7.
[n] D. 42. 1. 60.
[o] C. 5. 67. 1.

TIT. II.

Of the State, Quality, and Condition of Man in his relative Capacity, according to the Law of Nations.

THE relative State or Condition of Man depends either on the Law of Nations, or elſe on the Civil Law of this or that Community. According to the Law of Nations, the State of Man is either a State of Freedom, or a State of Servitude [p], in other Terms called a State of Bondage and Slavery; and as ſuch I ſhall treat of it under this Title. Hence the ancient Law of Nations diſtinguiſhed all Men into Freemen or Bondmen; and herewith did the *Roman* Civil Law agree. I call it the ancient Law of Nations; becauſe Slavery, as it was anciently practis'd among the Heathens, not ſuiting with the Chriſtian Religion, (which looks upon all Men alike, as proceeding from one common Parent, and created for one and the ſame end) is now in all Chriſtian Nations worn out and aboliſhed. For it ſeems to be againſt Chriſtian Charity, and that Brotherly Communion which we ſtand obliged by to another, to exerciſe ſuch an abſolute Dominion over any, whom Nature and Religion have made our Equals. Thoſe hard and ſevere Laws of Servitude, therefore, which were in uſe among the old *Romans*, whereby Slaves were excluded from the Participation of all Civil Right whatſoever [q], and could not ſo much as marry, nor have any Eſtate of their own, nor bring any Action in their own Name; muſt needs now fail of their Uſe and Vigour, as being an incongruous State.

[p] D. 1. 5. 23.
[q] D. 50. 17. 32.

Freemen or *Liberi*, are ſo called from the *Latin* word *Libertas*, as having a free Power and natural Liberty of doing whatever they judge proper to be done; unleſs they are either hindered by ſome Force, or forbidden by ſome Law to act in this manner [r]. And *Cicero* in his Offices defines Liberty or Freedom to be a power of living according to the way a Man would wiſh to live: *Libertatis proprium eſt ſic vivere ut velis*, ſays he. And the ſame Perſon, again, in his Paradoxes ſays, That Liberty is the Power of living according to a Man's Wiſh. Bondmen or Vaſſals are in *Latin* ſtiled *Servi* from the word *Servitus*; and they were they, who had not this Liberty, but were by an eſtabliſh'd Conſtitution of the Law of Nations, (contrary to the Law of Nature) made ſubject to the Dominion and Property of another Perſon. For in the beginning, Nature knew no ſuch diſtinction as *Bond* or *Free*; theſe Names of Diſtinction being only impoſed on Men by Fortune, after Bondage was introduced by the Law of Nations.

[r] I. 1. 3. 1.

By the Law of Nature, the State and Condition of all Men was one and the ſame: All Men being born to Freedom till Mankind afterwards, by Captivity [r], departed from hence, and entered into a State of Bondage. For Servitude or Vaſſalage firſt proceeded from Wars, which were introduced by the Law of Nations [s], after Things ceaſed to be in common, and Property was eſtabliſhed among Men. Then it was the *Nimrods* and mighty Hunters of the World were oppoſed by force; and Men entered into mutual Leagues of Defence againſt theſe devouring Monſters, which produced Conflicts and Contentions among Nation and Nation, Society and Society. And as Men were made Priſoners by the conquering Party, this power, which one Man had over another as his Bondman, was firſt granted by the Gentiles as a Benefit, and on the ſcore of Humanity, for the Preſervation of ſuch, who, ſurviving the Slaughter of the War, came into the Hands and Power of the Conquerors: And from hence the Priſoners thus ſaved were in *Latin* ſtiled *Servi, à Servando* [t]. And thus thoſe Perſons that were ſo taken by the Enemy in Wars, according to the Law of Nations, were alſo ſtiled *Mancipia, quia manu capiuntur.* So that from what has been ſaid, it is not lawful for us, according to the Law of Nations, to kill our Enemy, after he is taken Priſoner: which many Perſons think to be only true, when he is brought within our Camp, Garriſons, or other Preſidial Juriſdiction. For it is an Act of the greateſt Cruelty to kill a Man that has once ſurrendred himſelf to us, and contrary to that Humanity which one Man owes and profeſſes to another. And this was what obtain'd in the Heathen World. But at preſent, among Chriſtians, Perſons taken in War, and called Captives, do not in any wiſe by their Captivity become Bondmen: and we never make uſe of this Law, unleſs it be againſt thoſe Barbarians the *Turks*, who in the like manner reduce all Perſons taken from us under the ſevereſt Degrees of Bondage. For, among Chriſtians, the ancient Laws of Captivity are not practiſed; nor are Men taken Priſoners in War expos'd to Sale as formerly [u], nor eſteemed as Vaſſals. But theſe Laws relating to Seizures in War, are only obſerved in reſpect of ſuch Things, which do by the right of War belong to the Captors. Thus Bondage and Servitude had its Riſe from the Law of Nations, and was only afterwards confirmed by the *Civil* Law unto the *Romans:* And though Divines tell us, that it was allow'd by the Law of God given unto the *Jews*, for which they cite the Book of *Exodus* [v]; yet St. *Paul* aſſures us, that *with God there is no Bond or Free.* A Bondman was *nolens volens* (as we ſay) compelled to obey his Maſter; and as to his Perſon and Goods, they were entirely at his Maſter's Diſpoſal. Hence it came to paſs, that by the *Civil* Law, (the greateſt part of which is founded on the Law of Nations) Bondmen and Servants were deemed as no Perſons among the *Romans*, though by the Law of Nature all Men were equal [w], as aforeſaid.

[r] I. 1. 3. 3.
[s] I. 1. 3. 2.
[t] I. 1. 3. 3.
[u] I. 1. 3. 3.
[v] Cap. 21.
[w] D. 50. 17. 32.

Now Perſons were ſaid to be Bondmen by the Law of Nations, as well as by the *Civil* Law, ſeveral ways. *Firſt*, by *Captivity:* For Perſons taken Priſoners by the Enemy in War, as already hinted, did heretofore become Bondmen or Vaſſals unto the Captors, and they might be either ſold or retain'd as the meer Property of thoſe that took them. They were looked upon as their Goods and Chattels; and, having no Goods of their own to diſpoſe of, they could not make a Laſt-Will and Teſtament [x]: But now as Perſons taken Priſoners in War do not become Slaves, they retain the power of making a Will, though they die in the Hands of the Enemy, which anciently they could not do, (as is juſt now related,) till the Emperor *Leo* afterwards ordain'd [y], that Captives ſhould have the power of making a Laſt-Will and Teſtament. *Secondly*, Perſons became Bondmen by *Birth* or *Nativity*, as being born from Handmaids or Bondwomen, tho' their Father was a Freeman at the ſame time [z]: For though a Child otherwiſe,

[x] I. 2. 12. 1.
[y] Nov. Leon. 40.
[z] I. 1. 3. 4.

wiſe, in reſpect of Dignity and Nobility (as to its Birth) follows the Condi-
[a] D. 1.5.19. Gloſſ. ib. tion of the Father, and not the Mother [a]; yet in the preſent Caſe, in reſpect of Freedom or Liberty, the Birth follows the Condition of the Mo-
[b] C.3.32.7. ther, and not the Father [b]; and this in favour of the Birth or Child born. For the Mother's Condition may be of advantage to the Child at three ſeveral Seaſons, *viz.* at the Time of Conception, at the Time of its Nativity, and at the intermediate Time, *viz.* between the Mother's Conception, and
[c] D. 1.5.5.2. the Birth of the Child [c]. For if the Mother was found to be a freed Woman at any one of theſe times, the Child was ſaid to be free, though ſhe was at other times a Bond-woman. The third Cauſe of Bondage or Servitude, rather according to the *Civil* Law than the Law of Nations, was Sale: which happen'd, when a Freeman of twenty Years of Age ſuffer'd himſelf to be ſold, that he might have a Share or Part in the Purchaſe-Money; and
[d] Deut. c.15. this was alſo according to the *Jewiſh* Law [d]. See St. *Paul's* Epiſtle to *Philemon*, and other places of his Writings. A fourth Cauſe or Reaſon of Servitude, was, when any Perſon was by ſome Sentence or other condemned to be put to death on the Score of ſome capital Crime: For then he be-
[e] D. 48.19. 29. came a Servant unto Puniſhment, and loſt his liberty [e]. Hence, according to the *Roman* Law, he could not make a Will, unleſs the Puniſhment was remitted to him, and he was reſtored to his former State of Liberty or Free-
[f] D.28.1.8.1. dom [f]. For the Emperor had it in his power to reſtore a Perſon to his Honours, Order, and all other Things, and to re-inſtate him in his former
[g] C.9.51.1. Condition [g]; as the ſeditious *Ruſticks* were in the Year 1525, reſtor'd by an Ordinance of the Imperial Diet; and in the Year 1526, in a Diet at
[h] Nov. 22. c.8. *Spires*, to their ancient Fame and Honours. But at this day, no Freeman can be made a Servant unto Puniſhment by any Sentence [h]. And, therefore, Matrimony is now retain'd with a Perſon, that is condemn'd to the Mines or Gallies; ſuch Perſon retaining the *Peculium* which he has acquir'd by his Labour and Induſtry in the Gallies themſelves; and he may bequeath the ſame by a Laſt Will and Teſtament.

[i] I.1.3.5. As to the Right and State of Vaſſals, there is now no Diſtinction made [i]: For the Lord has the ſame Right and Power over all his Vaſſals, and one is not more a Servant than another: But yet they differ in reſpect of the Order and Offices, which they heretofore diſcharged. Among our *Saxon* Anceſtors, the moſt inferior Rank of Vaſſals were thoſe, which of later times were called *Villains:* But even theſe were anciently divided into two degrees, the ſuperior which were term'd *Free-Lazzi.* Theſe were ſuch as had been Slaves, but had purchaſed their Freedom by their Deſerts; and tho' they had eſcaped the Depth of Bondage, yet they did not attain to a full Pitch of Freedom: For tho' the Lord might quit his own Title of Bondage, yet no Man could be made free without the Act of the whole Body.
[k] *Tacitus.* And therefore the Hiſtorian [k] ſays, that they were ſcarce above Servants. Theſe are now-a-days among the Number and Rank of ſuch as are called Copy-holders, who have the Privilege of Protection from the Laws, but no Right of Vote in making of Laws. The moſt inferior of all were thoſe that were anciently ſtiled *Lazzi* or Slaves; being the Dregs of the People, and wholly at the Will of the Lord to do any Service, or to undergo any Puniſhment; and yet the Magnanimity of the *Saxons* was ſuch they abhorr'd Tyranny: And hard Uſage by Beating, Torture or Impriſonment, was ſeldom uſed amongſt them, in order to compel them to ſerve. This wrought Reverence in theſe Men towards their Lords or Maſters, and maintain'd a kind of Generoſity in their Minds, that they did many brave Exploits, and many times not only purchaſed their own Freedom, but even brought Strength and Honour to the Kingdom. Among the *Romans* there
[l] D. 1.5. D.40.7.1.pr. were ſome that were ſtiled *Statu-liberi* [l], that is to ſay, ſuch as had Liberty or Freedom appointed them for a Time certain, or under certain Conditions,

Conditions, but in the *Interim* were really Vaſſals. There were ſome others that were really Vaſſals, tho' they had ſome Specialties of Freedom granted them; for they were in the Property of ſome Perſons, and being annexed to the Eſtate or Glebe-Land, were transferr'd together with the Eſtate; and theſe were in *Latin* termed *Aſcriptitii* or *Glebæ aſcripti*. Tho' the Law compares Monks unto Bondmen [m], becauſe they are ſubject to their Abbot in all Things, and having no Property of their own, cannot make a Will (for all their Acquiſitions go to the Monaſtery:) yet a Monk really is a Freeman, and not a Bondman; and therefore, may be a Witneſs and the like. I have ſaid, that among *Chriſtians* there is no ſuch Thing as a true Bondman at this day, in the manner as heretofore among the *Romans*, and almoſt all other Nations. For that which was not lawful for Bondmen or Vaſſals to do, by the *Roman* Law and the ancient Law of Nations, our Servants may do with Impunity, and according to Law; ſince they may be Witneſſes, make Wills, *&c.* Among Freemen there was anciently this Diſtinction, *viz.* Some were ſtiled *Ingenui* or Free-born; and others were called *Libertini* or *Liberti* [n], being ſuch as were manumis'd: But of theſe I ſhall diſcourſe hereafter.

[m] Nov. 5. c. 5.

[n] I. 1. 3. 5. D. 1. 5. 5. 2.

From what has been ſaid it may well be inferr'd, that Bondage or Servitude was that ſtate of Man, whereby he became ſubject to the Dominion and Power of another Perſon. And hence whatever Bondmen acquired went to their Maſter's Profit and Advantage [o], and they had no Property in it themſelves [p]; they might make the Condition of their Maſter better, but cou'd not render it worſe by any Obligation contracted by them [q]; their Acts were looked upon as the Acts of their Maſter in moſt reſpects, and not aſcribed to themſelves [r]; their Maſters heretofore had the abſolute Power of Life and Death over them, tho' this Power was afterwards limited [s]: But tho' they had not the Rights and Privileges of Perſons in civil Society; yet they had all the Rights which flow from Communion, according to the Law of Nature and right Reaſon [t]; becauſe in this Reſpect all Men are equal. I have juſt now hinted, that Maſters had heretofore the Power of Life and Death over their Bondmen or Servants according to the Law of Nations, and might therefore put them to Death with Impunity: which great Power was ſeemingly ſupported on this Principle, *viz.* That every one is Moderator and Arbiter in his own Eſtate, and as he is to judge touching the Abuſe thereof [u]; the Law ſeemed not to regard, what the Maſter did with his Servant, in whom he had a full Property, and over whom he had an abſolute Power by ſaving his Life in War. Yet this Power of putting Bondmen to death according to Pleaſure, was afterwards taken away, unleſs it was in ſome ſpecial Caſes [w]. So that a Perſon putting his Bondman to death without Cauſe ſhewn, became then as liable to Puniſhment as if he had killed a Freeman or another's Vaſſal: and by the *Cornelian* Law [x] touching Murder, might be criminally impleaded for it, this Law making no Diſtinction between a Bondman and a Freeman. But Maſters might give moderate Correction to their Servants by ſtripes and other gentle Methods of Chaſtiſements [y], after the ſame manner that a Husband may correct his Wife upon good Reaſon given, and a Maſter his Scholars.

[o] I. 2. 9. pr. & 4.

[p] I. 1. 8. 1.

[q] D. 50. 17. 133.

[r] I. 3. 1. 8. pr.

[s] I. 18. 1.

[t] D. 50. 17. 32.

[u] D. 5. 3. 25. 11.

[w] I. 1. 8. 1.

[x] C. 9. 41. 1.

[y] I. 1. 8. 1. C. 9. 19. 1. un.

A Bondman by the *Civil* Law cou'd not be put to the *Rack* or *Queſtion*, and interrogated againſt his Maſter, except it were in ſome certain Caſes [z]: nor cou'd he by the *Roman* Law be a Witneſs againſt him; and as he cou'd not be a Witneſs againſt him, or in any other Caſe, ſo neither cou'd he be a Judge [a], and the like. If Maſters treated their Bondmen with greater Aſperity than was fit, and they fled to the Church or Prince's Statue, their Maſters were compelled to ſell them upon reaſonable Terms, and to receive the Price [b]: For tho' Fortune had brought them into Bondage; yet they ought ſtill to be looked upon as Men, ſince they became Bondmen only by neceſſity,

[z] C. 9. 41. 1.

[a] D. 5. 1. 52.

[b] I. 1. 8. 2.

ſity, and not by Choice or Nature. Tho' regularly ſpeaking, a Bondman
[a] C. 3. 1. 6. cou'd not be in Judgment againſt his Maſter [a]; yet it was otherwiſe in eight ſeveral Caſes: For in Cauſes which related to the State of a Bondman, and in ſome Cauſes which concern'd the Intereſt of the Publick, a judicial Pro-
[b] D. 5. 1. 53. ceſs might ſubſiſt between a Bondman and his Maſter [b]. As when his Maſter ſuppreſs'd a Will, wherein he declar'd that he had left his Bondman his full Liberty. *Secondly*, In a Caſe wherein the Maſter had defrauded the
[c] D. 48. 12. 1. Publick of Proviſions in order to ſell them dearer [c], as by regrating and foreſtalling the Market, *&c.* *Thirdly*, In the caſe of cheating the Publick of
[d] I. 1. 18. 9. any Tax, Toll or Tribute, by embezzling the Publick Money [d]. *Fourthly*,
[e] D. 5. 1. 53. In the Caſe of coining falſe Money [e]. In theſe and the like Caſes a Bondman might accuſe and appear in Judgment againſt his Maſter. And thus much touching the State of Man as he was anciently diſtinguiſh'd into *Bond* or *Free*, according to the Law of Nations, and the *Civil* Law. For tho' this Diſtinction is now at an end; yet I thought it neceſſary to ſay ſomething hereof, in order to explain and clear up ſeveral Parts of the *Roman* Law, which wou'd not be well underſtood without it. I proceed in the next place to conſider the State, Quality and Condition of Man in his relative Capacity as a Citizen or Subject.

TIT. III.

Of the State, Quality, and Condition of Man in his relative Capacity, as a Citizen or Subject, according to the Rules of Civil Polity.

THE State of Man according to Civil Polity, which *Vulteius* calls the Order of Men, is that Condition, wherein a Man becomes a Member of this or that Society or Civil Community: And herein he is ſtiled a *Subject* or a *Foreigner*, to this or that Commonwealth. Now a *Subject*, or what is the ſame Thing, a *Citizen*, is in *Latin* ſtiled *civis*, and is a Perſon that is under the Care and Protection of any State, or the Laws thereof; and in this Senſe the Prince himſelf may be called a *Citizen*, tho' not in our vulgar way of Speech a Subject. Among *Citizens*, in the largeſt Acceptation of the word, ſome are veſted with Dignity and Juriſdiction, as the Prince is, and under him all ſubordinate Magiſtrates, or elſe ſuch as have no Juriſdiction at all. Among thoſe that are cloathed with Dignity without any Juriſdiction, we may reckon all ſuch as act in a publick Capacity; as the Prieſthood, Soldiery, the Prince's Counſellors otherwiſe called *Palatines* [f], all Advocates, and Profeſſors of liberal Arts and Sciences, and the
[f] C. 12. 24. like. Theſe are called Perſons of a publick Employment in a State. Among Subjects that act in a private Capacity, and are veſted with ſome Dignity, may be reckon'd Noblemen and Gentlemen, who bear ſome Enſigns of Honour commonly ſtiled *Atchievements* or *Coats of Arms*. And laſtly, there are ſome Subjects, that are without any Dignity at all, but are diſtinguiſhed by their Trades, and a certain vulgar way of Life; and theſe we call *Mechanicks*.

A *Foreigner* is he, who, though he be a Freeman, yet is not a *Roman* Citizen, or a Subject of that State, (for I ſhall here principally treat of *Roman* Citizens:) And is ſuch a Perſon as has not the Enjoyment of civil Rights in any other State than that unto which he belongs as a Subject or Liege-

man. A *Roman* Citizen was he, who was Subject to the *Roman* Empire either by Birth [g]; or else by being made a Denizen [h]. But a *Foreigner* was he, who was neither a Citizen by Birth or Country, nor by Denization. By Denizen, I here mean such as is an Alien or Stranger born, but has submitted to be a Subject to this or that Empire, or Prince's Dominion. Whenever a *Foreigner* travel'd out of his Country, he could only claim the Benefit of the Law of Nations [i], having no Right to the Law or Privileges of any particular Place. But by an Imperial Constitution of *Marcus Antoninus* all Strangers were naturaliz'd into the Body of the *Roman* State [k]. This Right of Denization was lost by the *Media Capitis Diminutio*, viz. When a Person was condemn'd to perpetual Banishment, called *Deportation* [l]; or revolted over to the Enemy [m]; or was declar'd an Enemy to the State. By the Law of *England* an Alien or one born out of the King's Liegeance, or under the Obedience of another Prince, cannot purchase Lands *to his own Use*, for the King shall have them by his Prerogative: neither can he purchase any Freehold or Lease for Years, *&c.* nor can he be Heir by descent, though an Alien Friend. But an Alien or Foreigner may maintain personal Actions, because an Alien may trade and traffick, buy and sell, take a House for Habitation during his Residence as necessary for Commerce, if a Merchant; but he cannot maintain either real or mixt Actions. An Alien Enemy shall maintain neither *real* nor *personal* Actions till the Nations are in Peace. An Alien may be made a Denizen by the King's Letters Patents, or naturalized by an Act of Parliament; which is more perfect and effectual than Denization by Letters Patents. See *Calvin's* Case in *Coke's* Reports [n].

[g] D. 50. 1. 1. pr.
[h] C. 10. 43. 3.
[i] D. 48. 19. 71. 1.
[k] D. 1. 5. 17.
[l] I. 1. 16. 2.
[m] D. 4. 5. 5.
[n] Rep. 7. fol. 1.

Among *Foreigners* or *Aliens* there are some that are stiled *Confederates* or Allies; others that are called *Enemies*; and a third sort that are termed *Neuters*. *Confederates* are those, with whom any State has entered into a strict Alliance by some League or Covenant [o]. Those are called *Enemies*, with whom we have any just War [p]: For all others warring with us are termed *Rebels* and *Free-booters*. They are stiled *Neuters*, who, being in Amity or Peace with a State, neither declare War in favour of it, nor against it. By the *Civil* Law a Prince may compel his Subjects to return to the Place of their Birth, and to inhabit there. Because, tho' they may constitute a dwelling unto themselves in another Place, yet they cannot renounce or quit the Right of their Allegiance to him: And if Subjects will not return to their Native Country on the Prince's Summons, he may confiscate all their Goods and Estates lying within the Precincts of his Dominions; for they owe him a natural Allegiance. In respect of Property, indeed, a Prince has no Right unto the Goods and Estates of his Subjects; but in respect of Jurisdiction and Protection, all Things do belong to him, and he may tax them for the Use and Service of the Publick, tho' he cannot by the Plenitude of his Power divest any Man of his Property.

[o] D. 49. 15. 7.
[p] D. 49. 15. 24.

I have already observed, that a Person becomes a Subject or Citizen either by *Birth* [q] or *Denization* [r]. And this Right of a Citizen the Sons may derive from the Father, tho' the Father had his Dwelling or was an Inhabitant in another Place [s]. I mean *really* an Inhabitant [t]: For a Declaration before Witnesses, that he claims to be an Inhabitant there, does not make him to be a real Inhabitant [u]; no, though he has purchased a House there [v]. Inhabitants or *Incolæ* are in the *Code* stiled *Municipes*; but very improperly: For an *Incola* is he, who has his Dwelling in some State or City where he was not born, and not he who lives in the Country [w], tho' the Word *Incola* in an improper Sense may be extended to any kind of Inhabitant, whether in Town, City or Country; and it matters not where he was born. Those Persons in City or Town are called *Municipes*, that are capable of Civil Offices therein, from the two *Latin* Words *munus* an Office, and *capio* to take: But, in a general Acceptation of the Word,

[q] D. 50. 1. 1. pr.
[r] C. 10. 43. 3.
[s] D. 50. 1. 6. 1.
[t] D. 50. 1. 20.
[u] D. 50. 1. 20.
[v] D. 50. 17. 13.
[w] C. 10. 38. 3.

word, all Perſons were term'd *Municipes* that were Subjects to the *Roman* Empire; and thus the word *Municipium* may be applied to a State or Common-wealth, as well as to a leſſer Community.

It has been a queſtion among ſome, whether an Inhabitant, once ſettled in a Country, may depart from thence without leave? That the Inhabitants may not remove in Multitudes, it is certain; for the State could not ſubſiſt under ſuch a Liberty: But it ought not to be deny'd to ſingle Perſons, if they diſcharge their Debts contracted there, and if the Publick there does not particularly ſtand in need of their Preſence. Thus a Perſon who is an Inhabitant in ſuch a Town or Place, cannot by his own Will prejudice the Place of his original Settlement, nor exempt himſelf from thence [w], though he ſhould transfer his Dwelling to another Place or City [x]; for he ſtill remains a Citizen where he was born, and may be claimed. The Law diſtinguiſhes between the Place of a Man's Birth or original Settlement, and the Place of his Dwelling, which is arbitrary. That is called the Place of his Birth or original Settlement, where he had his Abode from his Father, (for every Perſon follows the Settlement of his Father, and is a legal Inhabitant where he was born) and this Settlement no one can change, tho' he may remove himſelf from the Place of ſuch original Settlement. Thus as a Son or Child born in juſt Wedlock at *Rome* follows the original Settlement of his Father, and becomes a Subject or Citizen there [y]; ſo on the other hand, a Baſtard or ſpurious Iſſue follows the original Settlement of its Mother [z]; unleſs it be otherwiſe provided by ſome municipal Law [a]. A Man's Dwelling, in *Latin* called *Domicilium*, is the Place of his Abode or Reſidence, whether born there or not: For he may, upon divers Accounts and at different Seaſons, have his Reſidence in ſeveral Places; this not being abſurd, when he equally divides his Time of Reſidence in this manner [b]. There are ſome Perſons who have their Dwellings in reſpect of ſome Dignity, Office, or Employment, which obliges them to a Reſidence in ſome certain Place: But this is not their only Dwelling, if they may be elſewhere at a Time, which does not require their Reſidence; for then theſe Perſonshave another Dwelling elſewhere. Thus Senators or Parliament-Men, in reſpect of Honours, and not of undergoing Offices, ſeem to have a Dwelling in the Capital City of the State [c], as *Rome* was heretofore to the *Roman* Senate. But tho' Senators ſeem to have a Dwelling in the Capital City, as aforeſaid; yet they are alſo underſtood to have a Dwelling in the Place where they were born, and to be Inhabitants there, becauſe their Dignity rather ſeems to have given them an additional Dwelling than to have changed their original Settlement [d]. Again, for example, a Court-Officer that is in waiting for half a Year, or an ancient Receiver of the publick Revenues, who attends every alternate or third Year, is ſaid to have his Dwelling in the Place of his Receipt during the Year that he exerciſes his Office. And military Officers and Soldiers, that are in the Service of the War, are likewiſe ſaid to have their Dwellings in the Places where they are employed upon Duty; and they may have their ordinary Reſidence in ſome other Place [e].

Manumiſſion alſo heretofore, when it was in uſe, made a Perſon to be an Inhabitant or a Citizen, becauſe a *Libertus* or Freedman always followed the original Settlement of his Patron [f]: And if he had ſeveral Patrons, he followed the Settlement of them all [g]. Thus Adoption alſo made a Perſon to be an Inhabitant of this or that Place: For the Perſon adopted ever followed the original Settlement of his adopting Father [h]. Yet the Right of a Perſon's original Settlement was not changed by Adoption: For the Perſon adopted and his Deſcendant was oblig'd to undergo civil Offices in both Places, *viz.* as well in that City where he was born,

as

[w] C. 10.38.4.
[x] C. 10.38.5.
[y] D. 50.1.1.2.
[z] D. 50.1.9.
[a] C. 10.38.3.
[b] D. 50.1.5. & 6.33.2.
[c] C. 10.39.8.
[d] D.1.9.11.
[e] D.50.1.23.1.
[f] D. 50.1.22. 23. & 25.
[g] D.5.1.6.
[h] D.50.1.17.9.

as in that wherein he was made a Citizen by Adoption[i]. And thus tho' Inhabitants do enjoy all the Privileges, Honours and Advantages of the Town or City, where they are made free; yet, on the other hand, they shall be oblig'd to undergo all the real and personal Offices of that Place where they have their Birth, called their original Settlement, tho' they have their dwelling elsewhere[k]. If Persons shall refuse to undergo such Offices as are enjoin'd or laid upon them, they shall be liable to make good the Damage thereof to the State[l], unless they can defend themselves by some Plea of Age[m], Dignity[n], and the like.

[i] D. 50.1.15 fin.
[k] D. 50.1.17. 4.
[l] D. 50.1.21.
[m] D. 50. 1.6. 1.
[n] D. 50.1.17. 4.

Though a Person be oblig'd by his natural Allegiance unto the Prince, under whose Dominions he was born, and cannot quit the same as long as such Prince will give the Protection of a Subject to him; yet a Man may renounce his being an Inhabitant of this or that City, and at pleasure transfer his Dwelling unto another place, unless he has been called unto some Office in the City: For then he ought first to go through such Office, if he has a mind to quit the Place[o]. If any Dispute or Controversy shall arise touching the Right of a Man's being an Inhabitant in this or that Place, it shall be determined before the Judge, who has the care of that City or Place committed to him, where a Man is said to be an Inhabitant, and chosen unto an Office[p]. Every Man is said to have his *Dwelling*, where he maintains himself or his Family; or has the principal Part of his Estate lying: And from hence no one ought to depart, unless it be upon particular Avocations; for if he departs from hence, he is said to be a Traveller, and if he returns again, his Peregrination ceases[q]. If a Person quits his own Country, and becomes a Subject to another Prince, he is said to owe such Prince a legal, and not a natural Allegiance.

[o] C. 10.39.1.
[p] D. 50.1.37.
[q] C. 10.39.7.

TIT. IV.

Of the State, Quality, and Condition of Man in his relative Capacity, as he is a Master of a Family.

I SHALL next take a View of Man as he is the Master of a Family. Now the word *Familia* has several Significations in Law[r], relating both to Things and Persons. As it relates to Things, it comprehends an Inheritance and the Substance of a Man's Goods[s]: And thus it is used in several Laws of the twelve Tables; as *proximus Agnatus familiam habeto*, let my next of Kin by *Agnation* have my Estate, or be my Heir. See also *Ulpian* on the Digests[t]. But I shall make use of it here, as it has a Regard unto Persons. At first only Servants were couched under this Term; and then it denoted a Body of Servants from the Verb *Famulor*, to serve: But afterwards it came to point out such Persons as live by Nature, or by Law, in the same House, under the Power of one Person, who was stil'd the *Paterfamilias*, though he was a Minor and really had no Children, but so called by reason of a future Possibility[u]. In this last sense the Word *Family* includes the Wife, Children, Grandchildren, *&c.* It differs in Signification from the word *Gens*, because the word *Gens* is a Term of a larger Acceptation, and is made use of to include all such as are of the same Stock or Name in what degree of Kindred soever they are, though it be a thousand De-

[r] D. 50. 16. 195.
[s] C. 6.38.5.
[t] D. 50. 16. 195. 1.
[u] D. 50. 16. 195. 2.

grees off. But the word *Family* has a more narrow Relation; and is only here extended to ſuch as are of Kin by the Father's ſide, called the *Agnati*, as thoſe that were of Kin by the Mother's ſide were ſtiled the *Cognati*. And thus *Agnation* is properly ſaid to be of ſuch Kindred as are in the Family of the *Paterfamilias*, whether they be emancipated or not: For tho' they are emancipated; yet they ſtill remain to be of the ſame Stock or Lineage by the Father's ſide. *Agnation* does not go beyond the Great Grandfather: But the word *Gens* extends itſelf to the Great Grandfather's Great Grandfather. *Agnation* was prefer'd before Cognation, becauſe Cognation proceeded by Perſons of the Female Sex, who had no power in the Family: But *Juſtinian* has now taken away this Diſtinction of Agnation and Cognation in ſeveral Reſpects, as I ſhall hereafter remark. As the Father or Maſter of the Family had a greater Power over his Children by the *Roman* Law than any other Father or Maſter had, (for he could ſell his Son on the account of Hunger [u], and had the Power of Life and Death over his Children): So he was liable to anſwer for his Son's Contracts in many Caſes; his Son and him being deem'd in Law to be one and the ſame Perſon [v]. By the ancient Law whatever the Son acquir'd was added to the Father's Subſtance, and the Son had no Property of his own. The Son could not call the Father into a Court of Judicature, without the Father's Leave; nor could the Son marry a Wife without his Father's Conſent [w]. But of this Relation between a Father and a Son, I diſcourſe under a particular Title touching the Father.

[u] C. 4. 43. 2.

[v] C. 6. 26. 11.

[w] I. 1. 10. pr.

All the Kindred deſcending from the Maſter of the Family centred in him; and till the Law releaſed them from this Power, either by Death or Emancipation, he had a full Power over them. When the Maſter died, his whole Power and Authority devolved unto the next below him in point of Succeſſion, and then he became the chief Head or Maſter of the Family: But this Power could never go out of the Male Line. When I ſay to the next below him, I mean to all and every Perſon in an equal Degree: As when he had three or four Sons, they all became equally Maſters of a Family, as being ſubject to the Power of no one above them. Tho' we often meet with the word *Materfamilias* in our Law-Books, yet it denotes nothing more than a Wife, or matronly Woman; for ſhe had no power went along with the Title [x].

[x] D. 50. 16. 196. 1.

A Perſon in his relative Capacity may be farther conſidered as a Huſband, who has an Authority over the Wife, if ſhe be emancipated from the Power of her Father. The Husband and Wife make but one Houſe or Family in Law: And as a Husband and Wife are but one Fleſh, the one cannot be a witneſs for the other. In Honour of Matrimony a civil Action, that carries any Infamy or Turpitude along with it, is denied to the Husband againſt his Wife: For tho' ſhe ſhould ſteal her Husband's Goods, whilſt Matrimony ſubſiſts between them, yet ſhe ſhall not be liable to an Action of Theft. But if a Divorce happens, ſhe may then be liable to an Action *Rerum Amotarum:* And if ſhe ſteals his Goods after a Divorce, ſhe is liable to an Action of Theft [y]. A Wife by the *Roman* Law was in the Power of the Father, and not of the Husband, unleſs it were *ad debitum Carnis* and *quoad obſequia Matrimonii*, tho' ſhe be preſumed to be the ſame Perſon with the Husband: But by the Law of the *Lombards*, the Wife is not in the Power of the Father; and this Law we follow here in *England*, and in other Places at this day. But tho' the Wife was in the Power of the Father, according to the *Roman* Law; yet ſhe was obliged to work and labour for her Husband, as owing him conjugal Duty [z]; and was likewiſe bound to yield him Reverence and Reſpect [a]. The Wife, in reſpect of Name and Dignity, is deemed to follow the

[y] D. 25. 2. 1. & 2.

[z] D. 38. 1. 48.

[a] D. 23. 3. 14. fin.

Name

Name and Dignity of her Husband; yea, tho' she be a Widow, till such Time as she passes to a second Marriage [b]. She likewise follows the Jurisdiction and Dwelling of her Husband, as soon as she is coupled to him in Matrimony, and becomes a Citizen or an Inhabitant of that Place, unto which her Husband belongs [c], and is taken and deemed to be of the same original Settlement with her Husband [d]. If the Husband be legitimate by Birth, he makes his Wife legitimate too, tho' she was born otherwise. Though a Husband ought to maintain his Wife during Matrimony, even though he has marry'd her without a Dowry; yet in many Cases he is excus'd from allowing her Alimony: Among which this is particular, *viz.* When she goes away from him without such Causes as the Law approves of [e]; because the Wife must then impute it to herself. But the Wife's being an excommunicated Person is not a just and sufficient Cause of denying Alimony, as *Baldus* observes [f]. But a Husband may deny Alimony to his Wife, who goes away from him or elopes on the score of committing Adultery; and in this Case she shall also lose her Dower, if Adultery be proved upon her. A Wife ought not to depart from her Husband, because he gives her a Blow or gentle Correction; for a Husband may correct his Wife with Moderation [g]: But if he beats her immoderately, with Clubs and the like, she may leave him, and he shall be oblig'd not only to maintain her out of his House, but shall likewise, according to *Baldus* [h], be punish'd for his Excess. And for great Cruelty the Wife may be separated from her Husband *quoad Thorum*, tho' the Wife had given cause for such evil Treatment. I say, a Husband, though he ought to defend his Wife from all Injuries [i], because he himself is then injur'd as well as her, may yet give her moderate Correction: And therefore, a Husband, who has given Caution not to offend his Wife by cruel Usage, does not contravene such Caution, if he gives her gentle Correction. A Wife loses her Dower not only for Adultery, but if she goes into the Bath with Men; or suffers herself to be wantonly kissed, or dishonestly embraced by a Man, for such Kisses and Embraces are the Fore-runners of Lust and Venery.

The Husband, as the Scripture phrases it [k], has a Power over the Body of his Wife; he may command Service and Obedience from her, tho' not in every Case, but only in such Things as are lawful and honest, and within the Limits of a Reverential Love and Duty. And this Authority is gain'd by Consent [l]; for by Nature there seems to have been a Parity of Power. She may give and buy indeed, according to the *Civil* Law, without the Consent of her Husband [m]; but he ought not to be affected with her Contracts or Debts [n], or Injuries committed by her, nor shall the Wife be affected by the Debts or Act of her Husband. But by the Laws of *England* it is otherwise; for with us the Husband and Wife are adjudged as one Person in Civil Cases, and have but one Estate. She is also disabled to contract without her Husband's Consent: For if she is a sole Merchant, she is presum'd to have his Consent. They cannot give or grant to each other during the Marriage [o]. The Husband may be prosecuted for the Debt and Damages committed by the Wife: And in these Cases the Laws of other Nations are almost now the same with the Laws of *England*. See *Groenvegen* on the *Code*. The Wife with us loses her Dower for the Treason of her Husband [p], contrary to the Rules of the *Civil* Law. By the *Civil* Law the Wife is said to be *Domina dotis*, Proprietor of her Dower, and to have the Possession thereof in Law [q], tho' the Husband has the Usufruct. But the Goods, which the Wife has, are in a doubtful Case presum'd to be among the Husband's; and this in order to take away every filthy Conjecture. A Person, that has two Wives or more, is infamous by the *Civil* Law; and it is the same Thing, if he has one Wife and a Concubine: so that Concubinage is forbidden in this Case, which was otherwise

[b] C. 12. 1. 13. C. 10. 39. 9.
[c] Glos. in l. 7. C. 10. 39.
[d] Glos. in l. 8. C. 10. 38.
[e] C. 5. 17. 8. D. 38. 1. 48. D. 33. 1. 13. fin.
[f] In l. 22. d. 24. 3.
[g] D. 24. 3. 15.
[h] In l. 5. d. 9. 2.
[i] D. 47. 10. 1. 3.
[k] 1 Cor. 7. v. 4.
[l] Nov. 117. c. 14.
[m] C. 8. 56. 6.
[n] C. 4. 12. 1.
[o] 1. Inst. 112. a.
[p] 5. Edw. 6. cap. 11.
[q] C. 5. 12. 30.

wife allow'd of. A Husband ought not to exact Modesty and Chastity from his Wife, when he himself does not exhibit an Example thereof: And therefore, in the Case of Adultery the Law allows the Wife to recriminate, if she be accused thereof by her lewd Husband, and there shall be a mutual Compensation of Crimes.

I have before hinted, that a Wife cannot be bound by any means for her Husband's Debts, tho' she should often confirm the same by an Intercession of Suretiship, unless it evidently appears, that the Money borrow'd was converted to her Behoof and Advantage, or came into her Substance [r]; or unless it be otherwise by some Statute or Custom. Hence it comes to pass, that by an Arret in *France*, a Woman may become a Surety for her Husband [s], if she shall have first renounced the Benefit of the *Senatus-consultum Velleianum*, which forbids Women to become Sureties, or (at least) gives them an exception if sued hereupon [t]. And *Gail* in his *Practical Observations* assures us [u]; that it is a received Custom in *Germany* for the Wives of Merchants or Tradesmen to be bound for their Husbands, as being in Partnership with them. Moreover, 'tis to be observed, that as a Wife cannot be bound for her Husband, so neither can she prosecute an Injury, which is done to her Husband, because (perhaps) Wives do participate of the Husband's Dignity, and not Husbands of the Dignity of their Wives. Therefore, a Person, that violates the Dignity of the Wife, is at the same time reputed to violate the Dignity of the Husband: But not *è converso*. There is nothing more agreeable to Humanity, than that the Husband should partake in the fortuituous Cases of the Wife, and the Wife bear a Part in the fortuitous Cases of the Husband [w]: For which reason a Divorce does not ensue upon the Account of each other's Madness, as I have noted elsewhere.

[r] Nov. 134. c. 8.

[s] Papon. 12. Arrest. 3.

[t] D. 16. 1. 2. & 2.

[u] Lib. 2. obs. 90. n. 5.

[w] D. 24. 3. 22.

TIT. V.

Of the State, Quality and Condition of Man in his relative Capacity, as a Father and Son: and of the Father's Power over his Children; and how it is dissolved.

THE Relation between Parents and their Children is another natural Foundation which God has laid for Civil, or rather Domestick Society: therefore I shall here consider Man under the State, Quality and Condition of a Father and a Son; and say something of the Father's Power and Jurisdiction over his Children, as it was anciently practis'd among the *Romans*; and how the same was dissolved and at an end. By a *Parent*, in a strict Sense of the word, I mean both Father and Mother; tho' sometimes in a large Acceptation of the word *Parent*, a Father, Grandfather, Great Grandfather, and all Superiors in the right Line are included: as also a Mother, Grandmother, Great Grandmother, and the like [v]. By a Son, or the word *Filius*, the Law often includes both Son and Daughter, whenever the Subject Matter requires it. Under the word *Liberi* we mean not only Sons and Daughters in the first Degree of Descent, but even sometimes Grand-Children, Great Grand-Children, *&c* [w]. The Father is he, whom lawful Marriage or Wedlock points out to be such. I here speak of a just and natural Father, and not of such as is made a Father by Law, as by Adoption, Legitimation, and *per oblationem curiæ*: of which hereafter.

[v] D. 50. 16. 51.

[w] D. 50. 16. 220. pr.

Now

Now all Children, that were born of *Roman* Citizens or Subjects, in juſt and lawful Wedlock, were by the *Civil* Law ſaid to be in the Power of the Father, till they were releaſed from thence either by Death or Emancipation: And the Father and Mother were in *Latin* called *Pater-familias* and *Mater-familias*; and the Children were ſtiled *Filii-familias*. By the Power of the Father I underſtand that Right, whereby Sons and Daughters, and other Deſcendants in the Male-Line, were, in reſpect of their Perſons and Eſtates, entirely ſubject unto the Father, and Grandfather by the Father's ſide, as to ſome certain Effects, which I ſhall remember by and by. And tho' Reverence and Obedience be due to Parents according to the Law of Nations [x]; yet this ſpecial Power was only introduced by the *Civil* Law, as the Text affirms [y]. *Plutarch* remarks, that *Romulus* was the firſt Founder of this Law, *viz.* That the Son ſhould remain in the Father's Power as long as he liv'd. If the Grandfather was living, the Father and the Son were in the Power of the Grandfather, and the Father had not this ſpecial Power over his own Son till the Death of the Grandfather, becauſe the Father himſelf was a Dependant. The *Romans* claim'd this kind of Paternal Power, as peculiar unto themſelves, pretending [z], that no other Nation exercis'd ſo great Power over their Children. But by their leave this is falſe in Fact. For we collect not only from the Cuſtoms of ſome other Countries, that this Power was founded on the Law of Nations, but likewiſe from the Reaſons that ſupport this Paternal Power, that it was elſewhere thus practiſed and receiv'd. In ancient *Gaul* Children were in the Parents Power, and the Power of Life and Death was granted unto the Father, after the ſame manner as it was heretofore uſed among the *Romans*. See *Cæſar*'s Commentaries touching the *Gallick* War [a]. And many of the written Cuſtoms in ſeveral Places of *France* do evince the Truth hereof, which do even preſcribe the Methods of Emancipation. So that this Paternal Power there muſt precede the ſame, ſince Emancipation is nothing elſe but the releaſing of a Perſon from the Power of the Father. *Chaſſaneus* obſerves, that it was thus adjudged in his Time in the Parliament of *Paris*, viz. That the Children of the *Gauls* were in the Parents Power. Indeed *Accurſius* and his Followers ſay; that the *Franks* had not their Children in their Power: But this is not true, if by *Franks* he means the ancient *Gauls*. But at this day this Power is entirely aboliſh'd in *France* by Diſuſe and Cuſtom, or much diminiſh'd (at leaſt) as it is in other Countries govern'd by the *Roman* Law. The Power of the Father among the *Perſians* carry'd a Tyrannical Sway along with it; and, according to *Ariſtotle* in his Ethicks [b], was the ſame as that of a Maſter over his Bondmen or Servants. Under the ſecondary Law of Nature, otherwiſe called the Law of Nations, this Right or Power was ſurely admitted: Becauſe *Abraham* would have offer'd up his Son *Iſaac* as a Sacrifice unto God [c], which certainly he would not have thought of, if any Law had forbid it.

[x] D. 1. 1. 2.
[y] I. 1. 9. 2.
[z] I. 1. 9. 2.
[a] Lib. 6.
[b] Lib. 8. c. 20.
[c] Gen. 22. v. 5.

But all Children, that had Fathers and Grandfathers, were not in their Power by the *Civil* Law; but only ſuch as had lawful Parents, as above hinted. And, *Firſt*, it is to be obſerv'd; that only Fathers, and not Mothers, had this Power. For tho' the ſame Reverence ought to be exhibited to all Parents alike [d]; yet Women had not that Power over their Children, which was introduced by the *Roman* Law [e]; and from hence it is called the *Power of the Father*. This only accrued to ſuch as were ſubject to the *Roman* Empire, if we may believe the *Inſtitutes* [f]. *Secondly*, It is to be noted; that the Grandfather's by the Father's ſide, had their Grand-Children in their Power, even in the life-time of the Father [g], as juſt now related: For as long as the Grandfather lived, the Father had not his own Son in his Power, ſince the Father himſelf was in the Power of the Grand-

[d] D. 2. 4. 6.
[e] I. 1. 11. 10.
[f] I. 1. 9. 2.
[g] I. 1. 9. 3.

father; and he, who is ſubject to the Power of another, cannot have another in his Power [h].

[h] D. 48. 5. 21.

I ſhall next enquire, what Rights and Advantages accrued to the Father by this Paternal Power, and what the Children reaped from thence. The Doctors ſince the Gloſs, and (particularly) *Aretinus* obſerves; That the Effects of this Power were ſeveral, and chiefly conſiſted in the following Articles, viz. *Firſt*, The Father had an entire Power of Life and Death over his Son, and might thro' neceſſity of Hunger, ſell or mortgage him [i]. For the Legiſlators did not believe, that Parents wou'd exerciſe ſo much Cruelty as to put their Children to death without juſt Cauſe, and thus this Power would conduce much in order to procure them that Duty and Reverence, which Children ought to pay to their Parents. But this Power of Life and Death over their Children, has ſince been reſtrain'd by Imperial Conſtitutions, as well as by the Judgments of the ancient Lawyers [k]: yea, Parents were afterwards ſeverely puniſh'd, that put their Children to death [l], tho' they did it upon a juſt Account, ſince the Power of the Father ought to conſiſt in Piety and Affection, and not in Cruelty [m]. But even after this exorbitant Power, which was given by the Law of the 12 Tables was taken away, the Father had a decent Power of correcting his Children, and of diſinheriting them too, if he expreſſly declar'd the Cauſes thereof [n]. *Secondly*, The Father could not be impleaded or called into a Court of Judicature by his Son in Civil Cauſes, as long as he was in the Father's Power, without the Father's leave [o]: But it was otherwiſe in criminal Cauſes, where the Intereſt of the Publick was concern'd. For by the *Civil* Law the Father and the Son were deem'd to be one and the ſame Perſon in Law [p]. Thus if a Son, that is above twenty-five Years of Age, ſhall refuſe to take the Heirſhip on himſelf, the Father may do it, if the Son be in his Power: and as to the Uſufruct thereof, he ſhall acquire what the Son ſhould otherwiſe gain; and Actions ſhall lie for and againſt him in this Caſe, and not againſt the Son the appointed Heir. The Father had alſo an Uſufruct in the Mother's Eſtate, which came to the *Filius-familias*; and not in theſe only, but in other Eſtates, as I ſhall obſerve hereafter. According to the *Canon* Law [q], and the Law of *England*, a Son is permitted to ſue his Father; and this is now the Practice in other Nations. *Thirdly*, By the *Civil* Law no Actions lay againſt Children in the Power of the Father [r]; but the Action was brought againſt the Father in all Civil Cauſes. This Part of the *Civil* Law is alſo now ablolish'd and out of Uſe. *Fourthly*, Whatever the Son acquir'd, was acquir'd unto the Father's Advantage, unleſs in ſome particular Caſes [s]: which Right of the Father is now gone by a contrary Cuſtom in moſt Countries. *Fifthly*, That a Son in the Power of the Father cou'd not ſue another without the Father's Leave and Conſent [t]: But at this day it is otherwiſe, if the Son be above twenty-five Years of Age. *Sixthly*, The Father had the Management and Adminiſtration of his Son's *adventitious* Goods and Eſtate, even againſt the Son's Conſent [u]: But as there is now no Diſtinction between an *adventitious* and a *profectitious* Eſtate, this Part of the Law is become obſolete. *Seventhly*, There could be no ſuch Thing as a civil Obligation formerly contracted between ſuch a Son and his Father [v]: nor could he without the Father's Conſent marry a Wife [w]; nor without the Father's Conſent make a Donation *Mortis cauſa* [x], or in Proſpect of Death. *Eighthly*, Such a Son could not make a Teſtament or Codicil even with his Father's Conſent, unleſs it were in reſpect of the *Peculium caſtrenſe* or *quaſi caſtrenſe*, wherein he was looked upon as a *Pater-familias* [y]. By the *Peculium caſtrenſe*, I mean ſuch an Eſtate as the Son got in the Wars: And by the *Peculium quaſi caſtrenſe*, ſuch as he purchaſed by his Profeſſion of the Law and the like. *Ninthly*, The Father might by an Interdict *de liberis exhibendis* ſue and

[i] D. 28. 2. 11. C. 8. 47. 10. C. 4. 43. 2.
[k] D. 48. 8. 2.
[l] C. 9. 17. 1.
[m] D. 48. 9. 5.
[n] Nov. 115. c. 3.
[o] C. 2. 2. 4.
[p] C. 6. 26. 11.
[q] 2. Q. 7.
[r] D. 5. 1. 4.
[s] I. 2. 9. 1.
[t] C. 6. 61. 8.
[u] C. 6. 60. 1. ib. Notat.
[v] I. 3. 20. 6.
[w] I. 1. 10. pr.
[x] D. 39. 6. 25. 1.
[y] C. 6. 22. 12.

and claim his Son, that was detained by another Person against the Will of the Son [y]. These were the chief Effects of the Father's Power over his Son or Children. I shall next examine how this Power was dissolved or came to an end.

[y] D. 43. 30. per tot.

Now the Power of the Father was first dissolv'd by the natural Death of him, who had the Son in his Power, unless he were the Grandfather: For a Grandfather might have his Grandson in his Power till the Time of his Death; and then the Son came into the Father's Power [z], as already hinted. *Secondly*, This Power was dissolv'd by the Civil Death of such Person, unless it were in a Case, where the Father or Grandfather was taken Prisoner by the Enemy: For by the *Cornelian* Law, and the Right of *Postliminy* (of which I shall treat in the Sequel of this Work more at large) such Power was rather suspended than taken away [a]. I say, that this Power was dissolved by a Civil Death: As when the Father suffer'd Deportation, or perpetual Banishment, on the Account of some Crime committed by him [b]; or was condemn'd by a Capital Sentence, whereby he became a Servant unto Punishment [c]. And it is further to be observ'd, that Deportation or perpetual Banishment dissolv'd the Power of the Father, whether the Father or Son suffer'd the same. It is called a Civil Death, because Persons, that suffer'd Deportation, were in respect of Civil Rights looked upon as dead in the Eye of the Law; since all Civil Rights were forbidden them, as Stipulations, Actions, the making of a Will, *&c.* Which are Acts of Civil Right; but they did not lose those Rights which were founded upon the Law of Nations [d]. *Thirdly*, This Power was dissolved by the Dignity of the Person, who was thus in the Power of his Father or Grandfather [e]: As when the Son was made a Patrician, Consul, Privy Counsellor, Bishop or the like. There is a Law, indeed, in the *Code*, which implies, that a Bishop might be under the Power of the Father: But this Law was afterwards corrected by a *Novel* Constitution [f], enacting, that the Episcopal Dignity should release a Person from the Power of the Father *quoad Proficuum*, but not *quoad Damnum*. *Fourthly*, When a Father went into a Monastery, he lost the Power of a Father: For then he became subject to the Power of the Abbot; and therefore, could not have a Son in his Power [g]. And the same might be said of a Son, when he entred into a Monastery: For, then being lost to the World, he was releas'd from the Power of his Father; and passed into the Power and Obedience of his Abbot. For those, who enter into Monasteries, devote themselves and their Estates unto God (as is pretended) in such a manner, that they cannot dispose of the same by Will. But a Monk so far retains the Right of the State, that he may succeed his Father by Will, and also be his intestate Heir, as being his Son [h]. *Fifthly*, The Power of the Father was determin'd by Prescription: As when the Father suffer'd his Son for ten Years or more to act as a Freeman or an independant Person [i]. *Sixthly*, This Power expir'd by Emancipation; which was twofold, viz. *Legal* and *Imperial*. The *Legal* was that, which was made according to a Law of the twelve Tables [k] by an imaginary Sale and Manumission: as it was heretofore wont to be, when the *Natural* Father sold his Son to a *Fiduciary* Father, who immediately sold him back again to his *Natural* Father; so that the Son was then with the Father in the Place of a Bondman, and not of a Son: And when he was manumis'd and discharg'd by the Father from this Dominion, it was called *Emancipation* and not *Manumission*, quasi *à manu missio*; that is to say, a dismissing of him from the Power of the Father. The other way of Emancipation [l], was, when the Father appear'd before a competent Judge together with his Son, and declar'd that he was willing that his Son should be discharg'd out of his Power; the feigned or imaginary way of selling his Son being exploded in

[z] D. 1. 6. 5.

[a] D. 49. 15. 12. 1.

[b] I. 1. 12. 1.

[c] I. 1. 12. 3.

[d] D. 48. 19. 17. fin. C. 6. 24. 1. dd. ib.

[e] I. 1. 12. 4.

[f] Nov. 81. c. 3.

[g] D. 48. 5. 21.

[h] C. 1. 3. 56. 1.

[i] D. 49. 9. 16. 3.

[k] Caii Inst. lib. 1. T. 6.

[l] Nov. 81.

[m] I. 1. 12. 6. *Juſtinian*'s Time [m]. And not only a Son, but even a Grandſon might be emancipated. A Father might emancipate his Son, and yet retain his
[n] I. 1. 12. 7. Grandſon in his Power: and ſo *vice verſâ* [n]. The laſt way whereby the Power of the Father was extinguiſh'd, was by ſpecifick Adoption made by an
[o] I. 1. 12. 8. Aſcendant [o]. For a Perſon adopted by a Grandfather on the Father or Mother's ſide, was releas'd from the Power of his *natural* Father, and paſſed into the Power of his adoptive Father: But it was otherwiſe, if he
[p] C. 8. 48. 10. was adopted by a Stranger or an extraneous Perſon [p]. Some will have it, that Captivity releas'd a Perſon from the Power of the Father: For when
[q] D. 49. 15. 24. a Father was taken Priſoner, he became a Servant unto the Enemy [q], and could not have another in his Power. But this Opinion of theirs I have already given an Anſwer to in ſome meaſure, ſaying that this Power of the Father is only ſuſpended for a Time, and not entirely loſt: For the *Jus liberorum* is depending on the account of *Poſtliminy*; becauſe if ſuch as are taken by the Enemy ſhall return again to their own Country, they ſhall
[r] I. 1. 12. 5. be admitted to all their ancient Rights [r]. Wherefore a Father on his Return ſhall have his Children again in his Power; becauſe, by a Fiction of Law, *Poſtliminy* ſuppoſes him, who has been thus taken, to have been
[s] I. 1. 12. 5. always in the City or Realm [s]. But if the Father die in the Enemies Hands, the Son ſeems to have been *ſui Juris* or independent from the Time that the Father was taken Priſoner. This was true, if the Perſon was made a Priſoner in a juſt and lawful War, which was denounc'd or decreed by the *Roman* People againſt others, or by others againſt the
[t] D. 50. 16. 118. *Roman* People [t]. For if a Perſon was taken by Robbers or Pyrates, he did not become a Servant unto the Enemy in the Senſe of the Law [t], as
[t] D. 49. 15. 19. 2. I ſhall hereafter note.

A Father was in three Caſes obliged *in Solidum*, by virtue of a Contract made by his Son, whom he had in his Power. As *firſt*, when he became a *Mandator*, or acted by Commiſſion, for ſuch a Son. *Secondly*, when any Contract was made with ſuch a Son by the Father's Order and Authority. And *thirdly*, when the Father became a Surety for Money lent,
[u] C. 4. 26. 8. or for which Credit was given unto ſuch a Son [u]. In the firſt Caſe he was bound by an Action *ex Mandato*. In the ſecond by an Action *quod Juſſu*. And in the third caſe by an Action *ex Stipulatu*, as an extraneous Perſon would be oblig'd. He that lent Money to a Son under the Power of a Father, contrary to the Decree of the Senate, called *Senatus-Conſultum Macedonianum*, cou'd not receive a Surety from the Father, who had the Poſſeſſion of the Son's Effects *Jure Peculii* on the Son's Death; becauſe he had neither a *Civil*, nor a *Prætorian* Action againſt the Father; nor was there any Inheritance on which Account the Surety might be obliged, but only a *Peculium* which the Father had the Occupation of. But at this day he has the Right of an Inteſtate's Eſtate: And therefore a Surety may be taken on the account of an Hereditary Obligation, if the Contract be lawful. A civil Action lies effectually againſt the Son, if his Contract be a lawful Contract. If a Father wilfully killed his
[v] C. D. 9. 17. l. un. Son, he was puniſhed as a Parricide [v], notwithſtanding this great Power; which was enacted by a Law ſubſequent to the twelve Tables: And if he treated his Son ill without a Cauſe, he was compelled to grant him E-
[w] D. 37. 12. 5. mancipation [w]. And ſuch evil Treatment was judged of from the Atrocity of the Fact: As when he exceeded due Meaſure in correcting him.

TIT.

TIT. VI.

Of the State, Quality, and Condition of Persons in their relative Capacities, as Husband and Wife.

A Person in his civil Capacity may be farther considered as an *Husband*, in whom an Authority over the Wife is lodged, if she be emancipated from the Power of her Father: For by the *Roman* Law, without such Emancipation, the Wife was in the Power of her Parent, and not of the Husband, unless it was *quoad debitum carnis* [x], *& quoad obsequia Matrimonii*; but this is otherwise by the *Lombard* Law. But tho' a Wife was thus in the Power of the Parent, according to the *Roman* Law; yet she was obliged to work and labour for her Husband [y]. But now the Husband has a Power over her Body, as the Scripture speaks [z]; he may command Service and Obedience from her, not in every Case, but only in such as are within the Limits of reverential Love and Duty. He may give her moderate Correction [a], as I shall observe by and by; and this Authority is gained by *Consent*, for by *Nature* there seems to have been a Parity of Power. He ought to defend her from Injuries [b]; because, as she is presumed to be the same Person with her Husband, he himself is then injur'd as well as his Wife. A Husband and Wife make but one Family or House in Law: And hence it is inferr'd, that one cannot be a Witness for the other, since a Husband and Wife are but one Flesh. A Wife must follow her Husband [c], and shall enjoy all the Privileges and Honours of her Husband [d]; which she retains after his Death as long as she remains a Widow. She is esteemed to be of the same Country with him. If he is legitimate by Birth, he makes his Wife legitimate too, though she was born otherwise: And though she may buy [e] without her Husband's Consent, yet he ought not to be affected by her Debts or Contracts [f], or the Injuries which she commits; nor the Wife by the Debts or Act of her Husband. By the Laws of *England*, the Husband and Wife are deemed as one Person in civil Cases, and have but one Estate. She is also disabled to contract without her Husband's Consent; for if she is a sole Merchant, she is presumed to have his Consent. They cannot give or grant unto each other during the Marriage [g], as they may by the *Civil* Law [h]. The Husband may be prosecuted for the Debt and Damages committed by the Wife; and in all these cases, the Laws of other Nations are almost the same with the Laws of *England*. See *Groenvegen de ll. Abrog.* [i] and *Vinnius* his Comment [k]. The Wife with us loseth her Dower for the Treason of her Husband, 5 *Edw.* VI. cap. 11.

A Wife by the *Civil* Law [l], may alienate her *Paraphernalia*, or those Things which the Wife has in her Husband's House, for her own proper use, and make a Grant thereof; but she cannot alienate or give away her Dowry, even with her Husband's Consent, by reason that the *Julian* Law *de Fundo Dotali* forbids the same. See the whole Title *de Fundo Dotali* [m]. But, by the customary Laws of *France* and *Saxony*, a Wife can alienate or give away nothing without her Husband's Consent, being under the Care and Guardianship of her Husband. And the Reasons hereof are many: *First*, Because the Female Sex labours under such an Infirmity of Judgment, that

[x] C. 6. 46. 5.
[y] D. 38. 1. 48.
[z] 1 Cor. c. 7. v. 4.
[a] Nov. 117. c. 14.
[b] D. 47. 10. l. 3.
[c] D. 50. 1. 32.
[d] C. 12. 1. 13.
[e] C. 8. 56. 6.
[f] C. 4. 12. 1.
[g] 1. Inst. 112. a.
[h] D. 24. 1.
[i] Lib. 1.
[k] Tit. 25. §. 19.
[l] C. 8. 54. 1.
[m] D. 29. 5.

[n] Dec. in l. 2. D. 50 17. a Wife may happen herein to act contrary to her own advantage[n]. *Secondly*, Becauſe when a Woman is married, or led into her Husband's Houſe, ſhe does immediately, according to the *Saxon* Law, upon the Conſummation of Matrimony, paſs into the power of her Husband, and all her Goods are under the Guardianſhip of her Husband: And this Law, in this reſpect, we follow here in *England*, and in moſt other places at this day. *Thirdly*, Becauſe the Husband has an Expectation of ſucceeding to all her moveable Effects, *Geradâ exceptâ.*

Though a Husband ought to maintain his Wife during Matrimony, even though he has marry'd her without a Dowry or Wedding-Portion; yet in many caſes he is excuſed from allowing her Alimony: Among which, this is particular, *viz.* when ſhe goes away from him, without ſuch a Cauſe as the [o] C. 5. 17. 8. D. 38. 1. 48. D. 33. 1. 13. fin. Law approves of[o]; becauſe the Wife muſt then impute ſuch Departure to herſelf. But the Wife being an excommunicated Perſon, is not a juſt cauſe for the Husband to deny her Alimony, as *Baldus* obſerves [p]. But a Huſ-

[p] In l. 22. D. 24. 3. band may deny Alimony to his Wife, that goes away from him on the ſcore of committing Adultery, and ſhe ſhall loſe her Dower in this caſe, if Adultery be proved upon her: And ſhe is preſum'd to leave her Huſband on the ſcore of committing Adultery, when ſhe departs from him without a warrantable cauſe, and converſes with another Man. But a Wife ought not to ſeparate herſelf from her Husband, becauſe he gives her a Blow or gentle Correction, for a Husband may correct his Wife with mo-

[q] D. 24. 3. 15. deration[q], as aforeſaid. But if he beats her immoderately with Clubs, and the like, ſhe may leave him, and he ſhall be obliged not only to maintain her out of his Houſe, but ſhall likewiſe, according to *Baldus* [r], be puniſh'd

[r] In l. 5. D. 9. 2. for his exceſs: And for great Cruelty, the Wife may be ſeparated from her Husband, *quoad Thorum & Menſam*, though the Wife had given cauſe for ſuch evil Treatment. A Husband, who has given caution not to offend his Wife by ill Uſage, does not contravene ſuch Caution or Security, if he gives her moderate Correction, becauſe he may do it as juſt now related. A Wife loſes her Dower not only for Adultery; but if ſhe goes in the Bath with Men, or ſuffers herſelf to be wantonly kiſſed, or diſhoneſtly embraced by a Man: For ſuch Kiſſes, and indecent Embraces, are the Forerunners of Luſt and Venery; and a Woman ought to keep herſelf modeſt, and free from Temptation.

A Perſon that has two Wives or Concubines, is accounted infamous by the *Civil* Law; and it is the ſame thing if he has one Wife and a Concubine: So that Concubinage, which was otherwiſe allow'd of among the *Romans*, is forbidden in this caſe. A Husband may oblige himſelf to his Wife in a certain Penalty, in caſe that he ſhall keep a Concubine, or in caſe that he ſhould renew his Converſation with a Concubine: Becauſe it is the Wife's Intereſt that her Husband ſhould not keep a Concubine, leſt ſhe ſhould be defrauded of her conjugal Dues. And this Law tends to the Conſervation of good Manners: For Wives, how chaſte ſoever they may be, are provoked and much exaſperated by their Husbands keeping of Concubines. A Husband, tho' he retains a Concubine, or commits Adultery with another Man's Wife, cannot be accuſed of Adultery by his own Wife, as may be ſeen hereafter under the Title of *Adultery*. But the Husband may accuſe his Wife of Adultery: And the reaſon aſſign'd for this difference, is, becauſe the Husband receives a greater Injury from the Adultery of his Wife, upon the account of his Offspring being rendred doubtful thro' the Adultery of his Wife, than the Wife receives from the Adultery of her Husband. In *France*, the Proſecution of this Crime of Adultery does not belong to the Wife, but to ſome publick *Actor* or *Defenſor*: yet ſhe may ſet forth her own Intereſt that is affected thereby; and by her Complaint demand her Intereſt to be conſidered, to the end that

ſhe

ſhe may obtain her Jointure, which ſhe ſhall have ſeparate from her Huſband, if ſhe can prove her Husband defiled with the Crime of Adultery. For a Husband ought not to exact Modeſty or Chaſtity from his Wife, when he himſelf does not exhibit an Example thereof.

The Goods, which a Wife has, are in a doubtful caſe preſumed to be the Goods of the Husband, or among her Husband's Effects: And this in order to take away every evil Suſpicion, or filthy Conjecture. But yet a Wife is ſaid to be the Miſtreſs and Proprietor of her own Dower, and to have the poſſeſſion thereof in Law [f]. In honour of Matrimony, an Action that carries any Infamy or Turpitude along with it, is denied to the Husband againſt his Wife: For tho' ſhe ſhould purloin or ſteal her Huſband's Goods, whilſt Matrimony ſubſiſts between them; yet ſhe ſhall not be liable to an Action of Theft [s]. But if a Divorce happens, ſhe may then be convened in an Action *Rerum Amotarum*; and if ſhe ſteals his Goods after a Divorce, ſhe is liable to an Action of Theft [t]. Tho' a Wife, not yet emancipated, was in the power of the Father, and not of the Husband, according to the *Roman* Law, (as already remembred:) yet, according to *Angelus*, ſhe could neither make a Will, nor a Codicil, even with her Father's Conſent; becauſe her Goods brought in Marriage did belong to her Husband in ſome reſpect.

[f] C. 5. 12. 30.

[s] D. 25. 2. 1. 2. & 29.

[t] D. 25. 2. 1. & 2.

It ſeems contrary to natural Equity, that Perſons ſhould be moleſted for the Debts and Contracts of other Men. Hence it was, that by the *Civil* Law, a Wife could not be moleſted on her Husband's Account, nor the Husband on the Wife's Account, as above related; nor the Mother for the Son, nor the Son for the Father, nor the Father for the Son [u]: it being provided by that Law, that one Man's Eſtate ſhould not be impleaded for the publick or private Debts of another [v]. And for this reaſon *Juſtinian* took away all odious Demands and Exactions made upon this account; it being unreaſonable, that one ſhould be the Debtor, and the Demand ſhould be made on another. But in *Holland*, and other Places now, ſo great is the power of a Husband, that a Wife and her Heirs, by modern uſage, may be convened on the account of any Contract whatſoever made by her Husband, in one Moiety of her Goods and Eſtate: And, therefore, ſhe is in part obliged to pay a Debt, which her Husband has contracted by his prodigal and diſſolute way of Life; and this, leſt too narrow an Enquiry ſhould be made into her Husband's Manners, and leſt that Honour of Matrimony ſhould receive a Blemiſh by frequent Altercations of this kind [w]. If the Husband be condemned in a civil Cauſe to pay a pecuniary Mulct or Fine, the Goods of the Wife, and her Heirs, are liable in one Moiety of the Sum, according to *Paponius* [x], by the Laws of *France*: But if the Husband be ordered to pay a Fine, for any grievous Crime, unto the Exchequer, and for Adultery, and the like, this ſhall only be paid out of the Husband's Eſtate. And this is the Practice in *Friezeland*. But yet, upon a Confiſcation of all the Husband's Goods for a Crime committed, the Wife ſhall have a Moiety of what has been gained between them, reſerved unto her, according to the Cuſtom of *Antwerp*, and ſome other Places. Thoſe Diſtinctions are not regarded with us here in *England*; but in all Fines for Offences committed by the Wife, the Husband muſt anſwer, as he muſt alſo for his own.

[u] C. 4. Tit. 12. & 13.

[v] C. 12. 61. 4.

[w] Groenv. de ll. Abrog.

[x] Lib. 15. Tit. Arreſt.

By the *Civil* Law, a Wife cannot be bound by any means for her Huſband's Debts, (as already hinted) tho' he ſhould often confirm the Interceſſion, unleſs it evidently appears, that the Money borrowed was converted to the Wife's Behoof or Subſtance [y]; or unleſs it be otherwiſe received by ſome Statute or Cuſtom. Hence it comes to paſs, that by an *Arret* in *France*, a Woman may become a Surety for her Husband, if ſhe ſhall have firſt renounced the Benefit of the *Senatus-conſultum Velleianum* [z].

[y] Nov. 134. C. 8.

[z] Papon. 12. Arreſt. 3.

And *Gail* tells us, that it is a received Cuſtom in *Germany* for the Wives of Merchants or Tradeſmen to be bound for their Husbands, as being in Partnerſhip with them [a]. There is nothing more agreeable to Humanity, than that the Husband ſhould partake in the fortuitous Caſes of the Wife, and the Wife bear a part in the fortuitous Caſes of the Husband [b]: And, for this reaſon, a Divorce does not enſue upon the account of each other's Madneſs, as I have noted under the Title of *Divorces.*

[a] Gail. 2. Obſ. 90. n. 5.

[b] D. 24. 3. 22.

The Wife follows the Juriſdiction and Dwelling of her Husband, as ſoon as ſhe is coupled and joined to him in Matrimony [c]; and becomes a Citizen or Inhabitant of that City or Place, unto which her Husband belongs [d]. She is in reſpect of Name and Dignity deemed to follow the Name and Dignity of her Husband, yea, tho' ſhe be a Widow, till ſuch time as ſhe paſſes to a ſecond Marriage [e]. It has been ſaid, that an Action *Rerum Amotarum* lies againſt a Wife for embezzling or purloining her Husband's Goods: And thoſe things are ſaid to be *amotæ*, which are concealed, hidden, carried away, or conſumed *dolo malo* [f]; that is to ſay, interverted with the Thoughts or on the Proſpect of a Divorce, which afterwards happens [g]. But if a Divorce does not follow, this Action does not lie, but the Effects thus removed or embezzled may be recovered by a perſonal Action [h]: For this Action is not granted whilſt the Marriage ſubſiſts; and if it be commenc'd upon a Divorce, it is diſſolved upon a Redintegration of Matrimony [i].

[c] D. 2. 1. 19. dd.

[d] Gloſſ. in l. 7. l. 10. 39.

[e] C. 12. 1. 13. C. 10. 39. 9.

[f] D. 25. 2. 3. §. Pen. D. 2. 17. 2.

[g] D. 25. 2. 25.

[h] D. 25. 2. 25.

[i] D. 25. 2. 30.

TIT. VII.

Of Children; *how diſtinguiſhed by the* Roman *Law: And of Baſtards; and how many kinds of them,* &c.

BEcauſe I ſhall have frequent occaſion to ſpeak of Children, in the courſe of this Work, in reſpect of Guardianſhip, Laſt-Wills and Teſtaments, inteſtate Succeſſions, and the like, I will here inſert a Title touching *Children:* Which are ſometimes in our Books ſtiled *Liberi*, and ſometimes *Filii* in the *Latin* Tongue, from the *Greek* Word φιλὸς, (as ſome imagine,) becauſe we can conceive no Love equal to that, which is between a Parent and a Child, or at leaſt (as *Cicero* obſerves) none ought to be ſo. And hence it is, that in his Epiſtles to *Atticus*, he ſays, that the Love of Parents to Children is a natural Affection and Benevolence. But this Etymology pleaſes not *Alciatus*, who rather thinks the *Latin* word *Filius* to be derived from the *Greek* word υἱὸς in that Language ſignifying a Son or Child, by adding, after the *Æolick* manner, a double *Gamma*, as thus Γυὸς: And from hence (perhaps) the *Picards* took their word *Fioux.* Others think this word *Filius* to be derived from the *Latin* word *Filum*; becauſe Children do often in their Face, and Shape of their Bodies, which we ſtile the *Filum Corporis*, repreſent the Father or Mother: as *Virgil* remarks in the Boy *Aſcanius*;

Sic oculos, ſic ille manus, ſic ora ferebat.

For this word *Filum* ſometimes ſignifies the Lineaments of the Face. But waving this critical Learning on the *Latin* word *Filius*, I will here conſider what Perſons come under the Appellation of thoſe two *Latin* Terms, *Liberi* and *Filii*; becauſe I ſhall hereafter make uſe of them in other Places.

Now,

Now, under the Appellation of the word *Filii*, in a large Senſe, according to *Paulus* the Lawyer, are comprehended all manner of Children [k], whether next or remote from the common Stock: But, according to the ſtrict and proper Acceptation of the word *Filius*, a Nephew or Grand-child is not comprized under the ſame [l]. And *Bartolus* and *Baldus*, in their Comments on the Law, here quoted in the Margin [m], have made an uſeful Diſſertation upon this Interpretation. And *Alciatus*, in his Commentary on *the Signification of Words*, and *Zazius* in his Treatiſe of *Subſtitutions*, do each of them aſſure us, that for the ſake of deſtroying all Cavils, the words *Filii* and *Liberi* do at this day include all Nephews or Grand-children, in *Latin* ſtiled *Nepotes*. But, ſtrictly ſpeaking, the word *Liberi* is taken in a larger Senſe than the word *Filii*, and comprehends all Deſcendants [n], even to Great Grand-children *incluſively*, whether Male or Female: But it is otherwiſe, if the word *Filii* be made uſe of. The word *Filii* differs from the word *Liberi*, as a *Species* differs from a *Genus*; becauſe thoſe, that are called to an Inheritance under the Name of *Filii*, are ſaid to be *ſpecially* called, and are only the next and immediate Iſſue to the Teſtator: But Perſons called under the Name of *Liberi*, are *generally* called, and it alſo extends to Grand-children, *&c.* By the word *Filius*, in our Law-Books, a Daughter is alſo meant, where the Matter will bear it; though, on the contrary, a Son or a Male Child is not underſtood by the word *Filia* [o]. Children are in *Latin* termed *Liberi*, to put their Parents in mind, that they have not a perpetual Command and Power over them. Therefore, if the Father neglects or refuſes to give his Daughter in Marriage, when ſhe is twenty-five Years of Age, without ſome great and important reaſon aſſign'd for ſo doing, ſhe may freely contract Matrimony without her Father's Conſent; and the Father ought (notwithſtanding this) to give her a Wedding-Portion, according to the Bulk and Quality of his Eſtate, and his Abilities. Under the Appellation of *Children* we may alſo reckon *Grand-children*, unleſs it be in ſome certain Caſes: as when the Dignity and Condition of the Thing induces the contrary, or the preſumed Intention of a Perſon making a Law or Diſpoſition, will have it otherwiſe.

[k] D. 50. 16. 48.

[l] D. 26. 2. 6.

[m] D. 28. 2. 29.

[n] D. 27. 1. 2. 7.

[o] D. 26. 2. 16. D. 50. 16. 122.

There are five kinds of Children according to the *Civil* Law. The *firſt* diſtinction is of thoſe, which are ſtiled *both natural* and *lawful*; and theſe are ſuch as are born in juſt and lawful Marriage. The *ſecond* is of thoſe, that are *only lawful*; as adoptive Children, which are made ſuch by Authority. The *third* diſtinction is of thoſe, that are termed *natural only*, which are born from a Concubine or freed Woman out of Matrimony: And theſe are in *Latin* called *Nothi*. The *fourth* is of thoſe, that are called *ſpurious* Children, and have no certain Father. And the *fifth* kind is of thoſe, that are named *inceſtuous* Children, as being deſcended from a *nefarious* and *inceſtuous* Marriage [p]. Thoſe that are born in lawful Marriage are ſtiled *natural*, becauſe they are deſcended from their Parents according to Nature: and *lawful*, becauſe this Conjunction of their Parents, from whom they are born, is approved by the Law of God and Man, and by the *Civil* and *Canon* Law.

[p] Gloſſ. in c. 6. x. 4. 17. v. *Repellendi.*

Though a *Baſtard*, *natural* Child, and the like, are Names which generally import the ſame thing; yet there is this difference between the ſeveral *Species* of Illegitimacy, *viz.* He is ſaid to be a *natural* Child, who is born of a Concubine, when ſhe lives in the Houſe with a Man, as in the Place of a Wife; and ſuch a Child ſucceeds in *duobus unciis* to the proper Goods of the Concubinary, if other Children are not extant, and the Man has not a lawful Wife: But this Perſon we ſtile a *Nothus*, tho' ſome will have a *Nothus* to be him, who is born in Adultery; and thus *Nothus* is ſaid to be a Son, becauſe he ſeems to be ſuch, and yet is not ſo. *Manzer* is properly a Perſon, that is born of a common Harlot or

Strumpet: But a *Spurius* and *Manzer*, I think, is the ſame with us. Such as are born in the beginning of the eleventh Month after their Husband's Death, are to be accounted for legitimate; but ſuch as are born in the end thereof, are to be held as Baſtards[q]. The Gloſs on this Law relates a Matter of Fact contrary to this Law itſelf, touching a Widow at *Paris*, that was deliver'd of a Child the fourteenth Month after her Husband's Deceaſe. Nevertheleſs, the good Reputation which was generally conceived of this Woman's Continency, ſo far prevailed againſt the Letter of the Law, that the Reverend Judges awarded the Cauſes of Child-birth to be extraordinary, declar'd the Woman to be chaſte, and the Child to be legitimate. But the Gloſs there concludes, *viz. Hæc in exemplum trahi facile non oportet.* By the *Civil* Law a Father acquires no Action for a *natural* Son, becauſe he is looked upon as an extraneous Perſon; and, conſequently, cannot ſucceed to a *feudal* Eſtate. By the Law of *England*, a Baſtard is a Perſon begotten or born out of lawful Wedlock[r]: For if a Woman, big with Child, takes a Husband, the Iſſue born (though within ſix Months after) is no Baſtard[s]. Or if the Wife elopes from her Husband, and continues in Adultery; yet the Iſſue born within that time (if both be within the four Seas) is intended to be lawfully begotten. And if a Man dies, and his Wife is ſo big with Child, that it is eaſily diſcerned, and ſhe takes another Husband, the Iſſue born within a Month, (or ſuch a time as it is impoſſible he ſhould beget it) ſhall be accounted the Iſſue of her firſt Huſband[s]. A Baſtard cannot inherit, nor bring a Writ of Detinue as Heir, becauſe ſuch a Perſon is *Filius Nullius*[t] in Law, *viz.* of Blood unto no one: And the Land ſhall eſcheat, where there is no Iſſue but ſuch a Baſtard, and no other Heir. But Marriage following after, gains him the Right of Inheritance[u], if after his Father's Death he enters before his younger Brother, or Siſter, *if both be Females*, born of the ſame Father and Mother within Eſpouſals[v], and continue the poſſeſſion all his Life-time without Interruption. No Writ ſhall be awarded to the Ordinary, to certify Baſtardy before three Proclamations be made in *Chancery* in three Months, *viz.* once every Month, that all Perſons that have any thing to object againſt the Perſon for Baſtardy, ſhall ſue to the Ordinary for that purpoſe[w]. By the Statute of *Merton*[x], a Child born before Marriage is a Baſtard, tho' the common Law, or the Order of the Church, be otherwiſe.

[q] Coll. 4. 1. 6.
[r] 1 H. 6. 31.
[s] 7 H. 4. 9.
[s] 21 Edw. 3. 29.
[t] Littl. 41.
[u] Littl. 94.
[v] Dyer. Rep. 23 Eliz.
[w] 9 H. 6. 11.
[x] 20 H. 3. 9.

Children born of a Concubine are neither legitimate, nor illegitimate, but are of a *Medium* betwixt both, according to the *Civil* Law: And they are properly ſtiled *natural*, becauſe they are born and brought forth according to Nature's Law, and are defended by no Support of other Law. And tho' the Laws have given a Name to the Iſſue of ſuch a Conjunction of Man and Woman, that is to ſay, tho' ſuch a Conjunction be lawful and free from any legal Puniſhment, according to the *Roman* Law; yet it is not ſuch an honourable Conjunction as carries Praiſe and Dignity along with it: And, therefore, the Offspring of a Concubine is not deemed a Man's own *juſt* and *lawful* Children, but (as I have ſaid already) are *only natural* Children. And 'tis well known, that this kind of carnal Copulation of Man and Woman, is prohibited both by the Law of God, and the *Canon* Law: And the reaſon why the *Civil* Law permits Concubinage, is, for the avoiding a greater Scandal; not that the Emperor approved the ſame as honourable and praiſe-worthy. But more of this, under the Title of Concubines hereafter. Theſe *natural* Children, tho' they do not ſucceed the Father in point of his Eſtate, if he has Children *lawfully* deſcended; yet Alimony and Maintenance is due to them according to the Meaſure and Proportion of his Eſtate, or the Patrimonial Inheritance. But Children by *inceſtuous* Marriage are not ſo much as to be maintain'd by their Father: which being remarkable, ought to be taken great notice of; becauſe, according

cording to the *Novels*, a Father that contracts an *inceſtuous* Marriage, ought to be maintain'd by his Children. And from hence it is to be obſerved, that if Children ought to maintain a guilty Father, much more ought a Parent to maintain innocent Children. But, by the *Canon* Law, Alimony is due even to Children of this kind from their Parents, according to the Bulk of their Eſtates: And this Method, or Rule of Law, all conſiſtorial Juriſdictions are wont to follow in this caſe. Therefore, the *Canon* Law is more in favour of Children, than the *Civil* Law: Becauſe (perhaps) the Authors of the *Canon* Law looking upon this kind of Children to be innocent; and the Cauſe of *Alimony* to be a favourable Cauſe: or (at leaſt) that *inceſtuous* Perſons ought alſo to be maintain'd by their Children in the point of great Exigency only. But to the end, that *natural* Children may obtain all the Rights of *lawful* Children, *Juſtinian* has found out certain Methods, whereby they may be made lawful by Legitimation, and by a general Name be ſtiled *legitimate* Children. For *Legitimation* is an Act of Law, whereby Children are rendred and made lawful: or, according to *Baldus*, it is a Reſtitution of a *natural* Child to a full and perfect State of Blood. But of this under the Title of *Legitimation.*

Children are ſo enjoined by the *Civil* Law to reverence their Parents, that anciently they could not ſue them without leave firſt obtain'd [y]: nor could they be Witneſſes againſt them: nor contract Marriage without their Conſent [z]; nor charge them with any criminal Act [a]. And by this Law it was, that if a Father made no Diſpoſition or Proviſion for his Children, they equally divided his whole Eſtate between them. Tho' the *Partus* or Child born follows the Mother in reſpect of its State and Condition, as that if the Mother be a Bond-woman, the Child is born a Servant; yet as to its Pedigree, Family, Settlement and Honours, it follows the Father. Children conceived and born after Deportation, are eſteem'd to be *lawful* Children, becauſe there is a continuance of Matrimony [b]: But Children born after Deportation, are not in the Power of the Father; becauſe the Father by Deportation loſes all civil Rights, as a diſfranchis'd Perſon [c]; the Power of the Father being a civil Right [d]. Not only Sons and Daughters ſtrictly ſo called; but even Grand-Children, Great Grand-Children, and others who are Deſcendants from theſe, do all come under the Name of *Deſcendants*. And if ſuch Deſcendants are extant and ſurviving at the Time of their Anceſtors Death, whether theſe Deſcendants are of the *firſt Degree*, as Sons and Daughters, or of a *ſecond* or *further*, they only are admitted to an Inteſtate Heirſhip, or (as we call it) to an Adminiſtration, in Bar of all other Perſons; becauſe natural Reaſon, as a tacit kind of Law, gives the Inheritance of Parents unto their Children, by calling them unto a due Succeſſion: As we ſhall ſee more at large under the Title of *Inteſtate Succeſſion.* Though a Grandſon by a Daughter be commonly reckon'd *inter liberos* [e]; yet this Interpretation does not proceed in reſpect of Privileges: which are for the moſt part in derogation of the publick Welfare; and, therefore, to be taken ſtrictly.

[y] D. 2. 4. 2. & 13.
[z] D. 23. 2. 18.
[a] D. 37. 15. 2.
[b] C. 5. 17. 1.
[c] D. 48. 19. 14.
[d] I. 1. 9. pr.
[e] D. 50. 6. 1.

Tho' there is no difference between *Natural* and *Adoptive* Children, ſo long as they are in the Power of their Parents; yet Emancipation makes a wide difference between them. For an *adoptive* Son or Child, on the diſſolution of his Adoption by Emancipation, ceaſes, according to the *Civil* Law, to be reckon'd in the Number of Children; and herein he is not aided and reliev'd by the *Prætor* or Judge. But a *Natural* Son, in reſpect of his Natural Father, tho' he ſhall loſe the Benefit of ſucceeding him according to the *Civil* Law; yet he may ſucceed him by virtue of the Judge's Decree. Tho' Children emancipated by the *Civil* Law have no Right to their Father's Eſtate, by reaſon that the Right of *Agnation* is thereby taken away from them in reſpect of Teſtamentary Suc-

Succeſſion, ſo that the Father is not oblig'd to appoint them his Heirs, or to diſinherit them; yet they may be relieved by the *Prætor's* Decree contrary to the Tables, or the expreſs Letter of the Will, wherein they are found to be paſſed by. Thus are they alſo by the *Civil* Law excluded from the Inteſtate or legal Succeſſion, as being extraneous Perſons: But the *Prætor* following natural Equity rather than civil Policy, may grant them the *Bonorum-Poſſeſſio, undè Liberi*, whereby they may ſucceed, as if they had been in the Power of the Father deceaſed at the Time of his Death. However, an emancipated Son cannot be ſtiled *ſuus Hæres* or *Agnatus*.

We have two Decrees touching the acknowledging of Children. The [f] *firſt* is ſtiled *Senatus-conſultum Plancianum*, which conſiſts of two Parts [f]. In the *firſt* Part whereof it is provided; that a Woman ſhall within thirty Days after any Divorce happens, declare unto her Husband or her Father, or if ſhe cannot come to the Preſence of them at their Houſes, then to ſome honeſt Neighbours, that ſhe is pregnant or with Child by her Huſband, and the Husband ſhall either ſend Keepers *ad ventrem ſervandum*, to intend the Birth; or elſe remonſtrate againſt her Pregnancy by him: otherwiſe he ſhall be obliged to acknowledge and maintain the Child when [g] born [g]. In the *ſecond* Part thereof it is enacted; that ſuch Women as ſhall impoſe a falſe or ſuppoſititious Birth on the Husband, ſhall be liable to the [h] Puniſhment of Forgery [h]. By the other Decree of the Senate made in the Reign of the Emperor *Adrian*, every Perſon is commanded to acknowledge ſuch Iſſue as is born, whilſt Matrimony is ſubſiſting [i]: And he, who is compellable to acknowledge a Child or Iſſue, is oblig'd to maintain the ſame according to his Eſtate and Abilities [k]. He is deemed to be the Father of the Child, *quem Nuptiæ demonſtrant* [l]; whom Marriage points out to be ſuch; unleſs he ſhews by very clear and evident Arguments of Reaſon, that it cannot be his Child [m]. Children, on the other hand, if their Parents be in want, are bound to maintain them according to their Abilities [n], as I ſhall ſhew hereafter under the Title of *Alimony*: And this Duty or Incumbrance of nurturing Children paſſes to the Parents Heirs [o]; and cannot be taken away by any Pact or Statute [p].

[f] D. 25. 3. 1.
[g] D. 25. 3. 1.
[h] D. 48. 10. 1. D. 48. 10. 19. 1.
[i] D. 25. 3. 3. 1.
[k] D. 25. 3. 5.
[l] D. 2. 6. 5.
[m] D. 1. 6. 6.
[n] D. 25. 3. 5.
[o] D. 25. 3. 5. 17.
[p] D. 25. 3. 5. 18, & 19.

TIT. VIII.

Of Emancipation *and* Manumiſſion, *whence ſo called, and what is requiſite thereunto; and laſtly, what are the Effects thereof.*

HAVING in ſome of the foregoing Titles made mention of *Manumiſſion* and *Emancipation*, as they were in Practice among the *Romans* towards Bondmen and Children; I ſhall here, for the better underſtanding of thoſe Methods, whereby Perſons acquir'd Freedom, treat a little more diſtinctly of them, and handle them by themſelves under this Title, tho' theſe Subjects are at this day antiquated, and every where grown into Diſuſe. And firſt of *Emancipation*.

By the *Roman* Law every Child was ſo far in Subjection to its Father, that before he could be releaſed from him and made free, he was by an imaginary Sale to be thrice ſold by his Natural Father unto another Man, called his *Fidu-*

Fiduciary Father, or Father in Truſt; yea, and to be bought again by the Natural Father [q]: And being thus manumis'd by him, he became free. The Form of this Sale or Alienation is deſcribed at large hereafter. And thus *Emancipation* is another way beſides Death, *&c.* whereby a Son or Child is exempted from the Power of the Father: Being defined to be a Relaxation of the Paternal Bond, whereby a Son is bound to the Father, as being made with the Conſent of the Father granting Emancipation, and with the Conſent of the Child receiving the ſame [r]. This Act of *Emancipation* was to be performed before ſome competent Judge; and it was ſo called, becauſe it was *quaſi manſi emptio ficta & imaginaria.* For regularly a Son could not compel his Father to give him this Emancipation [r]; nor on the other hand, could a Son be emancipated againſt his Will and Inclination: ſo that *Emancipation* was a voluntary, and not a neceſſary Act. Yea, the bare and naked Conſent of the Father or Son is not ſufficient, but there is a certain kind of Solemnity requiſite hereunto, which conſiſts in a proper Application to be made to a competent Judge, as aforeſaid. Therefore, the efficient Cauſe of *Emancipation* is the mutual Conſent both of Father and Son joined with a due Solemnity. The Father was not obliged to alledge and ſet forth the Cauſe why he emancipated his Son; nor was the Son bound to ſhew any Reaſon why he deſir'd this Emancipation, but Conſent was ſufficient, if the Solemnity of appearing before a competent Judge was added thereunto.

[q] D. 1. 7. 36.

[r] I. 1. 12. 6.

[r] C. 8. 49. 4.

Emancipation being a Delivery of the Perſon to be emancipated out of the Hand or Poſſeſſion of the Perſon emancipating, it bore a kind of likeneſs or reſemblance unto a Sale, and it was introduced by the old *Roman* Civil Law, called the twelve Tables. For it was heretofore performed by an imaginary Sale, as above remembred, which Sale was effected after this manner, *viz.* There were five Witneſſes (at leaſt) all *Roman* Citizens, to be preſent together with a Perſon ſtiled *Libripens* from his holding a Pair of Scales in his Hands; and the Chapman or Buyer, then came with a certain Braſs Coin in his Hand, and ſaid, *Hunc ego hominem in numero Quiritium meum eſſe aio, iſque mihi emptus eſt hoc ære*, viz. This Man in the number of the *Roman* Citizens is mine, having bought himwith this Money. And then immediately ſtriking the Ballance or Scales with the ſaid Coin, he gave it to him that made the Sale. This kind of Bargain was in *Latin* called *Nexus a nectendo*, becauſe it bound the Seller to make good the Sale, and ſometimes from the aforeſaid Ceremony uſed in it, is termed a Sale *per Æs & libram.* The Reaſon why theſe kind of Ballances were uſed in this kind of Sale (as ſome think) was, becauſe anciently they did not purchaſe with the Payment of coined Money, but by a certain Weight of Money; and hence ſuch Money was termed *Æs grave.* This way of Emancipation was afterwards taken away as being injurious unto Children [s], and the *Anaſtaſian* Method ſucceeded in its room, which was made by the reſcript of the Prince, according to a Conſtitution of the Emperor *Anaſtaſius*: And then came that of *Juſtinian*, which was made by the Authority of the Magiſtrate. There was one kind of Emancipation, which was ſtiled *Preſumptive*, viz. When the Father either expos'd the Infant [t], or would not ſuffer him to live with him any longer as a Father of the Family [u]. A Perſon, that was emancipated by the Prince's Reſcript, having the Right of a legal Inheritance reſerved to him, was called to the inteſtate Heirſhip of the Father, with the Brothers retain'd in the Family [v]. The effect of *Emancipation* was, that the Son might afterwards freely contract in his own Name, make a Will, and do all other Acts as a Father of a Family, and acquire the full Property and Uſufruct in *adventitious* Goods, except one Moiety of the Uſufruct, which was reſerved to the Father as a Recompence for his Emancipation [w]. *Juſtinian* ſays, that the Rights of

[s] C. 8. 49. 5. & 6.

[t] C. 8. 52. 2.

[u] C. 8. 47. 1.

[v] I. 1. 12. 6.

[w] C. 6. 60. 6.

[x] C. 8. 48. 10. 5. Adoption ceaſed by Emancipation [x]: For as by Adoption the Adoptive Father has a Power over his Adoptive Child; ſo this Power of the Adoptive Father was diſſolved by Emancipation, as will appear under the next Title.

[y] D. 1. 1. 4. I ſhall next ſpeak of *Manumiſſion*; which, according to *Ulpian* [y], is alſo the delivering of a Perſon out of the Hand and Power of another. For as long as any one is in Bondage or Servitude, he is ſaid to be under the Hand and Power of him, whoſe Vaſſal or Bondman he is: And being manumiſed, he is releaſed and ſet at liberty from the Hand and Power of his Maſter. Now *Manumiſſion* had its riſe and beginning from the Law of Nations, all Men by Nature being born free; and therefore, as Servitude was entirely unknown to that Law, ſo was Manumiſſion likewiſe. The Etymologiſts ſay; that *Manumiſſion* is ſo called, becauſe the Maſter holding the Bondman's Hand, or ſome other Member of his, ſaid to the By-Standers, *Hunc hominem liberum eſſe volo, &c.* I am willing this Man ſhould be free; and then diſcharged him out of his Power and Dominion, by emitting him out of his Hand. *Juſtinian* reckons up five ſeveral ways, whereby *Manumiſſion* is effected [z]. For *firſt*, a Bondman was manumis'd in the Church in the preſence of the Prieſt and whole Congregation by the Means and Intervention of ſome kind of Writing in the place of external Acts performed [a]. *Secondly*, Manumiſſion was made by a Rod or Wand, in *Latin* called *Vindicta*, with which the *Prætor* or *Prætor's* Lictor touched the Bondman, premiſing a ſolemn Form of Words which he thrice repeated: As *Aio te eſſe liberum.* And then the Maſter immediately taking the Bondman by the Right-Hand in the *Prætor's* Preſence, turned him round about, and afterwards diſmiſſed him. And by this means he obtained a greater Degree of Freedom than a Perſon otherwiſe manumiſed. *Aldobrand* [b] obſerves; that the Reaſon of turning the Perſon round about, was to ſhew that the Perſon thus manumiſed had a Power of going wherever he pleaſed. *Thirdly*, Manumiſſion was ſometimes made among Friends extra-judicially and out of Court: And in this Caſe five Witneſſes were held neceſſary, and likewiſe the Interpoſition of ſome Deed or Writing [c]. *Fourthly*, A Bondman might be manumiſed by an Epiſtle or Writing ſubſcribed by five Witneſſes, and written or ſubſcribed by the Patron himſelf [d]. And *fifthly*, a Teſtator might by his laſt Will and Teſtament bequeath Freedom to his Bondman: or, in other Terms, a Teſtator might, by his laſt Will and Teſtament, make his Bondman a Freedman. There are ſeveral other ways of Manumiſſion, which I here purpoſely omit, tho' *Cicero* in his *Topicks* only reckons up three, and will have no more, viz. *Per Vindictam, Teſtamentum & Cenſum. Tacitus* only reckons two *Species.* The firſt of which is in a particular manner ſaid to be by the *Vindicta*; and the other in a more general Senſe comprehends ſome other way of conferring Liberty.

[z] D. 1. 1. 5. 1.

[a] C. 1. 13. 1 & 2.

[b] In §. 1. I. 1. 5.

[c] C. 7. 6. 1. un. 2.

[d] I. 1. 5. 1.

In favour of Liberty, Manumiſſion was permitted and allow'd to be made at any Time, and in every decent Place: For, it being a matter of *voluntary* Juriſdiction, it depended on the meer Will of the Maſter; and, therefore, it was not neceſſary that it ſhould be ſped in a judicial way in the Preſence of the Judge ſitting on the Bench [e]. It is in Law called the *Benefit of Manumiſſion*, becauſe the merits of Bondmen excited their Maſters to beſtow the Benefit of Freedom on them. Thoſe Perſons that became Servants unto Puniſhment, cou'd not manumiſe their Bondmen or Servants, becauſe even they themſelves were Servants. Nor cou'd ſuch Perſons as were condemned of Capital Crimes, by their laſt Wills and Teſtaments manumiſe their Bondmen, according to a Decree of the Senate. Tho' all Men generally ſpeaking might manumiſe their Bondmen; yet an inſolvent Debtor was forbidden to do it in Fraud of Creditors [f]: For tho' Liberty be

[e] D. 1. 16. 2.

[f] D. 40. 9. 10.

a

a thing that admits of great favour in Law, yet the Right of Creditors ought not to be taken away by such Freedom [g]; since Fraud and Deceit is always understood to be excepted in every Act [h]. And a Person was said to manumise his Bondman in Fraud of Creditors, who was either insolvent at that very time as he manumised him, or who ceased to be a solvent soon after he had given him his Freedom [i]. And, in this case, to impeach such Freedom, two things were required, *viz. First*, a Will of defrauding in the Person manumising: And *Secondly*, Damage in the Event; because the Debtor's Goods were not sufficient to satisfy Creditors [k]. For if either of these Requisites failed, Freedom granted to a Bondman was not revoked: And, therefore, if the Manumiser had not an Intent of defrauding, it did not impeach a Bondman's Freedom, tho' the Debtor's Goods were not sufficient to answer Creditors. But as *Manumission* and *Emancipation* are now grown obsolete by another Polity, I shall close this Title.

[g] D. 43. 8. 2. 16.
[h] D. 17. 1. 60. 4.
[i] I. 1. 6. 3.
[k] I. 1. 6. 3.

TIT. IX.

Of Adoption, *what it is, how many fold; by whom, and before whom it is made; what Power it gives; and lastly, of the Solemnities thereof,* &c.

HAVING treated of Children in general, and of natural Children, in the foregoing Title; I shall here speak of such as are only lawful, called *adoptive* Children: For Persons become Sons and Daughters unto another, not only by *Nature*, but also by *Adoption*; which is a general Term in the *Civil* Law, that admits of a two-fold *Species*, as I shall shew by and by. Wherefore, here in treating of Adoption, I shall under this Title consider six things principally. *First*, what Adoption is, according to the Definition of it, and how many fold. *Secondly*, shew what is necessarily requir'd in that which is stiled *particular* Adoption. *Thirdly*, lay down what is necessary to *Arrogation*, and what is an Impediment to both *Species*. *Fifthly*, I shall declare what is the Effect and Consequence of Adoption. And, *lastly*, consider the Solemnities thereof, and make some Remarks on the whole.

Now, *first*, Adoption in general, according to *Azo*, is a legal Act, or Act in Law, whereby he that is not a Son, or an extraneous Person, is taken into a Family, unto which he does not originally belong by Birth, (for I here speak of *general* Adoption,) and is esteemed and held as a Son by the means of Election. These Persons thus adopted or elected, are substituted in the Place of natural Children, for the Comfort and Solace of such Men as have no Children of their own; and they are subject to the Power of the Father, as natural Children are. I call it an *Act of Law*, in order to exclude them, whom we stile *Alumni*, that are educated as Children, but are not adopted by any Solemnities of Law [l]. For to *adopt*, according to *Vigetius*, in his second Book *De Re Militari*, is to elect or make choice of one for his Son, who was not such before [m]. Thus those Persons, that the Captains or Centurions made choice of to supply the Place of such Soldiers as were absent, were called *Options*, being as it were adopted or chosen for this End and Purpose; and hence by some called *elected* Vicars: And *Varro* in his Book *De Linguâ Latinâ*, observes the same thing. See also

[l] D. 45. 1. 132.
[m] D. 1. 7. 1.

[n] C. 4. 65. 35. C. 10. 22. 3. also the *Code* [n]. I ſay, Adoption in general is that Election, which any Perſon makes according to *Law*, whereby he chuſes to himſelf a Son or Daughter, (for Females may be adopted as well as Males;) and the Perſons thus adopted are ſtiled his *lawful* Children, as being made ſuch by the Law. When the Law mentions *natural* Children in this reſpect, it means ſuch as are born in a juſt Marriage; and, by the Word *lawful*, ſuch are made ſo by Election: Though in another reſpect, thoſe are termed *natural* Children, which are ſo born and deſcended from a Concubine, as already related.

As to the Diviſion or *Species* of Adoption, the ſecond thing to be handled, it is two-fold, as it may be made two ſeveral ways, viz. *Firſt*, Adoption, ſimply ſo called; and *Secondly*, that which we call *Arrogation*. For ſometimes ſuch Perſons were adopted as were ſubject to the Power of another, as to the Power of the Father or Grandfather; and this is called Adoption in *ſpecial:* And ſometimes ſuch Perſons were adopted as are *ſui Juris*, viz. in their own Diſpoſal, and independent on the Father: And was called Arrogation [o]. And thus Adoption is a *Genus*, containing under it two *Species*, viz. Adoption ſtrictly ſo called, and Arrogation. Adoption in *ſpecial*, *firſt* requires, that the Perſon to be adopted be in the Power of his natural Father or Grandfather [p]. *Secondly*, that he be adopted before the Magiſtrate [q], which was ſeldom obſerved. And *thirdly*, that the Father or Grandfather do conſent thereunto. In reſpect of the Child to be adopted, it is ſufficient, if he does not contradict the ſame: And the Father may even, by a nod of the Head, conſent hereunto [r]. And as thoſe Perſons that were under the Power of the Father, were properly ſaid to be adopted; ſo thoſe that were *ſui Juris* were the proper Object of *Arrogation* [s]. As to the Point of *Arrogation*, which was more in uſe, ſeveral things were neceſſary hereunto. As *firſt*, that it was not to be done without the Leave and Authority of the Prince [s]: But this is now out of Practice, it often happening to the contrary. *Secondly*, it was requir'd, that the Perſon to receive *Arrogation* ſhould be a Perſon *ſui Juris*. *Thirdly*, that he who gives *Arrogation*, be interrogated, whether he deſires or be willing to have *Titius* for his juſt Son? And the Perſon to receive the ſame, ought to be asked, whether he be willing to ſuffer himſelf to be arrogated [t]? And this is true, if he can ſpeak for himſelf; but if he cannot, then this Queſtion is not neceſſary; provided there be otherwiſe ſuch care taken of him before the Magiſtrate upon this Matter, by ſuch as are of kin to him [u]. *Fourthly*, that in a Perſon under the Age of Puberty Inquiſition ought to be made into the Characters of each Party, leſt ſome Turpitude, Damage, Fraud, Circumvention, and the like, ſhould happen or be ſubſiſting [v]. And *fifthly*, the *Arrogator* ought to give caution, that, after the Death of the Perſon arrogated, he will reſtore all his Goods and Eſtate to ſuch Perſons to whom they devolve by a *Series* or Deſcent of Blood [w]: And this is true, if he be under the Age of Puberty. *Arrogation* was formerly cauſed and effected by and at the Requeſt of the People, and ſo it continued to be till the time that the *Roman* People transferred the Sovereignty, and ſettled the *Roman* Empire on *Auguſtus Cæſar:* At which time the Reſcript and Authority of the Prince was held neceſſary, for this end. And *Aulus Gellius* expreſſes himſelf in this manner, ſaying, whenever another Man takes extraneous Perſons into his Family, and reputes them as his own Children, this Act is either done by the Authority of the *Prætor*, or elſe at the Rogation or Recommendation of the People: And hence it was termed *Arrogation*. For that Act, which was done by the *Prætor*'s Authority, was ſtiled *Adoption*; and that which was done at the Rogation of the People, was ſtiled *Arrogation*. The Rites and Ceremonies, whereby each *Species* of Adoption was compleated, may be

[o] I. 1. 11. 1. D. 1. 7. 1.

[p] D. 1. 7. 1. & 2.

[q] D. 1. 7. 2.

[r] D. 1. 7. 29.

[s] I. 1. 11. 1.

[s] D. 1. 7. 2. pr.

[t] D. 1. 7. 2. poſt prin.

[u] D. 1. 7. 2. & 9.

[v] D. 1. 7. 2. 17.

[w] D. 1. 7. 17.

ſufficiently ſeen in *Caius*'s Inſtitutions, in *Aulus Gellius*, and in *Cicero*'s Oration for his Family: But none of theſe Authors mention the Rites and Ceremonies relating to the Emperor's Office herein. He who ſurrenders and gives up himſelf unto any one by way of *Arrogation*, is not only ſubject to that Perſon, but even his Children alſo, if he has any in *ſuis Sacris*, viz. in his Power (for the Power of the Father was in *Latin* termed *Sacra Paterna:*) And, moreover, beſides himſelf and his Children, he hereby ſubjects all his Goods, and whatever he has in corporeal Things, as already hinted. *Arrogation* ought to be effected by the Emperor himſelf on Cognizance and Examination had of the Cauſe of ſuch *Arrogation*; or elſe the Emperor on ſuit made to him might grant a Commiſſion of *Arrogation* by the means of his Reſcript, whereby ſuch Cognizance was granted to ſome ordinary Judge, or any other Perſon whatever. And the Reaſon why it was thus effected and executed with greater Solemnity than *Adoption*, which may be ſolemniz'd before any Magiſtrate, was, becauſe it is ſubject to greater Prejudice and Inconvenience than *Adoption*; ſince the Perſon arrogated, who was before *ſui Juris*, does hereby paſs into the Power of the *Arrogator*, with all his Subſtance, which happens not in *Adoption*; for the Perſon adopted is at that time in the Father's Power. And as there is greater Inconvenience, there ought to be greater Caution uſed. Another Reaſon aſſign'd, why ſo much Solemnity is not requir'd in one as in the other, was, becauſe the Father's Advice was to be had in the one for the Proviſion of his Son, which does not happen in Arrogation; and likewiſe for that a Son cannot find a better Friend than a Natural Father, there being no Affection which exceeds that of a Parent. Next follow the Effects of Adoption.

Adoptive Children as long as they remain in the Power of their *Adoptive* Father have the Right as Children begotten in juſt and lawful Marriage in reſpect of their *Adoptive* Father: Wherefore, ſuch Children ought either to be appointed Heirs, or elſe to be diſinherited by their *Adoptive* Father, as I ſhall obſerve in the Sequel under the Title of *Exheredation.* But Children emancipated were not reckon'd as Children either by the *Civil* or *Prætorian* Law. As Bondmen and Vaſſals are ſet at liberty from the Power of their Maſters by Manumiſſion; ſo are Children deliver'd from the Power of the Father, as well by *Adoption* as *Emancipation.* But Perſons only are by a Fiction of Law become Children by *Adoption*, and not ſaid to be Brothers or of Kin unto each other by any Proximity of Relation [x]: For *Adoption* has only a reſpect unto Children, and not to Brothers or any other Perſon in a collateral Line of Kindred whatſoever; nor can a Brother adopt another Perſon to be his Brother; nor a Couſin another Perſon to be his Couſin, and the like [y]. If the *adopting* Father be a Senator and the like, his *Senatorial* Dignity thereby paſſes and deſcends unto the adopted Son [z]. Again, the *adopting* Father has the Right and Power of puniſhing and correcting his *adopted* Son for Offences committed [a]: And the *adopted* Son cannot ſummon the *Adoptive* Father into any Court of Judicature without the Father's Conſent [b]. In reſpect of *Adoption* or legal Kindred, Matrimony is hindred or prohibited between the *Adoptive* Father and his adopted Daughter [c]. And *laſtly*, there is this Effect in this kind of *Adoption*, viz. That the Perſon *adopted* comes not under the Appellation of the Word *Liberi* or Children, unleſs it be in Caſes expreſſed in a *Nuncupative* Right: And hence it is, that by the *Feudal* Law an *adopted* Son is not admitted to a *Feudal* Eſtate of Inheritance [d], nor by the *Civil* Law to an *Emphyteuſis* [e], nor to the Benefit of Subſtitution. And 'tis the ſame Thing in Statutes and Privileges; becauſe in Statutes, Words ought to be taken ſtrictly and properly: And therefore, even in Statutes *adopted* Children are not comprized under the Appellation of the word *Liberi* or Children.

[x] D. 50. 17. 6. 6.
[y] C. 6. 24. 7.
[z] D. 1. 9. 5.
[a] 6 & 10. C. 9. 15. 1.
[b] D. 2. 4. 8. fin.
[c] I. 1. 10. 1.
[d] F. 2. 26. 1.
[e] D. 28. 2. 23.

dren [f]. And for the ſame Reaſon, Daughters excluded by the words *Maſculos filios* are not underſtood to be excluded by the *Filium Adoptivum* [g]. But in the Caſe, when a *Filius-fam.* is adopted by any of his Kindred in the Aſcending Line, as by a Grandfather, or Great Grandfather by the Father or Mother's Side, *viz.* when his Father is emancipated by the Grandfather; he ceaſes to be in the Power of his Natural Father, and paſſes into the Family and Power of the Perſon adopting him, being ally'd to him by a double Tie, *viz.* by a *Natural* Tie of Blood, and a *Civil* Tie of Adoption. And he ſo far paſſes into the Power of his *Adoptive* Father, that whatever he acquires, he does not acquire it for his *Natural*, but for his *Adoptive* Father; nor does he even ſucceed his *Natural* Father dying inteſtate [h].

[f] D. 50. 16. 220.
[g] Rip. in l. 8. C. 8. 56.
[h] C. 8. 48. 10.

Of *common Right* Women were prohibited the adopting of any Perſons to be their Children, unleſs it were by a ſpecial Grant had from the Prince [i], on the account of having Children ſlain in Battle, or upon ſome other great Occaſion: For as Women have not Children in their own Power [k]; no, not even their own; *Adoption* is not permitted to them, leſt that ſhould ſeem to be granted *per obliquum*, which is directly prohibited. And, moreover, it is not in the Power of Women (as we ſay) *generare filios* according to Nature; and, conſequently, it is not granted them to adopt them by *Art*; becauſe *Adoption* is an Imitation of Nature [l]. Hence it is; that Men, who lie under a *natural* Impoſſibility of begetting Children, cannot adopt; ſince Adoption is an Imitation of Nature. Wherefore, a Minor cannot adopt one, that is ſuperior or equal to him in point of Age [m]: For this wou'd be monſtrous and impoſſible in reſpect of Nature. And for the ſame Reaſon, a Perſon, that labours under an incurable Diſeaſe, which forbids him to marry a Wife and beget Children, cannot adopt one, as being a Perſon impotent in Regard to the Buſineſs of Generation.

[i] I. 1. 11. 10.
[k] I. 1. 11. 10.
[l] I. 1. 11. 4.
[m] I. 1. 11. 4.

The original Beginning was very ancient: For heretofore ſuch Perſons as refuſed to marry, on the Account of the Incumbrances that attend ſuch a State, and likewiſe ſuch as marry'd and had no Iſſue, or whoſe Children were dead, or who abandon'd their Fathers on the ſcore of a looſe and diſſolute kind of Life, were wont to chuſe Children for themſelves to inherit their Eſtate, and by *Adoption* to repair the Misfortune of a want of Children. Thus we read, that *Moſes* was adopted by *Pharaoh*'s Daughter [n]; and *Julius Cæſar* adopted *Auguſtus*; and afterwards *Auguſtus* adopted *Tiberius*. Indeed, it has been a Queſtion, whether *Adoption* be allow'd at this Day; and whether, if it be permitted, it ought to be effected by the ſolemn Rules and Ceremonies made uſe of by the *Romans?* And it ſeems to be allow'd, unleſs it be otherwiſe received by ſome contrary Cuſtom, or forbidden by ſome *Municipal* Law: But this Title itſelf is much grown into Diſuſe [o], and little regarded. For now ſuch as are aſſumed by us are not looked upon as Children, but only as *Alumni*, whom we take into our Care for the ſake of Nurture and Education: which we may make our Heirs, if we pleaſe, but are under no neceſſity of doing it. *Maſverius* obſerves, that an adopted Child does not ſucceed an Inteſtate by Cuſtom: But, on the contrary, we know; that the Duke of *Anjou*, being adopted by Queen *Joan*, ſucceeded to the Kingdom of *Sicily*. But this by the Authority of the Pope, to whom the Kingdom of *Sicily* was Tributary; the Kings of *Sicily*, according to *Angelus* [p], being his Vaſſals.

[n] Exod. 1. 2.
[o] Groenv. de ll. abr. I. 1. 11.
[p] Repet. in l. 14. c. 6. 42.

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TIT.

TIT. X.

Of Human *and* Legal *Acts*; *their Nature, Power, Regularity, and the Execution of them*, &c.

AMONG ſuch Acts or Actions as are done by Men, thoſe are properly ſtiled *Human* Acts, which are peculiar unto Man as he is a Man. For as a Man differs from irrational Creatures in this reſpect, *viz.* That he is maſter of his own Acts, it is from hence that only thoſe Acts are properly ſtiled *Human*, of which a Man is maſter. And as a Man is maſter of his own Act by virtue of his Reaſon and the Freedom of his Will, which is a Power flowing from his Reaſon and his Will, it hence follows, that thoſe are only *Human* Actions, properly ſpeaking, which proceed from a free and deliberate Will as actuated by Reaſon. And if there are other Actions that are adapted unto Men, thoſe may be called the Actions of a Man, but not properly *Human* Acts, ſince they are not the Actions of a Man, as he is a Man. Thus Walking, Running, Eating, Drinking, *&c.* are not properly *Human* Acts, tho' they are the Actions of Men, becauſe they are common to Brute Beaſts as well as to Men.

In a Human Act the *Intention*, *Regularity* and *Execution* of it are to be conſider'd. Now the *Intention* of a Human Act is the deſign of the Perſon acting, which proceeds from his Underſtanding and Will, as aforeſaid. For it is neceſſary, that he ſhould have a right Notion of what he is doing [q], otherwiſe a Miſtake renders the Act as not done at all [r]. This is requir'd not only in making of Teſtaments, and forming of Contracts, but alſo in the Commiſſion of Crimes, and in all Affairs of what Nature ſoever where Conſent is ſuppoſed [s]. Nay, even the Grant of the Prince, averred to be *ex certâ Scientiâ*, has no Effect, if it evidently appears that the Prince was deceived in his Grant. A Man muſt likewiſe will that Act, before he can be anſwerable for it: And the Will may be expreſſed by *Words*, *Signs* and a *bare Conſent*; which Conſent *Silence* ſeems to infer in many Caſes [t], eſpecially if the Fact be ſuch as might have been prevented by ſpeaking and declaring to the contrary. Indeed, Silence generally ſpeaking infers Conſent, if it tends to the Advantage of the ſilent Perſon; but if his Damage will follow from it, he is ſeldom eſteemed to be conſenting [u]. I ſaid, that a Miſtake or Error render'd an Act as not done at all, becauſe *Intention* and Deſign was requiſite, from which every Act was to be eſtimated. But this *Error* muſt be in a *ſubſtantial* Part of the Contract, and not in the *Name* of it [w], or the *Cauſe*, or ſome *external* Circumſtance or *Opinion* about it. With regard to the Commiſſion of a Crime, tho' the Crime was committed by a miſtake, yet if there was a *Neglect* or ill *Intention* at firſt that accompany'd the Action, the Criminal muſt be anſwerable for all the unforeſeen Accidents and ill Effects that follow upon it. But it is a received Rule in Law, that no Act ought to have any operation beyond the Intention and Will of the Agent [x]. Where an Act is indifferent in itſelf in reſpect to Good and Evil, and is injurious to no one, ſuch Act ought rather to be preſumed good than bad. And thus much of *Human* Acts ſtrictly ſo called for the preſent. I ſhall next ſpeak of *Legal* Acts.

[q] D. 44. 7. 57.
[r] D. 50. 17. 79.
[s] D. 50. 17. 116. 3.
[t] D. 24. 3. 2. 2.
[u] D. 8. 2. 5.
[w] D. 18. 1. 9.
[x] D. 12. 1. 19.

Now

Now the word *Act*, in *Latin* ſtiled *Actus*, is a generical Term made uſe of to ſignify any Thing, that is done either by words, writing, or any other ways; as by way of Stipulation, Payment of Money or the like: But the word *Geſtus* ſignifies ſomething done without words [w]. So that the word *Actus* is taken for every Thing that is done, whether it be by word of Mouth, as in *formal* Stipulations [x]; or by writing, as in laſt Wills and Teſtaments. Hence it is, that in Stipulations the Queſtion is, *Quid actum ſit?* And the words in the Stipulation ought to be conſider'd: which words, if they be obſcure and ambiguous, ought to be interpreted againſt the Stipulator [y]. Or *Secondly*, whether the Act be by ſomething done, as by the Payment of Money in current Coin, *&c.* The word *Actus* is ſometimes taken for the ſame as *Factum* [z]. By *legal* or *lawful* Acts, I here mean ſuch Acts as are to be found and met with in any Part of the written Law [a]; as *Emancipation*, *Acceptilation*, the *Aditio Hæreditatis* or the Heir's taking the Heirſhip on himſelf, the Option of a Bondman, the aſſigning of a Guardian, in *Latin* called *Datio Tutoris:* And theſe Acts are entirely vitiated by the adding of any Time or Condition thereunto, yet ſometimes the above-written Acts do *tacitly* admit of a Condition. But if thoſe Circumſtances were expreſſly contain'd therein, they wou'd vitiate the ſame.

[w] D. 50. 16. 19.

[x] I. 3. 16. 1.

[y] D. 45. 1. 38. 18. & l. 41 & 43.

[z] D. 48. 8. 5.

[a] Dyn. in l. 77. D. 50. 17.

The Law divides all legal Acts into *Publick* and *Private* Acts. The firſt are ſuch as concern the Publick Weal, as the Exchequer, *&c.* And the ſecond are ſuch as relate to the Advantage or Diſadvantage of private and particular Perſons. Or elſe thoſe may be called *publick* Acts, which are done by a Publick Perſon [b], as a Judge or Magiſtrate, and in a Publick Manner: And thoſe may be termed *private* Acts, which are tranſacted between private and particular Men, as Bargain and Sale, and the like. There are alſo ſome Acts, which are ſtiled *voluntary*, and others that are called *neceſſary* Acts. A *voluntary* Act is that, which may be perform'd and done ſeveral ways. And on the contrary, a *neceſſary* Act is that, which can only be perform'd and manag'd one way. *Neceſſary* Acts are the preſcribing of Medicines, and the giving of Food, *&c.* which being omitted, the Life of Man is in great danger, and with which (perchance) it may ſubſiſt. But this by the bye. *Publick* Acts are alſo taken for ſuch Books and Tables, as contain the Publick Acts and Buſineſs of a City or State, meaning the Laws, Statutes, *&c.* as *Catanæus* obſerves upon *Pliny* the younger: And hence the word *Acts* emphatically denotes the Publick Acts and Regiſters of Magiſtrates, Notaries, Actuaries, *&c.* And ſometimes the Publick Rolls and Archives of the Prince, that is to ſay, the Place where common Writings are laid up and preſerv'd, are called the *Publick Acts*. There are ſome Acts, which we call *Poſitive*, and others which we term *Negative* Acts. The firſt conſiſt in doing ſomething: But *Negative* Acts conſiſt in ſuffering, and not in acting; and ſuch Acts do not infer or argue a Conſent in the Perſon acting or ſuffering, properly ſpeaking.

[b] Gothofr. in l. 2. C. 2. 1.

Every *Legal* Act is made by the Application of three Things: For there muſt be a *Will*, a *Power*, and a *Mode* or *Form* of acting, according to *Baldus* [c]; and to give a Form or Being to a *Legal* Act, there muſt be a Method, Order and Diſpoſition of Words, eſpecially if ſuch Act conſiſts in Writing; and if this Order and Method be perverted or omitted, it annuls the Act. And this holds particularly true in all Judicial Acts. Every Act and Diſpoſition of Law receives its Interpretation from the Nature and Quality of the Perſon, who makes any Grant or Diſpoſition [d]: and a ſubſequent Act points out the previous Mind and Intention of the Party acting [e]. And a doubtful and ambiguous Act always rather admits of ſuch an Interpretation and Conſtruction in Law, whereby it may ſubſiſt and become valid, than

[c] In l. 8. C. 1. 18.

[d] D. 30. 1. 50.

[e] l. 2. 1. 15. D. 34. 5. 11.

than an Interpretation, which wou'd annul and deſtroy ſuch Act [f]. And hence it is a general Rule in Law; that ſuch a Preſumption ought always to be allow'd and purſu'd, whereby an Act may rather be rendred firm and valid, than that the ſame ſhou'd periſh [g]. And this Concluſion holds good, even tho' there ſhou'd be ſome Conjectures which contravene the ſame; becauſe ſuch a Preſumption as makes for the validity of an Act is rather preferr'd, than that which makes againſt it. An Act in a doubtful Caſe is rather preſumed to be done in a Man's own Name and on his own Account, than on the Account and in the Name of another Perſon. A doubtful and ambiguous Act is interpreted according to the Senſe and Meaning of the Agent or Perſon doing ſuch Act. A ſubſequent Act is explain'd and declar'd by an Act antecedent to it: And though a ſubſequent Act is preſum'd to be in execution of a preceding Act; yet it never ratifies and confirms an Act, which is deceitful and fraudulent.

[f] C. 4. 12. 4.

[g] D. 34. 5. 2. Gloſs. in c. 25. x. 5. 40.

Every Act or Action ought to be free from Temerity and Negligence: For a Man ought not to do any Thing, according to *Cicero* in his *Offices* [h], for which he cannot render a good, or (at leaſt) a probable Reaſon for his ſo doing: And this has an eſpecial Relation to a Judge, whoſe Buſineſs it is always to follow the Truth and right Reaſon. A Man doing an Act knowingly againſt the Precepts of Law, is preſum'd to have done ſuch Act in contempt of the Law. An Act of Approbation depends on the ſole Will and Conſent of the Perſon approving the ſame: But an Act done out of Neceſſity does not infer the Conſent of the Perſon doing it. If a Perſon wou'd prove ſome Act to be done by a Madman, he ought to prove the Perſon to be a Madman, at the Time when ſuch Act was done or executed. If an Act be ſo well executed by a Madman, that it does not appear to be the Act of a Madman, ſuch Act is well ſupported: But 'tis otherwiſe, if he has not lucid Intervals. And an Act is preſumed to be done in the Time of ſound Memory, when the Time of ſuch Act done is far remote and at a Diſtance from the Time, he was affected with Madneſs: For then the Preſumption is, that at the Time of the Act done he was a Perſon of ſound Memory and Underſtanding, according to *Baldus* [i]. For it ought to be conſider'd, whether the Act was done at any long Time before or after his Madneſs, or whether it was done very near the Time of his Madneſs. See *Imola* on the Law here cited [k]. And here I muſt obſerve; that he, who avers any Act to be done by a Madman, or by a Perſon of an unſound Underſtanding, ought to prove, that he labour'd under ſuch Indiſpoſition at the very Time when the Act was executed.

[h] Lib. 1.

[i] In l. 9. C. 6. 22.

[k] D. 28. 1. 20. 4.

If any Perſon be obliged to do an Act within a certain Time, he is bound to prove that he obſerved that Time. Where an artificial Day is not of the Subſtance of an Act, that which is done in the Night-Time may be ſaid to be done in the Day; becauſe a natural Day conſiſts of twenty four hours; and in this ſenſe the word *Day* is uſed in the firſt Chapter of *Geneſis*, where it is often ſaid, *viz. And the Evening and the Morning was the firſt Day*, &c; and what was done *in the Evening and Morning* was done in the firſt Day. For the natural Day *More Romano* begins at Midnight, and ends at Midnight the Day following. If an Act or Contract be done about Midnight, the Notary ought to attribute ſuch Act or Contract to the Day precedent; but if it be certainly done after Midnight, then to the Day following. A Man that has diſpatch'd any Act, is not preſumed to have committed Perjury or Forgery therein: And a Man ſpeeding an Act, if there be any neceſſary Cauſe extant, is rather preſum'd to have done it on the Motive of ſuch Cauſe, than on the Motive of a Cauſe meerly voluntary. The Subſtance of an Act is not preſumed thro' length of Time: But, the Subſtance of an Act being once proved, the Solemnity thereof is

eaſily preſumed. An Act becomes different and varies from itſelf, either when ſomething is added thereunto, or elſe when ſomething is diminiſhed and taken away from it: But many Acts continued and done *unico contextu* are deemed as one Act alone, nor does one Act infer another, unleſs ſuch laſt Act does neceſſarily follow from the firſt.

Acts that are done by ſeveral Perſons as a Corporation or Body Politick, as by a College and the like, are not vitiated in reſpect of ſuch unqualify'd Perſons as were preſent and interven'd thereat, if the Act does not turn on the Hinge of ſuch unqualify'd Perſons: For ſuch Acts do not take their Force and Eſtabliſhment from ſingle Perſons, but from the College or Corporation itſelf [l]. An Act, which is null, is taken *pro inutili & non facto*, ſo far as it concerns the prejudice of a third Perſon: But it is not ſo taken in reſpect of the Advantage, and in Favour of him who does it; becauſe if any Deceit or Fault ſhall be diſcover'd in him who does an Act that carries a Nullity or ill Fame along with it, he ſhall be puniſh'd notwithſtanding the Invalidity of the Act which he has done, leſt he ſhou'd receive an Advantage or grow rich from his own Diſhoneſty [m]. An Act is preſum'd to be done at the Inſtance of him, in whoſe Favour and for whoſe Advantage ſuch Act is done. And an Act, which is done with Expence, is preſum'd to be done by him who has an Intereſt in it. As every Act is regularly proved by two Witneſſes; ſo every Act, from whence a Preſumption ariſes, ought to be entirely perfect; and in a doubtful Caſe is preſum'd to be done in a Man's own Name, though it might have been tranſacted even in the Name of another Perſon [n]. As Acts may be proved by Witneſſes, if they depoſe ſpecially, *viz.* That it was thus acted, or thus written; ſo they may be alſo proved by a private Writing.

[l] Alex. Conſ. 40. vol. 2.

[m] D. 47. 2 12. C. 4. 48. 3.

[n] Bart. in l. 31. D. 12. 2.

Under the Appellation of *Acts* we may alſo reckon *Judicial* Acts: But becauſe I have, in the ſecond Volume of this Work, reſerved an entire Title diſtinct and ſeparate to itſelf, in order to treat of *Judicial* Acts; I ſhall ſay little or nothing of them in this place; and therefore I ſhall only ſpeak of them ſo far as may ſerve to clear up matters in the Progreſs of this Undertaking. Now generally ſpeaking under the Name of *Judicial* Acts we may reckon all thoſe Things, which happen to be done *in Judicio contradictorio*, that is to ſay, in a Court of Law where Matters are diſputed; and even thoſe Things which happen to come into Court, and as they are matters of *voluntary* Juriſdiction, are not diſputed at all, but only the Judge's Decree is interpos'd and made Uſe of. The Acts of a Judicial Cauſe in Controverſy are ſaid to be the Libels or Petitions offer'd, the Confeſſions of the Parties, the Examination and Depoſitions of Witneſſes, and ſuch Things as reſpect the Facts of a Cauſe, and ſerve to inſtruct the mind of the Judge: But the Acts of a Judicial Proceſs, or of Judicature, are ſaid to be the Citations, the giving of Bail or Caution and the like; ſo that the Acts of a *Cauſe*, and the Acts of *Judicature*, are different. But the *ordinary* Acts of *Judicature* are the Libel or Petition of the Party, Conteſtation of Suit, the Oath of Calumny, and the like; and theſe Acts are deſtroy'd and taken away by an Abſolution *ab obſervatione Judicii*, or a Non-ſuit, as we call it. The *eſſential* or *ſubſtantial* Parts of a Judicial Proceſs depend on the Law, and not on the Will of the Parties litigant; and, therefore, they may not be omitted by the Conſent of the ſaid Parties: nor can they be ratify'd by them, if they are null and void, according to this Rule in Law, *viz.* That *an Act cannot be ratify'd by a Deed, which does not depend on a Man's Power*; nor can the Nullity of an Act in ſuch a Caſe be ſupply'd by a Man [o]. But the Parties may themſelves either by Pact or Stipulation oblige themſelves not to except againſt the Nullity of an Act, but may bind themſelves to obey all the Acts

[o] C. 3. 13. 3. Arg. D. 30. l. 55.

and Sentences of the Court, even tho' they ſhould be null: For tho' ſuch Acts or Sentences ſhould not be valid in Law; yet the Pact and Agreement of the Parties is valid and binding [p]. The Sentence of the Judge is alſo comprized under the Appellation of *Judicial Acts*: And therefore, if any Law forbids Acts to be exemplify'd before a Judge, unleſs it be by a certain Notary, a Sentence cannot be exemplified, according to *Baldus* [q], unleſs it be by the ſame Notary. See alſo *Guid. Papæ*'s Deciſions [r].

[p] C. 3. 38. 2. & D. D. ib.

[q] Conſ. 137.

[r] Lib. 3. Deciſ. 616.

A Man that impugns any Act, cannot afterwards aid and aſſiſt himſelf by the ſame Act in that very judicial Proceeding, wherein he has impugn'd ſuch Act: But this is otherwiſe, if it happens in another Inſtance or judicial Proceſs. For then he may aid himſelf by that very Act which he has formerly impugn'd; becauſe a Variation is admitted and allow'd of in diſtinct and different Proceedings. And a Man may alſo call that Act to his aſſiſtance which he has impugn'd as to another effect, than in Reſpect of that on which he founds his Intention. Hence it is to be obſerved, that he who alledges any Deed or Inſtrument to be falſe, may afterwards repent thereof, and aver the ſame to be true: But he that avers a Deed or Teſtament to be true, cannot afterwards alledge it to be falſe. Yet this only proceeds in reſpect of a Deed or Inſtrument, when ſuch Deed or Inſtrument is *de facto proprio*; for if it be not *de facto proprio*, the Producent may impugn it, *viz.* by proving an Error or Miſtake therein. *Judicial* Acts are not preſumed, unleſs they are proved; and that which is not found to be written in the Acts of Court, is preſumed not to be done or acted [r]: And this holds true, even tho' the Judge ſhould in his Sentence aſſert it to be thus done and acted; for ſuch Aſſertion is no Proof that it was thus acted, unleſs there be ſome other *Conſtat* thereof.

[r] C. 1. 18. 13.

TIT. XI.

Of Deceit, Fraud, Coſenage, *and* Colluſion; *wherein they differ, and how they are made void and puniſhed. Of an Exception of* Deceit, *&c.*

AS *Deceit* and *Fraud* is not only committed in Contracts, but alſo in Laſt Wills and Teſtaments, either by corrupting or ſuppreſſing the ſame, and likewiſe in the Practice and Execution of the Laws themſelves, by a falſe and evil Interpretation of them; I will therefore here treat of *Deceit* and *Fraud*. And *firſt*, conſider what it is, and whence it has its Riſe. *Secondly*, I ſhall enquire, how many fold it is, and when it intervenes. *Thirdly*, I ſhall ſhew, how it is diſcover'd and proved. And *fourthly*, ſet down how it is made void and puniſh'd. Now *Deceit* or *Knavery* in *Latin* ſtiled *Dolus*, is by *Servius* [s] defined to be a Kind of Machination or Coſenage introduced in this manner, *viz.* when one Thing is done, and another Thing is pretended to be done [t]. But *Labeo* rightly rejects this Definition for two Reaſons. *Firſt*, becauſe Circumvention may happen without feigning and diſſembling the Matter in this Manner. And *ſecondly*, becauſe one Thing may be done, and another Thing pretended without any Knavery or evil Deceit. I ſay, *without any evil Deceit*, becauſe there is a *Dolus bonus*, which is nothing elſe but a Stratagem; and a *Dolus malus*, which is downright Knavery. Wherefore *Labeo* defines

[s] D. 4. 3. 1. 1.

[t] D. 2. 14. 7.

[t] D. 4.3.1.2. defines this laſt to be every kind of *Craft*, *Fallacy* and *Machination*, which one Man makes uſe of to cheat, deceive and circumvent another, either by the Concealment of a Fault in ſomething; and in this Senſe it conſiſts in the Mind [u], and may be called *Craft*, or *Calliditas* according to the *Latins*: or elſe it may be carried on by lying; and then it is termed a *Fallacy* [v]: or *laſtly*, it is managed *Arte verborum*, that is to ſay, by a Fineſſe of Words, and then it is called a *Machination* [w]. For as *Craft* conſiſts in Silence and Concealment, according to the Lawyers; ſo does *Fallacy* conſiſt in declaring that which is falſe. From what has been ſaid I therefore infer, that *Deceit* or *Fraud* is a Machination or Art unjuſtly made uſe of to cheat and deceive another Perſon [x]; or an induſtrious and deſign'd Deviation from that which is right, and ought to be done. And it differs from a *Lata Culpa*, becauſe a *Lata Culpa* is a Deviation from that which Men of the ſame Condition and Profeſſion commonly do, *viz.* it is not uſing that Diligence, which Men commonly practiſe, as *Bartolus* obſerves [y]. But yet *Deceit* and a *Lata Culpa* are compared unto each other; becauſe tho' the Law ſpeaks of *Deceit* alone; yet it is extended to a *Lata Culpa*, or groſs Negligence [z]. But tho' a *Lata Culpa* be equivalent unto *Deceit* in many Caſes; yet when it conſiſts only in a meer Act of Negligence, it never paſſes into *Deceit*, if the negligent Perſon has no Advantage of his Negligence.

[u] D. 19.1.1. fin.

[v] D. 47.2.43.3.

[w] D. 19.1.13.6.

[x] D. 4.3.1.

[y] In L. 3. D. 16.3.

[z] Bart. ut ſup.

Fraud in *Latin* called *Fraus*, commonly bears the ſame Senſe as the word *Deceit*, in the Law called *Dolus Malus*, as aforeſaid, and ſometimes *Dolus* ſimply without any Addition: And thus theſe two words *Fraud* and *Deceit* are often promiſcuouſly uſed for each other [a]. *Dolus Malus*, I ſay, becauſe the *Latins* making a Diſtinction, underſtand this word *Dolus* both in a good and bad Senſe. For example, ſuch a *Species* of Deceit they call *good*, which Phyſicians uſe in the Adminiſtration of their Medicines for the curing and healing their ſick Patients; deceiving them in the Medicaments which they preſcribe them. And, on the contrary, that is called *Dolus malus*, which we in *Engliſh* commonly term *Male-engine* or *Knavery*. If the word *Dolus* ſtands ſingly, and without a Corrective, it is always taken in a bad Senſe, *viz.* For Colluſion, Covin, Coſenage, *&c.* And, among the Lawyers, the word *Fraud* is always us'd in a bad Acceptation; and is by them defined or deſcribed to be a feigning of one thing for another, with an Intent of deceiving the Perſon with whom we have to do, as *Cicero* in his *Offices* writes of *Pythius*, who, when he had a mind to ſell his Gardens to *Caius Cannius*, that he might ſtir him up the more to buy them, ſent for Fiſhermen to him, and deſir'd they wou'd fiſh the next Day before his Gardens: whereupon he ſold his Gardens for a far greater Price than they were worth. For *Cannius* obſerving the Fiſhermen at work with their Nets and Boats, and every one brought Fiſh and laid them at *Pythius*'s Feet, purchas'd the Gardens for the ſake of the Fiſh-ponds, whereas in truth they had no Fiſh in them. But ſometimes the word *Fraus* is taken for the ſame as *Periculum* [b]: And the Ancients often uſe this word to ſignify a *Crime*; and from hence the Phraſe *Capitalem Fraudem admittere* [c] was to commit ſuch an Offence, for which the Criminal ought to be puniſhed with Death. But that is properly called *Fraud*, which is done contrary to Honeſty, good Conſcience, and the Promiſe, which one Man makes to another. And herein *Fraud* differs from *Deceit*, which is not only contrary to good Faith, but is alſo committed thro' Force; and therefore it is a *Genus de Pluribus*.

[a] D. 5.2.25. D.6.1.63. D.17.2.3.fin.

[b] Liv. lib. 1.

[c] D. 21.1.23.2.

For this *Dolus* or Deceit is twofold, *viz. Dolus velatus*, or a Deceit under *Coverture*, which is committed without Force, as by pretending one thing, and doing another; or elſe by doing ſomething in a private and ſecret manner, as in committing a *non-manifeſt* Theft. The other is called *Dolus opertus*, or an *overt* Deceit; and this is always committed by the means of Force.

Force. But that is properly called *Fraud*, when any *ſimulated* Promiſe is made, or when a Promiſe is made, that is prohibited by Law. For he is ſaid to commit Fraud, who either for his own Advantage, or with a view of deceiving another, conceals the Truth of a Thing by repreſenting that which is falſe. Wherefore, it is Fraud, and contrary to fair and honeſt Dealing, for the Seller to conceal from the Buyer, that which the Seller ought to declare unto him [d]. Whence, I think, the Grammarians may well enough derive the word *Fraus*, as they do the word *Furtum*, from the *Greek* Verb φέρειν, becauſe they who commit Fraud, do rob another of that which belongs to him; and thus they increaſe their own Advantage by the loſs and detriment of another [e]. And hence *Cujacius* defines Fraud to be a Damage, which either evil Faith and Diſhoneſty brings upon another, or elſe that which is collected from the Event of Things itſelf [f]. But, according to *Papinian*, Fraud is not only conſider'd and inferr'd from the Event of Things, but alſo from the Purpoſe and Intention of the Perſon [g]. The word *Fraus* is of a larger extent than the word *Dolus* in our Books, as it denotes every Act that is culpable, whether it has cunning with a Machination of deceiving joined with it, (and in this Senſe it ſignifies the ſame as *Dolus* or Coſenage [h];) or whether it be without any Machination of deceiving or cheating another [i]. But if mention be made of *Fraud* alone, ſimply and without the Addition of any other Word, it is to be underſtood of that kind of Fraud which is accompany'd with Deceit and Knavery. But ſometimes the word *Fraud* denotes the ſame as a ſophiſtical way of Reaſoning: As when a Perſon is by ſome falſe Perſuaſion led into an Error, being diverted as it were from the right way; and this way of Fraud is common among knaviſh Lawyers, who either deceive their Clients, or impoſe upon the Court. And thus the Reader has the ſeveral Significations of the words *Fraus* and *Dolus* as uſed in our Law-Books. I ſhall next conſider the different kinds of *Fraud* and *Deceit*.

[d] D. 19. 1. 1.
[e] D. 50. 16. 131.
[f] Cujac. in l. 7. D. 2. 14. 10.
[g] D. 50. 17. 79.
[h] D. 4. 3. 1. D. 2. 14. 7.
[i] D. 35. 2. 1. 1. Gœdd. in l. 181. D. 50. 16.

It has been already remembred; that there is one kind of *Deceit*, which is ſtiled *Dolus bonus*, viz. ſuch as is practis'd towards an Enemy, and the like; and another which is termed *Dolus malus* [k], and is not allow'd of. We have alſo another Diviſion of *Deceit*, viz. into *True* and *Preſumptive* Deceit. *True* or *real* Deceit is that, which is inferr'd and has its Riſe *à re ipſâ*, or from the Act of the Perſon contracting, or ordering ſomething to be done; and thus it is diſcover'd from the Act of a deceitful Man. But hereunto 'tis objected; that *Deceit* is proved from Conjectures, ſince it only conſiſts in the mind of Man alone: For *Dolo fieri vel non fieri conquieſcit in animo*, ſays the Emperor. How then can it be known from Facts, which are external Things? But hereunto the Gloſs gives a good Anſwer, ſaying, that this is to be underſtood touching the Quality of a Fact: For the Quality being a Circumſtance, which ariſes from the Fact itſelf, ought to be proved; and thus by a Figure in Rhetorick, the Quality is taken for the Thing wherein it reſides. Wherefore, that is ſaid to be from a Fact, which is from the Quality of a Fact. But becauſe *Deceit* conſiſts in the Mind, and is from the Purpoſe and Deſign of the Perſon chiefly, it hence follows; that there is a *preſumptive* kind of Deceit, which is proved and diſcover'd from Preſumptions, or Conjectures alone, ſince the Mind of a deceitful Man cannot be otherwiſe known, peradventure. Again, there is one kind of *Deceit*, which is ſtiled *future* Deceit, as having a reſpect to ſome future Act; and this cannot be by Pacts remitted or pardon'd [l]: And another which is called *Deceit* or Malice *de præterito*, as having a Retroſpect to ſome paſt Act of Malice; and this may be pardon'd. I make uſe of the word Malice here; becauſe there is an Act of Malice in every Act of Fraud. There is one kind of Malice or evil Deſign (for ſo the word *Dolus* always ſignifies) which is ſtiled *ordi-*

[k] D. 4. 3. 1. 3.
[l] D. 2. 14. 27. 3.

nary, and is wont to intervene in a Treſpaſs or Offence, as in Theft, Murder, *&c.* And another kind which is ſtiled *extra ordinem*, and *Dolus minoratus* from a juſt precedent Cauſe; for that a Puniſhment is leſſen'd by means hereof. By the *Canon* Law all Perſons are deemed capable of a deceitful and malicious Purpoſe, that are ſeven Years of Age: But by the *Civil* Law, Males are not adjudg'd ſo, till they are ten Years and ſix Months old, and Women not before they arrive at nine Years and a half old; for then they are deemed to be *pubertati proximi* [m], to border upon Puberty.

[m] D. 47. 2. 23. D. 46. 2. 2.

I have before hinted; that there is a *true* and *real* Deceit, and a *preſumptive* Deceit. The firſt is ſaid to be, when Deceit is proved to be *really* apply'd and made uſe of: And in a doubtful Caſe whenever the Law ſimply ſpeaks of Deceit, or of a deceitful Man, it is always to be underſtood of true and real Deceit [n]. *True* and *real* Deceit is alſo ſaid to be, when the Tokens and Preſumptions thereof are very clear and manifeſt: As when a Perſon has committed ſome Act, that is unlawful in itſelf, either according to the Law of nature, or ſome evident poſitive Law, and that lately made too. Thus when a Perſon, that has the Management and Adminiſtration of another's Buſineſs, as a Factor and the like, does not ſet down in his Account-Book, what Goods or Sums of Money he has received, and converts thoſe Goods or Moneys to his own proper Uſes, he may be ſaid to be guilty of *true* and *real* Deceit [o]. And the ſame holds good, if it appears, that his Books are not well kept and ſolidated. Deceit, or an evil and malicious Deſign proved by a Preſumption of *Law* is alſo called a *true* and *real* Deceit; becauſe Preſumptions of Law, according to *Menochius* in his Treatiſe of *Preſumptions* [p], are reckon'd clear Proofs: But it is otherwiſe, if it be only proved by a Preſumption of *Man*, tho' there are ſome Perſons that wou'd have even this to be called *true* and *real* Deceit, or Malice, *viz.* if it be proved by a Preſumption *of Man*. But *true* and *real* Deceit, or Malice, is never ſaid to be, when the Act only proceeds from a *lata culpa* or groſs Negligence; but this is called *Preſumptive* Deceit, or Malice *imply'd*, though it be ſaid that a *lata culpa* is compar'd unto Deceit. *Preſumptive* Deceit or Malice (for the Law often uſes one Term for the other) is ſaid to be, when the Law preſumes Deceit or an evil Deſign, or when the ſame is preſumed from a conjectural Proof, and when the Tokens thereof are not ſo clear and manifeſt, as that they do neceſſarily infer Deceit or Malice. Becauſe whenever a Perſon knows, or is preſum'd to know, that he is bound to do ſuch a Thing, and thro' Negligence does not do it, he is ſaid to be guilty of *Preſumptive* Deceit, or Malice: But if he knows, or is preſum'd to know, that he ought not to do ſuch a Thing, and acts contrary hereunto, he is ſaid to be guilty of *true* and *real* Deceit, or Malice in acting. And thus ſome will have a *preſumptive* Deceit to conſiſt in Omiſſion, and *real* Deceit to be placed in Commiſſion or the doing of a Thing. In reſpect of *preſumptive* Malice or Deceit, a Soldier and a Minor is excuſed, but not in reſpect of *true* and *real* Deceit or Malice.

[n] Paris conſ. 49. lib. 1.

[o] Socin. conſ. 159, & 190.

[p] Lib. 5. Præſ. 3. N. 6 & 7.

It has been alſo ſaid before; that Deceit is twofold, *viz.* that which is *re ipſâ* only, or in the Contract itſelf, and that which is *re ipſâ & conſilio*, that is to ſay, from the Purpoſe of the Perſon contracting: And in both Caſes a Contract is either null, *ipſo Jure*, or elſe it ought to be reſcinded by the help of an Exception; which laſt Method is moſt commonly obſerved. If Deceit *ex propoſito* be apply'd and made uſe of in a Contract, it renders the Contract null and void [q], becauſe Conſent is wanting; but Deceit *re ipſâ* does not induce a nullity of the Contract, but leaves room for a Man to recede from thence by reſcinding the Contract: And tho' theſe two Things are ſometimes equivalent, yet ſometimes they differ; but Deceit *ex propoſito* and *re ipſâ* are equivalent unto each other in all other reſpects, excepting that the firſt renders an Act null and void, but in the laſt

[q] D. 4. 3. 7. pr.

Case the Act must be rescinded, unless it be in the Case of a Minor, Woman and the like, where each kind of Deceit annuls an Act, if they are injur'd above one Moiety in the Act they deal in. And thus we always ought to consider whether the Deceit was in the Contract itself, or whether it was the Cause and Inducement of the Contract. For if it was in the Contract itself, as by buying too dear, or too cheap, it does not void the Contract *ipso Jure*, unless it be as before excepted, but makes it void by an Action or Exception of *Deceit*. Thus if the Faults or Defects of the Thing sold (moveable or immoveable) are concealed by the Seller from the Buyer, the Contract may be rescinded [r], and the Seller must have his Goods again with the Profit of them, and may make amends for Damages by reason of those Faults, which if the Buyer had known, he wou'd not have bought at all; but provided that the Seller knew and concealed those Faults. For tho' the Law permits Circumvention as to the *Price* in some measure, yet it does not allow Circumvention at all by equivocating or concealing the Faults. But more of this under the Title of *Bargain* and *Sale*. If Fraud or Deceit be the Cause or Inducement of a Contract, such Contract is so far valid as to bind the Person of such fraudulent Contracter to his own Prejudice, if the Person who was thus fraudulently induced will have it so; otherwise the Contract is null, if such Person deceived desires to have it made void. But in this Case the Person thus deceived ought, I think, to give Opposition to the Contract either by an Action, or an Exception *of Deceit* [s].

[r] D. 21. 1. 1.

[s] D. 2. 14. 34.

As *Fraud* and *Deceit* ought not to be a Protection unto a knavish Dealer, or to bring any Advantage to him [t]: so it is a known Rule in Law, that the *Deceit* of one Person ought not to turn to the Prejudice of another, or to affect him [u]; unless such other Person receives some Advantage from such Deceit: As the *Deceit* and *Fraud* of an Administrator or Guardian affects his Principal or Pupil, who receives Advantage from such *Deceit*. But in this Case the Person, who receives an Advantage, ought not to be convened in an Action of *Deceit*, but an Action lies to annul the Contract, or to declare it null. But yet an Action of *Deceit* is granted *in Subsidium*, if the other Action will not avail, and not otherwise. But *Deceit* and *Fraud* is not said to be committed, when a Person knows what is done, and wills the same [x]; for *Deceit* is founded upon Error, Ignorance and want of Consent. An Action of *Deceit* is a *Subsidiary* Action, and is the last Remedy which the Law affords for the obtaining of a Right, when other Remedies fail. But as an Action of *Deceit* carries Infamy along with it, it does not lie against an Heir for the Misdemeanor of his Testator, unless such Heir has better'd his Condition by the knavish Dealing of his Testator; and then it only lies so far and no farther, than the Heir has enriched himself by such knavish Dealing [y]. But *Sabinus* thinks, that an Action of Accompt, or on the Case, ought rather to be brought against an Heir, than an Action *of Deceit* [z].

[t] D. 4. 3. 12.

[u] D. 4. 3. 7. pr.

[x] C. 2. 4. 34.

[y] D. 4. 3. 26.

[z] D. 4. 3. 26.

The Law says, that a Person is guilty of *Fraud* and *Deceit*, who demands or sues for a Thing, which he is bound to restore again [a]: And of this we have an Example in a Debtor and an Heir. For if a Testator commands an Heir not to sue for such a Debt, and the Heir not regarding the *Legatum liberationis*, that being the Legacy whereby the Debtor is discharged, notwithstanding sues for the same, the Debtor may surely in this Case bar or exclude him by an Exception *of Deceit*: And may, moreover, have an Action *ex Testamento*, namely, upon the Will as a Legatary; because he may sue the Heir to give him a Discharge or Release from the Debt, otherwise called an Acquittance. But no Man seems to act *deceitfully*, who only sues for his own Right [b]. *Fraud* never seems to be remitted on the Account of a future Administration, even tho' Testators and Parties contracting

[a] D. 50. 17. 55. D. 44. 4. 8.

[b] D. 50. 17.

tracting have expreſſly mention'd a Remitter of ſuch Fraud; becauſe this wou'd be an Invitation and Encouragement unto Knavery. But what I here ſay touching *Fraud* has only a reſpect to ſuch Fraud which conſiſts in a Crime of Commiſſion: But it is otherwiſe, if it conſiſts in Omiſſion, or not doing a Thing. As when a Man fraudulently detains another's Goods, then ſuch Fraud is not deemed to be remitted by a general Releaſe; becauſe this is an Act of Commiſſion: But if a Perſon, that tranſacts Buſineſs for another ſhall thro' Fraud or Deſign omit any Thing therein, upon which account the Perſon, whoſe Buſineſs he had the Adminiſtration of, ſuffers any Damage thereby, he ſhall be diſcharged from Fraud by a general Releaſe.

Fraud and *Deceit* ought to be proved by the Perſon alledging or averring the ſame [y]; and it may be proved by Arguments, Conjectures and Preſumptions [z]: And it is proved, if the Quality of the Fact, wherein it conſiſts, be proved. A Perſon that has once paſſed an Account, and deliver'd up his Vouchers, is not preſumed to be guilty of *Deceit*: And therefore the Proof in this Caſe ought to be full and clear againſt him, if the adverſe Party wou'd again draw his Account into queſtion, and unravel the ſame; becauſe a Preſumption lies in Favour of an Account once rendred, eſpecially if he has received his *Quietus*, and has been diſcharged thereby [a]. But *Deceit* is preſumed againſt a Debtor, if he has alienated all his Goods and Eſtate, ſince he contracted the Debt: Wherefore, ſuch a Debtor, if he wou'd purge himſelf of *Deceit*, ought to prove, that ſuch Alienation was made upon a juſt and neceſſary Account. See afterwards the Titles of *Debtor* and *Creditor*, and that of *Bankrupts*. Deceit or an evil Purpoſe is not preſumed in a Judge, and therefore it ought to be prov'd: Which may be done either from the threatning words of the Judge, declaring that he will out of Hatred and Enmity pronounce Sentence againſt ſuch a one; or if he will not admit of the legal Proofs of the Party; or denies him Audence upon an unjuſt and frivolous Account. That is called *manifeſt* Deceit, when the Preſumptions thereof are ſo ſtrong and clear, that they induce the Judge to a Belief thereof, without any other adminicular Proof [b]. Thus he, who does not do that, which he knows, or (at leaſt) ought to know in reſpect of an Office or ſome Duty enjoin'd him, is guilty of *manifeſt* Deceit, or of *preſumptive* Malice and evil Deſign. A Pupil generally ſpeaking is not preſumed to be capable of *Deceit* or *Malice* [c]. By the *Roman* Law, *Deceit* and *Coſenage* is ſo odious and deteſtable a Thing among them, that it not only renders an Act void and voidable, but it is likewiſe puniſh'd with Infamy [d].

Hereupon the *Prætor* granted an Exception *of Deceipt*, to the end that no Man's Fraud and Coſenage ſhou'd be a Shelter or Protection to him [e]. For by the Law of the twelve Tables, or the ancient *Civil* Law, this Exception did not lie, but the Perſon deceived was driven to his Action of *Deceit* [f]; and hereupon Perſons were often deceived and abuſed under the Umbrage of ſtrict Law. For in Contracts *Stricti Juris* no other Remedy, but an Action cou'd be had. And thus tho' the old Law does not irritate ſome Contracts *quoad punctum Juris*, but confirms the ſame, eſpecially if a Contract be ſupported by a ſolemn Stipulation; yet if Fraud and Force intervenes in ſuch a manner, that one Man is trick'd by another's Knavery, or compelled to do a Thing againſt his Will, natural Equity forbids ſuch Contracts to be binding [g]; and hence it was, that the *Prætor* introduced this eaſy and ſpeedy Remedy by the Aid of an Exception of *Deceit* [h]. I will put a Caſe to illuſtrate the Matter, *viz. Titius* by a ſolemn Stipulation promis'd to pay me ten Pounds, who in Point of Law cannot rid himſelf of ſuch Contract by any evaſion, if he really promis'd it, unleſs he pleads an Exception of *Deceit* or *Fear*; ſaying, That *I circumvented him by Deceit*, or *compelled him thro' Fear*: and either of theſe Exceptions

[y] D. 2. 13. 8.
[z] C. 2. 21. 6.
[a] Menoch. de Arbitr. caſ. 209.
[b] C. 2. 21. 6.
[c] D. 43. 4. 1.
[d] D. 3. 2. 6. fin.
D. 3. 2. 13. fin.
[e] D. 44. 4. 1. 1.
[f] I. 4. 13. 1.
[g] I. 4. 13. 1.
[h] D. 44. 4. 1. 1.

tions irritate the Contract. In respect of the *Plaintiff* this is a *personal* Exception, because it lies against his Person: But in regard to the *Excipient* it is a *real* Exception; because in respect of him it is enough, that the Thing which he possesses has suffer'd [i]. To make this Matter clear, give me leave to put another Case. *Titius* by his Knavery procur'd a Promise of me, that I wou'd convey to him such an Estate, but before this Estate is deliver'd to him, he sells it to *Sempronius*, saying, *I sell you the Right of an Estate promis'd me by such a one.* *Sempronius* brings an Action against me to deliver him the Estate, which I had promis'd to *Titius*, (for *Sempronius* purchas'd the Estate of *Titius*.) I object unto *Sempronius* that *Titius* had deceiv'd or cheated me. In this Case I am relieved by an Exception of *Deceit* [k]. *Seius* sold an Estate unto *Mævius*; and, on a Promise of warranting such Assurance or Conveyance, did hereupon give Security unto the Purchaser in Case of Eviction. The Purchaser brought his Action against the Surety or Voucher, which *Seius* had given him on the Account of Eviction, and the Surety was condemn'd *ad Interesse*, to make good the Damage. He makes a Tender of the Estate to the Purchaser, and offers to pay him all further Damages, in Case the Surety be convened on such Sentence. In this Case an Exception *of Deceit* lies. But the Judge shall tax the Expences, which the Purchaser has been at in the Cause of Eviction, and condemn the Surety in these Expences to the Buyer [l].

[i] D. 44. 4. 4. pen.

[k] D. 44. 4. 4.

[l] D. 44. 4. 15.

Whoever has an Exception against the Plaintiff, as an Exception on a Pact *de non petendo*, or an Exception *Juris-jurandi* and the like, has also an Exception *of Deceit*: For whoever can abate an Action by any Exception, may defend himself by an Exception of *Deceit* [m]; because every Exception is founded upon Equity, and proceeds from thence. And this more particularly holds true; if the Plaintiff, knowing an Exception to accrue to the adverse Party, does (notwithstanding) bring his Action against the Defendant, and deduces his Right judicially by Libel or Petition, *&c.* This Exception is peremptory [n], and has always Place when the Plaintiff's Fraud is impeached [o]; and it accrues upon the same Account as an Action *of Deceit* does: But it does not lie against a Parent or Patron, because it sullies and blackens the Reputation of him unto whom it is objected; and therefore against these Persons an Exception is made on the Fact, without any mention *of Deceit* [p]. But tho' the *Roman* Law had such a great regard unto the good Fame of Parents and Patrons, and to the Reverence which Children and Freedmen ought to shew thereunto; yet at this Day it is not lawful for a Parent to worst the Condition of his Children in respect of their *Peculiums* or Estates. This Exception is perpetual, and not limited to a Time [q], as an Action *of Deceit* to the Term of two Years now [r], tho' heretofore it expir'd at the end of a Year; nor was it perpetuated by Contestation of Suit. A Replication *of Deceit* is not admitted against an Exception *of Deceit* [s].

[m] D. 44. 4. 12.

[n] I. 4. 13. 9.

[o] D. 44. 4. 2. 1.

[p] D. 44. 4. 4. 16, & fin.

[q] D. 44. 4. 5. fin.

[r] C. 2. 21. 8.

[s] D. 44. 4. 4. 13.

If an Heir sues for that which is *purely* and *simply* due to him, and he owes the same Thing, he shall not be ousted of his Action by an Exception *of Deceit*, if he be prepar'd to give Caution or Security *de reddendo*, when the Event of such Condition is at hand and exists. But it is otherwise, if he be not ready to give such Security [t]. *Titius* did *sub conditione* bequeath unto *Sempronius* the Sum of ten Pounds, which was *purely* due to him. *Titius*'s Heir may in the *Interim* sue for the ten Pounds, provided he give Security to pay the ten Pounds, when the Event of the Condition exists. But if he will not give such Security, he may be repelled from his Demand by an Exception *of Deceit*. The Deceit and evil Practice of a Proctor, committed before Contestation of Suit, does not affect his Client:

[t] D. 44. 4. 5.

but if it be committed after Suit is conteſted, it ſhall affect him; becauſe, then the Proctor being made *Dominus litis* thereby, he is deemed to be the ſame Perſon with his Client; but yet the Proctor's Male-Practice ought to
[t] D.44.4.11. be puniſh'd [t].

TIT. XII.

Of Fear, *and the ſeveral* Species *and Qualities thereof; how it annuls an Act; and after what Manner it is purged and done away.*

FEAR is defined to be a certain Paſſion or Impreſſion made on the Mind of Man by an Apprehenſion of ſome imminent Danger, or approaching Evil: And of this there is a twofold kind. The firſt is that, which happens to a Man of Courage, Prudence and Reſolution; which is ſtiled a *grievous* and *reaſonable* Fear: And the other is that, which happens to a Coward, or to a Perſon of no Courage and Conſtancy; and this is called a *vain* and *light* Fear. A *Reverential* Fear, *viz.* ſuch as is due from a Son to a Father, or from a Wife to a Husband, *&c.* joined with Threats or Blows, may be referred to ſuch a Fear as happens to a Diſcreet and Cou-
[u] C.2.21.12. D.4.2.pen. rageous Perſon [u]. And to ſuch a Fear we may alſo refer the importunate Intreaties and awful Commands of a Superior, whereby we do ſomething againſt the Diſpoſition of our Mind, in order to avoid Vexation, and other great Inconveniencies of Life. Again, it is to be obſerved; that there is one kind of Fear, which is named an *intrinſick* Fear, which is occaſion'd by ſome Natural Cauſe; as from a Diſeaſe, a Tempeſt, and the like: And another, which is termed an *extrinſick* Fear, which is adminiſtred by a free Cauſe, that is to ſay, by Man. And this laſt is ſub-divided into that ſort of Fear, which is ſtiled a *juſt* and an *unjuſt* Fear. The firſt is warranted and juſtify'd by the Authority of the Laws; as when the Law commands a Perſon to do ſuch an Act under a ſevere Puniſhment, and he is afraid to offend the Laws; but if he be afraid of the Puniſhment, without any regard to the Commands of the Law, it is a *ſervile* Fear. An *unjuſt* Fear is that which is brought upon us in order to extort our Conſent contrary to Right or Law. But ſome will have a *juſt* and an *unjuſt* Fear to ſignify the ſame as a *reaſonable* and a *groundleſs* Fear: In which ſenſe the Terms are often uſed.

As a Contract celebrated through a *light* or *grievous* Fear is valid according to the Law of Nature, becauſe a Conſent and Will ſufficient to con-
[v] Ethic.c.1. tract intervenes, (for according to *Ariſtotle* [v], Fear does not *ſimply* deſtroy the Will:) ſo a Contract celebrated through a *light* and *grievous* Fear is valid according to the poſitive Law of Man, unleſs it be in ſome Caſes; becauſe it does not appear by any Law, that a Contract ſo made is rendred
[w] C.2.20.12. void *ipſo facto*, but the Law only orders ſuch Contract to be reſcinded [w]. And thus by the *Civil* Law, or the Law of the twelve Tables, a Contract made thro' Force or Fear was valid as being entred into by Conſent (for by that Law a Perſon compelled even thro' Fear or Force may con-
[x] D.4.2.21.5. ſent [x],) nor was there any Proviſion made by the ancient Laws touching this Matter. And therefore the *Prætor*, the Judge of Equity, introduced an extraordinary Remedy to diſſolve ſuch Contracts as were founded up-
[y] D.4.2.1. on Force or Fear: ſaying, [y] That what was done on the Account of *Fear, he*

would not have to be firm and valid, nor would he ratify the ſame. By *Fear*, in this Edict of the *Prætor*, is only underſtood ſuch a *preſent* and *juſt* Fear as may happen to a Man of the greateſt Courage and Diſcretion, from the Dread of terrible Objects[z]: As when his Life is in danger[a]; or when he is afraid of ſome bodily Torments[b]; or of Bondage, Loſs of Eſtate, real Infamy, private and unlawful Impriſonment, but not of publick Impriſonment[c], unleſs he be unduly impriſon'd, *&c.* And it matters not, whether theſe things are threatned to a Man himſelf, or to his Wife and Children[d]. Yet if there be a *Conſtat* that a thing is done through a *light* and *vain* Fear, I think there is room for Reſtitution, at leaſt by virtue of the Judge's Office[e]. Fear is to be conſidered from the Quality of each Man's Perſon, *viz.* whether he be ſuch as is wont to put his Threats in execution; and likewiſe to be adjudged of from the Circumſtances of Things. And as there are ſome Perſons more fearful that others by Nature, and as Women are ſooner frighten'd than Men, therefore they ſhall be reſtor'd *in integrum*, upon a leſſer degree of Fear than Men[f]. *Romani Singularia* 226. The Terror of Arms is ſaid to be a *juſt* Fear, though the Perſon that bears them does not make uſe of them: For it is not neceſſary to ſtile it a juſt Fear, that the Perſon ſhould wait till he is hurt or wounded; becauſe then, according to *Alexander*[g], it is not Fear but an *actual* Injury. A *juſt* Fear may alſo be induced by a penal Precept or Command. And thus if the Owner of an Eſtate ſees Perſons armed coming towards him, whom he has reaſon to fear, and therefore quits his Eſtate, he may be ſaid to be driven out from thence by Fear.

But a *reverential* Fear is not included within this Edict of the *Prætor*[h], unleſs ſome other Impreſſion, or Act of Violence accedes thereunto, as before hinted. Thus a *reverential* Fear of a Wife towards her Husband, is not a ſufficient cauſe to reſcind a Contract; unleſs it be proved that it was founded upon Fraud and Violence[i], even though the Wife ſhould privately proteſt againſt ſuch a Fear: For by ſuch a Proteſt a Contract is not reſcinded, eſpecially in prejudice to him, unto whom an Alienation is made. And this alſo proceeds, though it ſhould be proved, that the Husband threatned him; becauſe if it be proved, that the Husband's Threats have been ſuch as not to extend to any Acts of Cruelty, the Contract ſhall not be reſcinded[k]. Though an Act done through Fear may be reſcinded by a *reverential* Fear[l]; yet if the Preſence of Friends or Kindred ſhall intervene, ſuch Allegation of *reverential* Fear ſhall ceaſe, according to *Bartolus*[m]: And this holds good, though the Son or Wife ſhould wave ſuch exception of Fear in favour of the Father or Husband; for the Act ſhall be rendred valid by the Preſence of Friends, ſince by the Preſence of Friends a preſumption of *Fear* or *Deceit* is excluded[n]. The Preſence of the Husband, or any other Perſon, to whom a *reverential* Fear is due, does not induce ſuch a Suſpicion of Fear as is ſufficient to hinder a Perſon as to the free power of making a Will, unleſs Threats are previous thereunto, or ſome Blows[o]: yet a Wife contracting for the advantage of her Husband, has the power of reſcinding ſuch Contract on the ſcore of Reverence alone, and a preſumptive Fear; and this Fear is always underſtood to be preſent, when a Wife, that has been twice beaten, gives any thing. If a Man has beaten his Wife, becauſe ſhe would not agree to a Contract to be made, and after ſome Interval of Time the Wife ſhall give her Conſent, ſhe is preſumed to conſent through fear. *Fear*, brought on a Feme-covert, by her Husband, does not ſeem to be purged or removed, ſo long as the Cauſe of that Fear, from whence it had its riſe, ſubſiſts: And for this reaſon, Fear brought on a Wife by a Husband, never ſeems to be purged or done away ſo long as Matrimony depends.

Every kind of *Fear* is not ſufficient to invalidate Matrimony, as being contracted through Fear, but the Fear of Death, or of ſome bodily Torture, is

[z] D. 4. 2. 9. D. 4. 2. 5. & 6.
[a] D. 4. 2. 7. 8. & 9.
[b] C. 2. 21. 4.
[c] C. 2. 21. 10.
[d] D. 4. 2. 8. fin.
[e] Bart. & Bald. in l. fin. D. 4. 2.
[f] Dd. in l. 14. C. 4. 2.
[g] Conſ. 98. vol. 3.
[h] D. 4. 2. 8. C. 2. 21. 6.
[i] D. 23. 2. vi. 1. 18. 2.
[k] Abb. in c. 1. x. 1. 29.
[l] D. 44. 5. 1.
[m] In l. ult. D. 29. 6.
[n] C. 2. 4. 35.
[o] D. 23. 2. 22.

[p] X.4.1.28. is requir'd hereunto [p]. It was a Diſpute among the Doctors, whether a Minor, if he married an old Woman, full of Wrinkles, and without Teeth, through fear of his Parents, ſhould enjoy the Benefit of Reſtitution *in integrum?* And it was held, that he ſhould not, though it was a *reverential* Fear, and ſuch a Fear as might happen to a Man of Courage [q]: For there is no mention made of a *reverential* Fear either in the *Code* or *Digeſts*. Where a Promiſe has been made through Fear, and a Payment has been made after ſome Interval of Time in purſuance of that Promiſe, ſuch precedent Fear is not purged and done away by ſuch Payment, provided there be the ſame Cauſe of Fear remaining at the Time of Payment, which there was at the Time of the Promiſe made: But if ſuch Payment was made without conſtraint, the precedent Fear is purged and removed [r]. The Fear of Power and Dignity alone is not ſufficient to avoid a Contract, nor even of Threats and Menaces [s], unleſs they proceed from one who is wont to execute his Threats [t].

[q] D.23.2.22.

[r] C.2.20.2.

[s] C.2.20.9.

[t] C.2.20.7.

By this Edict of the *Prætor*, both an Action and an Exception, *quod metûs cauſâ*, lies for the Perſon, who ſuffers and undergoes Fear, whether the matter be perfected or not [u]: And the *Prætor* alſo gives the ancient Action, which did accrue before Fear was inflicted [w]: But if a Perſon makes choice of one Action, the other is gone [x]. This Action lies for Damage [y]; and is not given unto him, who ſuffers no loſs by Fear [z]. And as it is a written Action *in Rem*, it lies not only againſt him who inflicted this Fear, but alſo againſt every other Perſon that has received any advantage from thence [a], although he be free from any Crime [b]. It is granted within a Year in four-fold, according to the ancient Law, and after a Year *in ſimplum:* But by the modern Law it lies only *in ſimplum.* When it lay *in quadruplum*, the ſimple thing itſelf was reſtor'd, and the Penalty of three-fold added [c]: And ſo it is now *in ſimplum*, the Thing is reſtored, and the ſimple Value added by way of Penalty. It is a tranſitory Action, and lies againſt Heirs and Succeſſors, ſo far as they receive any advantage from ſuch Fear or Damage: But they are not obliged to a fortuitous Caſe, nor to make good the Thing if it periſhes [d]. But as this is an *arbitrary* Action, the Defendant ſhall not be liable to Puniſhment, if he reſtores the thing to the Plaintiff before the time of a definitive Sentence [e]. Nor ſhall the Defendant be liable, if the thing periſh'd without his Fault and Knavery, before he was guilty of delay; but he ſhall be entirely liable, if it periſh'd after ſuch delay [f].

[u] D.4.2.9.3.

[w] D.4.2.9.4.

[x] D.4.2.9.6.

[y] D.4.2.12. fin.

[z] D.4.2.14. pr.

[a] D.4.2.9.§. fin. & l.10.

[b] D.4.2.14.3.

[c] D.4.2.14.10.

[d] D.4.2.18.

[e] D.4.2.14. 1. & 4.

[f] D.4.2.23. & 33.

TIT. XIII.

Of a Fault, *in* Latin *ſtiled* Culpa; *how it is divided according to the Lawyers*, viz. *into* Culpa lata, levis *and* leviſſima; *and what theſe* Species *are*, &c.

THE word *Fault*, in *Latin* called *Culpa*, is a general Term; and, according to the Definition of it, it denotes an Offence or Injury done unto another by Imprudence, which might otherwiſe be avoided by human Care: For a Fault, ſays *Donatus* [g], has a Reſpect unto him, who hurts another not knowingly or willingly. Here we uſe the word *Offence* or *Injury* by way of a *Genus*, which comprehends Deceit, Malice, and all other

[g] In Terent. Hecyr.

other Miſdemeanors, as well as a Fault: For Deceit and Malice are plainly intended for the Injury of another, but a Fault is not ſo deſigned. And, therefore, we have added the word *Imprudence* in this Definition, to point out and diſtinguiſh a Fault from Deceit, Malice, and an evil Purpoſe of Mind, which accompanies all Treſpaſſes and Miſdemeanors. A Fault ariſes from Simplicity, a Dulneſs of Mind, and a Barrenneſs of Thought, which is always attended with Imprudence[f]: But *Deceit*, called *Dolus*, has its Riſe from a malicious Purpoſe of Mind, which acts in contempt of all Honeſty and Prudence, with a full Intent of doing Michief or an Injury. And by theſe laſt Words in the Definition, *viz. which might otherwiſe be avoided by human Care*, we diſtinguiſh a *Fault* from a *fortuitous* Caſe. For a Fault is blameable through want of taking proper care, and it obliges the Perſon that does the Injury; becauſe by an Application of due Diligence it might have been foreſeen and prevented. But fortuitous Caſes often cannot be foreſeen, or (at leaſt) prevented by the Providence of Man, as Death, Fires, great Floods, Shipwrecks, Tumults, Piracies, *&c*[g]. Thoſe Things are ſuperior to the Prudence of any Man, and rather happen by Fate, therefore are not blameable: But if Fraud, or ſome previous Fault, be the occaſion of theſe Nocuments, they are not then deemed to be fortuitous Caſes[h]. A Fault is a Deviation from that which is good; and, according to *Bartolus*, erring from the Ordinance and Diſpoſition of a Law. It is ſometimes difficult to judge what is the difference betwixt a Fault and a *Dolus*, ſince theſe Words very often ſtand for one and the ſame thing. There is no one in this Life lives without a Fault; but he that would ſpeak diſtinctly and properly, muſt impute a *Dolus* to ſome Wickedneſs or Knavery, and a Fault to Imprudence. The firſt conſiſts chiefly in acting, and the other in not acting or doing ſomething which a Man ought to do.

[f] D. 26. 10. 3. fin.

[g] D. 50. 17. 23; C. 4. 24. 6.

[h] D. 48. 19. 28. 12. D. 9. 2. 27. 9. D. 6. 1. 36. 1.

According to *Bartolus*[i], a Fault is divided into five *Species*, viz. *culpa latiſſima*, *latior*, *lata*, *levis*, and *leviſſima*. The firſt he makes to be equal to *manifeſt* Deceit; and the ſecond to be equivalent unto *preſumptive* Malice or Deceit. The firſt and ſecond of theſe diſtinctions (he ſays) approaches unto Fraud, and is ſometimes called by the Name of *Fraud*. But a *lata culpa*, which is occaſioned by groſs Sloth, Raſhneſs, Improvidence, and want of Advice, is never compar'd unto Deceit or Malice. For he that underſtands not that, which all other Men know and underſtand, may be ſtiled (ſays *Bartolus*) a ſupine and unthinking Man, but not a *malicious* and *deceitful* Perſon. But, I think, none of thoſe Diſtinctions of his have any Foundation in Law: For ſuch Things as admit of any degree of compariſon, in reſpect of being *more* or *leſs* ſo, do not admit of any *ſpecifick* difference; as *magis & minus diverſas ſpecies non conſtituunt*[k]. For that which the Law ſays *de latiore culpâ* ſometimes, is to be underſtood *de latâ culpa*, after the manner that a Word of the Comparative Degree is ſometimes put for a Word of the Poſitive[l], as in *Virgil*;

[i] In l. 32. D. 16. 3.

[k] D. 33. 7. 29.

[l] C. 4. 1. 8. Gloſſ. v. *conſultius*.

Triſtior & lacrymis oculos ſuffuſa nitentes.

Wherefore, I ſhall here diſtinguiſh a *Fault* into two *Species* only, *viz.* into *lata* and *levis*, though others mention a *Culpa leviſſima* too. The firſt denotes a Negligence extremely blameable; that is to ſay, ſuch a Negligence as is not temper'd with any kind of Diligence. The other imports ſuch a kind of Negligence, whereby a Perſon does not employ that care in Mens Affairs, which other Men are wont to do, though he be not more diligent in his own Buſineſs. But as often as the word *Culpa* is ſimply uſed in the Law, it is taken for that which we ſtile *culpa levis*[m], a light Fault, becauſe Words are ever underſtood in the more favourable Senſe. A *culpa leviſſima*, or ſimple Negligence, is that which proceeds from an unaffected Ignorance and Unskilfulneſs (ſay they) and it is like unto ſuch a

[m] D. 50. 17. 24.

Fault which we eaſily excuſe, either on the account of Age, Sex, Ruſticity, *&c.* Or, to ſet the Matter in a clearer Light, a *lata culpa* is a Diligence in a Man's own Affairs, and a Negligence in the Concerns of other Men. And a *levis culpa*, is, when a Man employs the ſame Care or Diligence in other Mens Affairs, as he does in his own; but yet does not uſe all Care and Fidelity, which more diligent and circumſpect Men are wont to make uſe of: and this may be called an *accuſtom'd* Negligence, as well in a Man's own Affairs, as in the Buſineſs of other Men [n]. A *lata culpa*, I mean a great Fault, is equivalent, or next unto Deceit or Malice [o]. And it may be ſaid to be *next* unto Deceit or Malice two ways, *viz.* either becauſe it contains in it a *preſumptive* Deceit [p], as when a Man does not uſe the ſame Diligence in another's Concerns, as in his own: or elſe becauſe the Fault is ſo groſs and inexcuſable, that though Fraud be not preſumed, yet it differs but little from it [q]. As when a Perſon becomes negligent in favour of a Friend: For though Favour, and too great a Facility of Temper, excuſes a Man from a malicious or knaviſh Purpoſe, yet it is next of kin thereunto. And it is a Rule laid down in Law, that when the Law commands any Act of Deceit to be made good, it is alſo always underſtood of a *lata culpa*, or a groſs Fault. Wherefore ſince a great Fault is equivalent, or next unto Deceit, it follows, that in every Diſpoſition of Law, where it is ſaid, that an evil Intent or *Dolus* ought only to be repair'd, it is to be underſtood alſo of a *lata culpa:* which is true, I think, unleſs it be in the *Cornelian* Law *de Sicariis* [r]. For he, who commits the Crime of Murder *ex latâ culpâ*, ſhall not be puniſhed according to the Severity of that Law, but in a more gentle manner: And thus herein a *lata culpa* is diſtinguiſhed from Malice, or an evil Deſign, called *Dolus malus*; for a Murderer is liable on the ſcore of his wicked Purpoſe, and not on the account of groſs Negligence. Some ſay, that, generally ſpeaking, whenever the Law or an Action is touching a pecuniary Penalty, and the Law expreſſly mentions a *dolus*, a *lata culpa* is inſufficient, and is excluded.

A Fault may be committed at three ſeveral Seaſons. For ſometimes it is antecedent to a Fact [s]; as when a Man makes Pit-falls for the ſake of taking Stags, or other Beaſts, and any thing falls thereinto, and is hurt. *Secondly*, it may ſometimes be committed after the Fact, or follow the Fact, as in the Law here quoted [t]: as when a Perſon does not proſecute that which he ought to purſue, which is the caſe of a Phyſician or Surgeon, who undertakes a Cure, and does not go through with it. And *Thirdly*, it may be committed at the very time of doing an Act; as when a Phyſician adminiſters Phyſick unskilfully. A Fault does not only conſiſt in Negligence, or not doing a thing, but even ſometimes in doing a thing; though generally it is otherwiſe: as when a Man does an Act, which the Law does not permit him to do. A *lata culpa* is divided into two kinds, *viz. culpa verſutiæ* and *culpa ignaviæ*. The firſt is committed, when Men do by a ſubtle and knaviſh Diſpoſition of Mind, or by a certain kind of affected Improvidence, either neglect [u] or diſſemble [w] the Affairs of other Men, when they are at the ſame time diligent and provident enough in their own Concerns: And here a *lata culpa* is of ſo near kin unto Deceit, that the Law often calls it by that Name [x]. But a *lata culpa* is not compared unto Deceit or Malice, where the Law does not expreſſly make it ſo. Indeed, a *lata culpa* is ſometimes compar'd unto Malice; but then this only holds true, when it is not puniſh'd with a corporal Puniſhment, or with Death [y]. I call that *culpa ignaviæ*, which points out to us a ſupine and inexcuſable Negligence, ſuch as is contracted by a Vice of Nature, whereby we are leſs ſagacious, or elſe by ill Education. For it argues too much Sloth to be ignorant of that, which all Men know and are acquainted withal. This laſt kind of Negligence is ſometimes ſtiled too great a Security or Confidence [z].

[n] D. 36. 1. 22. 3.
[o] D. 16. 3. 32.
[p] D. 16. 3. 32.
[q] D. 17. 1. 8. fin.
[r] D. 43. 8. 7.
[s] D. 9. 2. 28.
[t] D. 9. 2. 8.
[u] D. 17. 1. 29. 3.
[w] D. 19. 1. 1. 1.
[x] D. 16. 3. 32. D. 50. 16. 226.
[y] D. 48. 3. 12. D. 47. 9. 11.
[z] D. 22. 6. 6.

A

A *lata culpa* is such a Fault in a Person as might have been prevented with Care and Prudence; and in other Terms, *Ulpian* stiles it *culpa incauta* [y], or a Fault without the Intervention of Caution. Though a *lata culpa* cannot truly and properly be stiled *Deceit*, because Deceit infers a manifest Cheat and Imposture, and a *lata culpa* only involves Fraud under a colour of Negligence; yet there is a dissolute kind of Negligence, which being a Veil for a subdolous Mind, is liken'd unto Deceit, and as it resembles Fraud is punish'd as such. The Emperor introduced this Distinction of *lata culpa* in Favour of such Persons, whose peculiar Care and Business it was not to make themselves acquainted with the Laws. The knowledge of the Laws has at all Times been committed but to a few: And, therefore, *Justinian* does not subject such to a *lata culpa*, who are ignorant of the Law; it being not their Business to have a critical Knowledge thereof. For though a Fault of Imprudence may be imputed to such as are concerned in Trade and Publick Business, and yet knowingly suffer Money left in Trust to be laid out on the Publick: yet they cannot be said to be guilty of a *lata culpa*; because they know not the Law relating to Trusts. So neither can Princes be said to be guilty of a *lata culpa*, because they act by their Council and Ministers of State, who are answerable for the Errors of Princes. But such Persons, as either by Office or Profession are bound to know the Laws, are accountable for a *lata culpa*, and their Negligence or Unskilfulness is equivalent unto Deceit in many Cases; as where a Lawyer gives wrong Advice unto his Client, or a Physician prescribes contrary to the known and establish'd Rules of Physick, and the like. Nor is it any Objection to say, that such as are ignorant of the Laws are compared unto Fools, because Fools often make a Trip, and fall through their own Unskilfulness; but these Persons are obliged to know the Business of their own Profession.

[y] Tit. 12. leg. Mosaic.

A *Fault* is not presumed, but ought to be proved by him, who alledges the same [z]: And this is true, whether the Fault be an Act of Commission or Omission. For in a doubtful Case that Interpretation ought always to prevail, which excludes and bars the Presumption of a Fault: And, therefore, to toll a Fault a Person is presumed to have done that in another's Concern, according to *Angelus* [a], which he is wont to do in his own. So that an Administrator is presumed to have done that in another Man's Business, which he is wont to do in his own. But yet Fire is presumed to happen thro' the Fault of the Tenants or Inhabitants of a House, unless the Tenant himself proves, that it happen'd without his Fault, or the Fault of his Family, for whom he is liable. But though a Fire be presumed to have its rise from the Fault of the Inhabitants; yet such a Fault is only presumed to be a Fault of the lightest nature: And, therefore, since a Tenant is not answerable for such Fault, but only *de dolo*, and *de latâ & levi culpâ*, he may excuse himself from the Damage, which happens by Fire to the House, which he rents; and he shall not be answerable for any Damage. For a Fault of a Tenant in respect of Fire in order to make him liable, ought to be a Fault of Commission: And, otherwise, a Tenant liable on the account of Fire is not so even by the *Aquilian*, tho' that Law comprehends even the lightest Fault. But, I think, this is otherwise by the Law of *England*, whereby a Person is answerable for his Laches or Negligence.

[z] D. 48. 3. 14.

[a] In l. 9. D. 15. 1. 1.

It has been said, that whenever the word *Culpa* is simply put in any Law without the Addition of *lata*, &c. it is taken for a Fault of a light nature [b]: For there is this *Medium*, according to some, between a *culpa levissima* and a *culpa lata*; and this, unless the subject Matter be repugnant thereunto. As 'tis the same in Witnesses, who, if they depose that a Fault hasintervened in a Contract, make no Proof by reason of the uncertainty of

[b] D. 50. 17. 24.

of their Depoſitions: For they ought to depoſe and ſpeak in a more expreſs Manner, *viz.* whether they mean a *culpa lata* or *leviſſima* [c]. A *lata culpa* may be diſcover'd two ways. *Firſt*, When a Perſon does not do a Thing after the ſame Manner, as all other Men do it, and fails in his Buſineſs and Undertaking. And, *Secondly*, When he is not as diligent and careful in the Affairs of other Men, which he undertakes, as he is in his own Concerns [d]. But this I have already hinted.

[c] Corn. conſ. 108.

[d] D. 16. 3. 32.

TIT. XIV.

Of Negligence *in particular*; *how oppoſed unto Diligence, and of the ſeveral Degrees of Diligence*; *and the Conſequences of Negligence*, &c.

THO' *Negligence* be a Fault, and might be well enough entirely comprehended under the foregoing Title; yet I ſhall treat of it more particularly in this Place, and ſhew the Conſequences of it: Becauſe a *Fault* may conſiſt in doing, as well as in not doing a Thing; but Negligence conſiſts barely in not doing a Thing, which we ought to do. And here it is firſt to be noted; that tho' *Negligence*, in the vulgar Acceptation of the Word, frequently ſignifies the ſame Thing as Sloth and Idleneſs; yet it is ſometimes taken in a harſher Senſe, and denotes Contempt and Diſobedience: As it is ſaid in the *Digeſts* [e], *If a Judge ſhall neglect the Imperial Conſtitutions*, that is to ſay, if he ſhall pronounce a Sentence in oppoſition to them, or the Publick Laws, *he ſhall be puniſhed.* He alſo ſeems to be negligent, who, being often cited and convened to appear, does not exhibit his Preſence in Court [f]: And this kind of Neglect alſo favours of Contempt and Obſtinacy; and is without doubt a great Fault. *Manifeſt* Negligence is often called *lata culpa* in the *Code* [g]; and ſo likewiſe is that, which we often call *Negligentia nimia*, or an exceſſive Negligence [h]. The Epithets uſually given unto Negligence are ſuch as theſe, *viz. groſs*, *diſſolute*, *great*, *exceſſive*, and an *extended* Negligence. *Negligence* and *Contempt* are in ſome reſpects equal, and puniſh'd alike: For tho' they are different Things in their own Nature; yet the Law ſometimes makes uſe of thoſe Terms promiſcuouſly. Negligence, indeed, differs but little from Contempt itſelf, eſpecially when it has its riſe from a Man's own proper Fault: For then, according to the Gloſs [i], it is compar'd unto Privity and Contempt; yea, in ſuch a Caſe, Negligence is equivalent unto Deceit and Malice, tho' regularly ſpeaking a negligent Perſon is puniſh'd in a leſſer degree than a fraudulent one [k].

[e] D. 48. 10. 13.

[f] D. 42. 1. 47. 1.

[g] C. 5. 51. 2.

[h] D. 48. 3. 12.

[i] In. c. 3. x. 1. 11. Arg. x. 4. 18. 6.

[k] D. 48. 5. 17. D. 25. 4. 1. 14.

Diligence is that, which is oppoſed unto a Fault or Negligence; and ſo we find it in the *Digeſt* [l]. Now there is a threefold kind of Diligence, as there is of Negligence, according to ſome Men's Diviſion of it, *viz.* Diligence in the higheſt, middle and loweſt Degree: And as there are ſo many Degrees of Diligence; ſo there are ſo many Degrees of a Fault, ſay they. A *lata culpa* is oppoſed unto the loweſt Degree of Diligence; a *levis culpa* anſwers the middle Degree of Diligence; as a *culpa leviſſima* does the higheſt Degree thereof. He who is not diligent in his own Affairs may well enough be called a negligent Perſon; becauſe it is not probable, that a diligent Perſon will be guilty of any Error or Miſtake in his own

[l] D. 18. 1. 68.

Matters. Every Perſon ought to be careful and diligent in the Office wherein he is employ'd, and in no wiſe negligent therein: For Negligence, if it be *groſs*, as all Negligence is in ſuch a Perſon, will render him liable to Puniſhment as the conſequence of his Negligence. And for this reaſon, every Perſon that is diligent in his Office ought to fare better than he who is negligent therein, according to this Maxim, *viz. every diligent Perſon is under a better Condition than a negligent one.* Or as *Solomon* phraſes it [m], *he becometh poor that dealeth with a ſlack Hand, but the Hand of the diligent maketh rich.*

[m] Prov. c. 10. v. 4.

If a Perſon be bound in an Obligation to do ſome certain Act, which has a Limitation annexed to it in point of Time and Place, his Negligence is *eo ipſo* proved, if he does not do it in purſuance of ſuch Time and Place, unleſs he ſhews ſome Impediment that prevented him [n]. But ſometimes Neglect only in general is to be proved, as when ſome Town or Diſtrict is obliged to apprehend a Malefactor committing a Robbery in ſuch a Place; and then it is ſufficient to prove, that the Fact was committed ſo near the Town, that the Town muſt have knowledge of the Fact committed, either by publick Fame, or otherwiſe; and that they might have taken the Robber, if they had purſued him, and ſent out an Hue and Cry, and done other things neceſſary hereunto, according to the Accidents of the Fact. The Negligence of a Judge or Magiſtrate ſhall be puniſh'd by a general Action on the Caſe, if he be obliged to do an Act at the Petition of the Party, and he does not do it, and Damage ſhall be given a Man againſt ſuch a Judge or Magiſtrate, not to be taxed or rated by the ſuperior Judge in virtue of his Office; but entire Damage ought to be given to the Party, according to Evidence, and the true Value thereof, not by way of Penalty for the Judge's Negligence, but for the Damage which the Party ſuſtains: But if the Party ſuffers no Damage by the Judge's Negligence, or the Judge be not properly apply'd to, as on the Bench, and the like, he ſhall not be puniſhed or fined. No one is preſumed to be negligent, eſpecially when the Buſineſs he is upon is *de commodo & lucro* [o]: But it is preſumed, that a Perſon who has been once negligent, is ſo at preſent, and will be always negligent, unleſs he proves his Diligence.

[n] D. 49. 16. 3. 7.

[o] Arg. l. 5. 51. 10. & D. 22. 3. 25.

There are many Caſes in Law, wherein a Man's own Negligence ſhall affect or hurt him: As where a Perſon that is a Creditor, is alſo a *Negotiorum Geſtor* unto his Debtor; that is to ſay, has the Management of his Debtor's Concerns, and receives his Money for him. In this Caſe, if the Creditor does not ſatisfy himſelf out of the Moneys which he received on his Account, when he might do it, he ſhall, for his Negligence, loſe his Action againſt his Debtor [p]. Again, if a Landlord has not demanded his Rents or Penſions for ten Years together, and afterwards, on his Tenant's Death, immediately demands them for ſo many Years paſt, he is preſum'd to have been paid or ſatisfy'd for all but the preſent Year, becauſe the Tenant is dead, who could give Information, or prove (perhaps) the Payment of the Rents. *Thirdly*, if a Perſon, who has a Deed or Writing, which makes for the Proof and Merits of his Cauſe, ſhall neglect to produce ſuch Deed or Writing, he is preſumed to do this, becauſe it makes againſt him, (for a Perſon who conceals, or does not ſhow that on which he founds his Intention, has a Preſumption againſt him:) And ſo, on the other hand, a Perſon who produces a Deed or Writing, is deemed to approve thereof.

[p] D. 3. 5. 13.

Negligence, as it is a Negation or Privation of *Diligence*, is not proved by Witneſſes, depoſing, That ſuch Perſons were guilty of Negligence, unleſs they aſſign a concluſive Reaſon of their Knowledge, as in a negative Proof or Matter: Becauſe theſe Things are not perceived by any bodily Senſe; and for this reaſon, ſuch Witneſſes otherwiſe depoſing, rather ſeem

[q] Bart. Conſ. 102. lib. 1.

to be Judges than Witneſſes[q]. And they ought to aſſign ſuch a reaſon of their Knowledge, even though they be not interrogated. Again, Negligence is not proved *eo ipſo* alone, becauſe ſomething was not done which ought to have been done: but it ought to be proved, that ſuch Perſon could have done it, and yet did not do it.

TIT. XV.

Of Ignorance *in general, how divided; and of Ignorance in reſpect of* Law *and* Fact *as oppoſed unto Knowledge; and how Knowledge and Ignorance may be proved.*

IN treating of *Ignorance*, I ſhall firſt lay down a Diviſion thereof as it is diſtinguiſh'd by Divines and Caſuiſts, into what they call *Ignorantia bona, mala & indifferens.* The firſt kind of Ignorance concerns thoſe things, which adminiſter to us an occaſion of ſinning: And, therefore, it is better not to know theſe things than to know them. The ſecond kind of Ignorance, is, when we are ignorant of thoſe things which have a relation unto God, and to Man's Salvation; and ſuch an ignorant Perſon God will ignore as inexcuſable: This kind of Ignorance being of a dangerous Conſequence, becauſe it is the Mother of all our Errors; and, therefore, the Clergy (eſpecially) ought not to incur the ſame; ſince the Knowledge of thoſe things, which are contain'd in the Canon of Scripture, is incumbent on thoſe Men who have taken on themſelves the Office of teaching the People. The third kind of Ignorance conſiſts in thoſe things, wherein the Kingdom of God, and Man's Salvation, is in no wiſe concerned: And, therefore, in this reſpect it matters not, whether they are known or not. If it be an Ignorance which concerns the Law of Nature, ſuch an Ignorance is a Sin in Perſons adult, and of riper Judgment: But if it only concerns ſome poſitive Law of Man, then it is a Crime to be ignorant of thoſe things, which every one is bound to know in virtue of his Duty and Office. But in things not neceſſary, and which no one is bound to know in virtue of ſome Office; yet if a Man through Contempt and Malice refuſes to know them, it is alſo a Crime: But 'tis otherwiſe, if this kind of Ignorance proceeds not from Malice and Contempt of Knowledge, for then it is not a Crime, but rather a Defect or Puniſhment. And as the Divines and Caſuiſts have thus divided Ignorance in a three-fold manner: So likewiſe have the Lawyers diſtinguiſh'd it into a three-fold kind, *viz.* The firſt they ſtile Ignorance *of Law*. The ſecond they call Ignorance *of Fact*. And the third they term Ignorance *of Puniſhment*.

Ignorance *of Law* happens, when a Man does not make himſelf acquainted with ſome Precept or Prohibition of Law: As it happens, when a Man imports certain Merchandizes, not knowing they are prohibited by the Laws of the Land. Ignorance *of Fact* happens, when a Man knows the Law, but is ignorant of the Fact prohibited by that Law: As it happens, when any one knows that there is an Eccleſiaſtical Cenſure pronounced againſt Strikers of Clergymen, but does not know this Man to be a Clergyman. Ignorance *of Puniſhment* happens, when a Man does not know there is a Puniſhment pronounced againſt ſuch kind of Delinquents: As it happens, when a Man ſtrikes a Clergyman, knowing that he is thus prohibited to

ſtrike

ſtrike a Clergyman by the Laws of the Church, and knowing alſo the Perſon whom he ſtrikes to be ſuch, but yet does not know that he is forbidden thus to ſtrike under the Pain of an Eccleſiaſtical Cenſure. It is Ignorance *of Law* not to know, what is Theft or Homicide, *&c.* according to the Law of Nature; and ſuch an Ignorance is a great Sin in an adult Perſon.

Now what we call Ignorance *of Law* is ſubdivided into *invincible* and *involuntary*, and likewiſe into *vincible* and *voluntary* Ignorance. In the firſt Caſe, when it is invincible and involuntary, as in a Madman committing Theft, Murder, or any other Crime of the like nature, through Ignorance of the Laws, he is wholly excuſed by ſuch Ignorance from the Guilt of Sin, if this Defect of Knowledge happen'd to him without his own Fault, becauſe he was ſo (perhaps) from his Nativity; and, therefore, he never could have any Knowledge of the moral Law. And the ſame may be ſaid of him, who, doubting in ſome Caſe, conſults ſome Perſons whom he judges skilful therein, and is (notwithſtanding) informed otherwiſe than agrees with Truth: For in ſuch a caſe, he is excuſed from Guilt, if he has uſed all poſſible Endeavours rightly to inform himſelf. When a Man is ignorant of that which is done in publick, and in the preſence of the People, he is ſaid to be guilty of *groſs* and *ſupine* Ignorance, and ſuch Ignorance ſhall not excuſe him. Though *Error* and *Ignorance* are often uſed promiſcuouſly in Law, and do in ſpecial denote the ſame Thing or Imperfection; yet they differ, properly ſpeaking. For *Error* never admits of Truth, but always follows that which is falſe: But *Ignorance* may be predicated of that which is true, as well as of that which is falſe. *Error* cannot be without *Ignorance:* But he that is ignorant is not always guilty of an Error, but only he who thinks he knows what he knows nothing of. There is an Error *of Law*, and an Error *of Fact*, as I ſhall obſerve hereafter. He errs in Law, who falſely thinks that he may do that by the Laws, which he ought not to do.

Ignorance *of Fact* is alſo, when a Perſon does not know a Man to be dead, though the Judge or *Prætor* has granted the *Bonorum-Poſſeſſio* of his Eſtate, and ſuch a Perſon ſhall not be prejudiced in point of Time, this not being an Ignorance of Law. But if he knows his Kinſman to be dead, and does not know that the *Bonorum-Poſſeſſio* ought to be granted to him, as being the neareſt of kin; or if he knows himſelf to be the written Heir, but does not know that the Judge grants the *Bonorum-Poſſeſſio* to written Heirs, the Time ſhall run againſt him; this is an Ignorance *of Law*, and he is deceived in that which is inexcuſable. And 'tis the ſame thing, if the Brother of the Deceaſed, by the whole Blood or the Father's ſide, believes the Mother has a better Right than himſelf to the Eſtate [r]; this being likewiſe an Ignorance of Law. But if a Perſon does not know himſelf to be of kin, he may ſometimes be miſtaken in point of Law, and ſometimes in point of Fact [f]. For if a Perſon knows himſelf to be a Freeman, and who are his Parents, and yet does not know himſelf to have the Rights of a Kinſman, ſuch a Perſon may be ſaid to be miſtaken in point of Law. But if a Perſon (perhaps) being expoſed in his Infancy, and left to the wide World, by this means does not know who are his Parents; or has (perhaps) been a Bondman unto ſome one, and therefore believes himſelf to be ſuch, whereas in Truth he is not, ſuch a one may rather be ſaid to err *in Fact* than *in Law* [t]. Again, if a Perſon knows that the *Bonorum-Poſſeſſio* has been granted to another, and yet does not know that the Time of the *Bonorum-Poſſeſſio* is elapſed and paſſed by in reſpect of him, and is ignorant that the *Bonorum-Poſſeſſio* belongs to him *ex capite ſucceſſorio*, the Time ſhall run againſt him, becauſe this is an Error in point of Law [t]. And it is the ſame thing, if a Perſon that is appointed Heir

[r] D.22.6.1.1.

[f] D.22.6.1.2

[t] D.22.6.1.2.

[t] D.22.6.1.3.

Heir to the whole Subſtance, does not think he can ſue for the *Bonorum-Poſſeſſio* before the opening of the Will or Teſtamentary Tables, (for he may ſue for it before the Will is open'd:) But if he does not know, that
[u] D. 22.6.1.4. there is ſuch a Will, it is only an Error in point of Fact [u]. Theſe are ſome Inſtances, which may ſerve to explain an Error *of Fact*, and an Error in point of *Law*.

An Error or Ignorance in point *of Law*, ought not in every reſpect to be reckon'd in the ſame Predicament with an Error in point *of Fact*, ſince the Law ought to be finite and certain; but Facts are infinite and uncertain. The Law is known to a Man of Prudence and common Underſtanding: But the Interpretation of it often deceives and puzzles a moſt know-
[v] D.22. 6. 2. ing Man [v]. And hence it is, that Ignorance *of Law* ſometimes excuſes a Perſon, eſpecially if it be attended with great Ruſticity and Dulneſs of
[w] D. 2.1.7.4. Mind [w], as in Peaſants, *&c.* or when a Novice or raw Soldier errs in point of military Diſcipline, and the like. But in the Buſineſs, it is of great Import and Conſequence to conſider, whether a Man be ignorant of the Fact
[x] D.22. 6. 3. pr. and Cauſe of another, or whether he be ignorant of his own Right [x]: For in this laſt caſe, regularly ſpeaking, Ignorance is not to be endur'd, as be-
[y] D. 22.6.6. ing a *groſs* and *ſupine* kind of Ignorance [y]. And this laſt kind of Ignorance the Law ſtiles a *diſſolute* kind of Ignorance, or the Negligence of a loſt and diſſolute Perſon, who is ignorant of that which all others beſides himſelf knows, and which may be eaſily known: For this kind of Ignorance is founded upon groſs Negligence, and too great a Security, which
[z] Conſ. 189. diſſolute Men are often endued with. *Caſtrenſis* tells us [z], there is a Preſumption of Law lies againſt him, who alledges himſelf to be ignorant of
[a] C. 1. 14. 7. the Law, becauſe all Perſons ought to know the Laws [a]: But Perſons under
[b] C. 1.18.2. twenty-five Years of Age are not included under this general Rule [b], nor are
[c] C. 1. 18. 1. Soldiers [c], and ſometimes Women and Ruſticks are excuſed by reaſon of their Ignorance of the Law, when they cannot conſult and adviſe with Per-
[d] D.22.6.9.2. ſons more skilful in the Laws than themſelves [d]. And it is to be noted, that when a Preſumption of Law lies againſt a Perſon in this Caſe, ſuch Perſon pleading his Ignorance of the Law is not to be admitted to his Oath
[e] Jaſ. in §. 3. I. 4. 6. to prove his Ignorance [e].

Ignorance in reſpect to the Act of another Man is not preſum'd, if a Perſon be obliged, by virtue of an Office enjoined him, to make Enquiry thereof. For as 'tis no excuſe to a Shepherd if the Wolf devours the Sheep, and he knows nothing thereof, to alledge himſelf ignorant of the matter; ſo it is the ſame thing in a Prelate, ſaying, he is ignorant of the Life and Converſation of his Pariſhioners: for herein he is not preſumed to be ignorant of their Offences, becauſe every one is preſumed to know the Fact of another, when the Fact is ſuch as he is bound to know by virtue of his Office, or (at leaſt) to enquire into. But it is otherwiſe, if he be not obliged to enquire thereinto; for then, in ſuch a caſe, Ignorance is preſum'd as to the Act and Deed of another Man. Hence I infer, that a Biſhop who confers a Benefice or Dignity on an unfit Perſon, is preſumed to have known his Diſability, unleſs he proves his Ignorance thereof; becauſe it was his Duty firſt of all to have enquir'd into the Life, Morals, and Converſation of the Perſon thus promoted. Ignorance may be proved by a Man's own Oath, unleſs ſuch a Perſon alledging Ignorance be adjudged and taken for a Perſon, that has forfeited his Credit according to the Rules of Law; or unleſs ſome evil Fame has blaſted the ſame: For then his Oath ſhall not be credited, there being a ſtrong and urgent Preſumption againſt him. Ignorance in this reſpect may alſo be proved by proving, that the Perſon elected was commonly deemed and taken for a qualified Perſon, and as a lawful Man he diſcharged ſeveral publick Offices and Honours.

Ignorance may be proved by Conjectures, though this be not full Proof. If a Man proves his Abſence, or any other juſt Cauſe upon which Ignorance is wont to be grounded, it is a ſufficient Proof of a Man's Ignorance of a thing. Again, Ignorance is *eo ipſo* proved, if you do not prove that a Man had Knowledge of ſuch a thing: But this only holds true, when a Preſumption lies in favour of a Perſon pleading Ignorance, and when he is not obliged to know a thing. Another way of proving Ignorance is by the Oath of the Perſon that alledges it, if he be a Man of Credit and Integrity; becauſe ſuch things as depend on the Mind alone, (as Ignorance does) are proved by the Oath of the Party: But Ignorance is not thus proved, when the Diſpute relates to the Prejudice of a third Perſon.

TIT. XVI.

Of Conſent, *voluntary and involuntary; and what Obligation waits and attends upon the ſame; and of Sufferance,* &c.

AS *Conſent* is a neceſſary Ingredient in all Contracts, and in ſeveral other Acts of Men, in order to bind them either to the Performance of them, or elſe to undergo ſome Penalty for the neglect of them, and the like; I ſhall here treat of it for the better Explanation of ſeveral Subjects in the enſuing Work. Now *Conſent*, according to *Connanus*[f], is, when the Minds or Wills of two Perſons, or more, do concur in one and the ſame thing, each Perſon upon a thorough Knowledge of the Matter, approving thereof: And *Aſſent* differs from *Conſent*, becauſe *Aſſent*, properly ſpeaking, is the Concurrence of one Perſon alone unto any Act; yea, it is not properly ſtiled *Conſent*, unleſs it be expreſſed in Terms or Words[g]. Thus a *Tutor* or *Curator*, by his Knowledge and Preſence alone, is not deemed to legitimate the Contract of a Minor, becauſe his Conſent ought to be expreſſed in Terms[h]. And in all thoſe things which are regularly prohibited by Law, but are permitted by the Conſent of any one, as in every Matter that is diſpenſable, and which is contrary to the common Law, a *ſpecifick* and *expreſs* Conſent is requir'd, and a *tacit* Conſent is not ſufficient: And the reaſon is, becauſe in things that are prohibited and injurious, Conſent is not preſumed. As in the caſe of a Clerk's Non-Reſidence on his Benefice, which the Law prohibits and condemns, though too often practis'd; the *tacit* Conſent of the Biſhop, who may diſpenſe with his Non-Reſidence, is not ſufficient to free him from the Penalty of the Law; becauſe the Biſhop is not preſumed to conſent to ſo odious a thing. But yet, becauſe a Diſpenſation is herein allowed, if founded upon good and weighty Reaſons, the Biſhop may indulge his Abſence from his Living by an *expreſs* Conſent. And ſo in other Caſes of the like nature. And hence we have the Diſtinction of an *expreſs* and *tacit* Conſent, notwithſtanding the aforeſaid Definition.

[f] Lib. 6. cap. 1. n. 4.

[g] D. 24. 3. 2. 2.

[h] Oldrad. Conſ. 327. n. 5. vi. 2. 1. 3.

There is a two-fold kind of *Conſent:* The firſt is that which is *properly* ſuch, and is ſtiled a *voluntary* Conſent: As when a Perſon does a thing out of meer choice, and without the leaſt Biaſs or Compulſion of Fear. And the other is *improperly* termed *Conſent*, as being a kind of an involuntary Act, or a *coacta voluntas*, as often ſaid; and this we ſtile an *involuntary* Conſent, which ſeldom avails any thing: As when a Perſon

complies with an Act through fear, or to avoid a worſe conſequence; and if this Fear be an unlawful Fear, it renders the Act or Obligation ineffectual.

[i] D.46.8. As the Will is declar'd by Facts; ſo alſo is Conſent inferr'd from thence [i], but then the Facts ought rather to be poſitive than negative: And it is likewiſe collected from the Silence of a Perſon preſent, if his own advan-

[k] D.17.1.18. tage be concerned therein [k]. And tho' this may be more properly termed *Aſſent* than *Conſent*; yet I ſhall here uſe the one Term for the other, without diſtinction. Conſent alſo may be induced by a Meſſenger, a Letter, a

[l] D.1.7.29. D.44.7.2. Nod of the Head, and the like Signs [l]. In all Matters of Favour, a *tacit* Conſent reſulting from Knowledge, is ſufficient; becauſe in ſuch Matters

[m] Calder. Conſ. 50. Preſence and Knowledge is looked upon as Conſent [m]. Thus if a Perſon be in his Preſence named unto any profitable or honourable Office, and does not oppoſe the ſame, he is deemed *tacitly* to conſent to ſuch a Nomination. And 'tis the ſame thing in reſpect of the Father's Conſent touching the Marriage of his Son, if the Father be preſent, and does not contradict the Contract. So we have many Acts and Contracts in Law, that are perfected by *tacit* Conſent, which are too numerous here to remember. As Conſent is given ſeveral ways, where the Parties are abſent, as by a Seal, a Letter, (eſpecially) when it exhorts a Perſon to any thing, a Meſſenger, and the like, as juſt now mentioned: ſo where the Parties are preſent, it may be given by a Kiſs, a Nod of the Head, and ſhaking of Hands, *&c.*

[n] Concl.417. See *Maſcard. de Probationibus* [n].

In Stipulations and Contracts, the Conſent of Parties ought to be *ſimultaneous*; that is to ſay, the Parties ought to agree to the ſame thing: Becauſe if one Perſon conſents touching one thing, and the other gives his Conſent touching another, the Contract or Stipulation is vitiated. Therefore, in this caſe, great regard ought to be had to the Words of the Parties

[o] Bart. Conſ. 59. in their Conference or Diſcourſe [o]. Where the Conſent of ſeveral Perſons is requir'd to ſubſtantiate an Act, the Conſent of all of them ought to be had, otherwiſe nothing is done; as in the caſe of two Delegates, or Proc-

[p] VI.1.19.6. tors *in ſolidum*, unleſs they act jointly [p]. This holds good in reſpect of Individuals: But 'tis otherwiſe in regard to Corporations and Bodies Politick, where the major part prevails. Conſent given to an Act does not prejudice the Perſon, if the Act touching which ſuch Conſent is given, be not valid, unleſs it be in criminal Caſes. Whenever the Conſent of a Perſon is requir'd to the Validity of any Act, it is ſufficient that ſuch Conſent intervenes

[q] Arg.D.8.3. 11. Dec. Conſ. 367. before or after the Act [q], unleſs the Law expreſſly requires it to be before the Act: But whenever the Form and Solemnity depends on the Authority of the Perſon, and on the Qualification of the Perſon to do an Act, his Conſent and Authority ought to intervene *in ipſo actu*, in the very Act it ſelf. And thus the Conſent of a Guardian ought to intervene at the time

[r] D.3.2.13. of the Contract, and not *ex intervallo* [r]. A *conditional* Conſent, or a Conſent founded upon a Condition, has no Operation in Law at all, if ſuch Condition be not fulfilled and performed.

As Conſent is entirely founded upon Knowledge, ſo thoſe Perſons do not ſeem to conſent, who are miſtaken, and in an Error, as I ſhall obſerve again, in the next following Title: But then, ſuch Error or Miſtake ought to appear, and therefore an erroneous Conſent is in no wiſe prejudicial. Hence a Madman, Ideot, or Infant, who is not capable of thinking as he

[t] D.33.5.8. ought to do, does not ſeem to have given his Conſent to any thing [t]: But a Perſon that is deaf may give his Conſent; becauſe he may be made to underſtand what is done. And as *Conſent* is founded upon Knowledge, ſo in the like manner is *true* and *proper* Conſent eſtabliſhed upon a Freedom of the Will: And it is to be noted, That that Conſent is not ſaid to be

[s] X.4.5.5. free, which depends on the Will and Diſcretion of another Perſon [s]. A Perſon ſeems to give his Conſent to ſuch Matters as are done by a Judge, if he

he does not oppoſe the ſame. Thus thoſe Perſons are underſtood to conſent to a Judge, who, knowing themſelves not to be ſubject to his Juriſdiction, do notwithſtanding ſubmit themſelves to his Cognizance [t]: But if they think he has Juriſdiction, and have thereupon ſubjected themſelves thereunto, they are not underſtood to have conſented unto it, ſince a Perſon that is miſtaken cannot be ſaid to give a Conſent, as aforeſaid [u]. Again, a Perſon ſeems to have conſented to a Judgment, who, having an Injury done him, has not appealed from thence [x]. But of this hereafter, under the Title of *Sentences*.

[t] D. 5.1.2.
[u] D.2.1.15.
[x] C.5.62.6.

He alſo is ſaid to conſent, who ſuffers and permits a thing to be done for a long time, without any controul, (which we here call *Sufferance*:) And in this caſe, the Term of ten Years is deemed to be a long ſpace of time; for if it be proved, that ſuch a Term of Years have intervened ſince the Act was ſped, ſuch Act is valid upon a preſumptive Conſent. Thus a Lord is preſumed to have given his Conſent to an Alienation, if he ſhall ſuffer an *Emphyteuſis* to be in the poſſeſſion of a Perſon for ten Years together. But Conſent is not preſumed from Length of Time, if the matter in Debate or Queſtion be of any great Prejudice or Conſequence; unleſs ſuch a Conſent be proved to be eſtabliſhed upon an immemorial Length of Time. Conſent is proved by Silence, and Knowledge for Length of Time, which in other Terms we call *Sufferance*, in an honourable and concupiſcible Act, but not in an onerous and prejudicial Matter. For Conſent is not preſumed to have intervened from ſuch a Silence, when the Matter in Debate is touching the Diſprofit or Inconvenience of the Perſon ſaid to be conſenting. Nor is Silence or Sufferance looked upon as Conſent, when it tends to oblige another Perſon than who is thus ſilent: But, in favour of the State or a Pupil, a Perſon ſilent is looked upon as a Perſon conſenting to the Prejudice of another. Conſent, which is thus inferr'd from Silence or Sufferance, is called a *preſumed*, and not a *feigned* Conſent, or a Conſent by Fiction of Law. But where an *expreſs* Conſent is requir'd, ſuch Conſent is not preſumed from Preſence, Knowledge, and Silence: But ſuch a Conſent is ſufficient, where Words and other evident Tokens of Conſent are not neceſſary, unleſs as above excepted. A Perſon may not only conſent by his Silence, but alſo by becoming a Surety for another. Conſent in every doubtful Caſe is preſumed to have intervened; and in all Matters it is ſufficient to have conſented once.

Conſent, as to the Exerciſe and Power thereof, is four-fold. The firſt is a Conſent founded upon *Negligence*: And this the Lawyers ſtile a *Conſent of Negligence*, and is a blameable Conſent. The ſecond is a Conſent flowing from Advice given; and is a criminal Conſent, when it tends to the Commiſſion of Crimes. The third is termed a Conſent of *Co-operation*, and this is alſo condemned for the ſame reaſon, when it is joined with evil Practices. And the fourth kind is called a Conſent of *Authority*, or in point of *Defence*: As when a Guardian conſents unto the Act of his Pupil or Ward, *&c.* I have already, under the Title of *Negligence*, conſidered the firſt of theſe four *Species* of Conſent; and, therefore, I ſhall only ſpeak to the three others principally.

Now touching the ſecond *Species*, the word *Advice* or *Counſel* is taken in two different Senſes. *Firſt*, as it bears a relation unto another Perſon: And *Secondly*, as it relates to a Man himſelf; and in this Senſe of the Word it is often taken for the ſame thing as Deceit, and an evil Deſign [w]. Thus when any Perſon that is not yet come to the Years of Diſcretion, (or as we ſay, has not *plenum Intellectum*) is obliged to do any thing with the Advice and Counſel of another Man, we ſay ſuch other Perſon's Conſent is held neceſſary; and thus the words *Conſent* and *Advice* do import the ſame thing. And 'tis the ſame in reſpect of *Conſent* and *Counſel*, if

[w] Bart. in l. 53. D. 50.16.

if a Perſon intreats, perſuades, inſtructs, or exhorts another to do a thing by ſhewing him the Advantage that will follow from thence. But the evil Counſel and Advice of a Perſon, who ought to give ſound and wholeſome Advice, ought not to be follow'd: And, therefore, he who ſhall give ſuch Advice in criminal Matters, or Matters of Treſpaſs, ſhall be puniſh'd as a Perſon conſenting: For Conſent and Advice may be given by Intreaty, Perſuaſion, Inſtruction, Impulſion, *viz.* by ſhewing the Advantage that will flow from ſuch an Act. But, regularly ſpeaking, no Perſon becomes liable or obnoxious to Puniſhment *de nudo conſilio*; that is to ſay, when Advice and Counſel is not reduced to practice.

Hence it having been a Queſtion among the Lawyers, whether a Perſon conſenting either by *Negligence*, *Advice*, or otherwiſe, ſhall be puniſh'd as a Perſon acting and doing an unlawful thing? I anſwer, *Firſt*, that when a Perſon gives conſent by way of *Negligence*, as the Doctors phraſe it, he ſhall be puniſhed as a Perſon acting, if it be in his power to prevent it. As for example, if I know that *Titius* will commit ſuch an Offence as Murder, and the like; and it is in my power to hinder his committing the ſame, but by my Negligence I omit it, I ſhall in this caſe be puniſh'd in ſome meaſure. But if I act through Negligence only, and not through Malice and evil Advice, I ought not to be puniſhed in ſo ſevere a manner as he who acts and commits the Offence. And this is the received Opinion of the *Civilians*. But, regularly ſpeaking, a Perſon is not bound to prevent and hinder an Offence, unleſs the Delinquent be ſubject to him as a Vaſſal or Servant, a Son, and the like; or unleſs the Offence be to be committed againſt the Perſon of the Prince, the Safety of the State, or againſt him to whom I am ſubject, as a Father, *&c.* For a Son is guilty, if he does not reveal a ſecret Deſign intended againſt his Father's Life or Perſon; and ſo of other Subjects and Dependants. *Secondly*, When a Man conſents by yielding Counſel and Advice, he ought to be puniſhed, but not as the principal Actor or Tranſgreſſor. But *Hoſtienſis* diſtinguiſhes otherwiſe: For (ſays he) either he, who is conſulted and gives Advice, would act or do otherwiſe himſelf, and then the Perſon who asks Advice is leſs puniſhable: or elſe he would not act otherwiſe; and then, becauſe the Offence of the Perſon conſenting is equal with the Crime of the Perſon acting, the Perſon giving Advice ought to be puniſhed as the Perſon acting or tranſgreſſing. Yet it is a Rule in Law, That if Advice or Counſel be given in Sincerity, and without Fraud or Malice, it ought not to be of any prejudice to the Perſon that gives it; becauſe every Man is at liberty to conſider with himſelf, whether it be expedient for him to follow ſuch Advice, or not. Thus, if I adviſe you rather to lay out your Money on the Purchaſe of ſuch an Eſtate, than to put it to Intereſt, I am not liable to an Action, though the Title of ſuch an Eſtate ſhould prove bad, if I did not know it to be ſo before hand, becauſe the Advice was honeſtly given, and rather Advice than a Command, and the like. But if I order or adviſe you to lend Money unto a certain Perſon, as unto *Titius*, and you would not otherwiſe have lent him the Money, I ſhall be liable to an Action *ex Mandato* [x]; becauſe you ſeem to have contracted with ſuch Debtor by my Perſuaſion or Command. But an Action of *Deceit* lies againſt the Adviſer for fraudulent Advice given: As when the Adviſer knew, that the Debtor who deſired to borrow Money of me, was decay'd in his Circumſtances, and a Bankrupt, and yet affirmed him to be a ſafe and proper Man to lend Money to; in this caſe, an Action of *Deceit* will lie againſt the Adviſer, ſince he gave him a falſe Commendation in point of Credit, for the ſake of deceiving or cheating me [y]. And thus in Crimes and Offences a Perſon who gives Advice is puniſhed after the ſame manner (as aforeſaid) as the principal Offender, eſpecially if the Perſon, to whom the Advice is given, had not

[x] D. 17. 1. 6. 4.

[y] D 4. 3. 8. & 9.

not, without the Inſtigation of ſuch Advice, committed the Offence [z]: But if he had otherwiſe committed the Offence, even without ſuch Advice, the Adviſer ought to be puniſhed in a more gentle manner, if the Offence be of a light nature; but it is otherwiſe in atrocious Caſes [a]. Laſtly, it is to be obſerved, that the Adviſer is not liable to any Action or Puniſhment, if there be no Offence committed ſubſequent to ſuch Advice given [b], as before hinted; for no hurt is done by the Advice given, unleſs Theft, or ſome other Offence enſues thereupon [c]. By the *Civil* Law an Interpretation of Fraud and Malice is always made not only from the Event, but alſo from Advice given [d]. *Thirdly*, In reſpect of Conſent by *Co-operation*, there is a Parity of the Offence and Crime, with the Perſon acting and conſenting, when any one conſents by lending his Aid and Aſſiſtance: For here he either co-operates as principal, and then doubtleſs he ought to be puniſhed in the ſame manner as the Principal in the Offence; or elſe he co-operates only as an Acceſſary, by yielding Aſſiſtance to the Delinquent, as when he lends him a Sword to kill a Man, or comes as an Aſſociate and an Accomplice with him to commit Robbery, that he may not be prevented from committing the intended Crime, and the like. So that though he did not actually ſet his Hand to the Crime; yet he gave his Aid and Aſſiſtance to the Delinquent.

[z] D.47.10. 11.6.
[a] X.5.12. c.6.3.
[b] I.4.1.11.
[c] D.50.16.53.
[d] D.50.17.79.

TIT. XVII.

Of Error, *and how many ſorts there are, according to* Bartolus *and the Doctors; how it differs from* Ignorance; *what kind of Error excuſes; and how proved.*

ERROR is an Opinion or Judgment, whereby a Man approves that to be true which is falſe, or thinks that to be falſe which is true, or that to be certain which is uncertain, or that to be uncertain which is certain. *Error* and *Doubt* are the ſame in effect of Law [e], though they differ in ſome reſpect: for *Doubt* is an equal poiſe of the Mind, ariſing from an Equality of contrary Reaſons; as when a Perſon is at a ſtand, and cannot determine with himſelf from different Arguments, *pro* and *con*, which he has for a thing [f]: but *Error* determines a Man either to that or this ſide of a Queſtion, whether it be true or falſe. *Error* and *Ignorance* are often in Law taken in a promiſcuous Senſe and Manner, and do ſignify the ſame Defect and Imperfection in ſpecial [g]: But herein they differ, for that *Error* never admits of Truth, always following that which is falſe; but *Ignorance* may be ſaid of that which is true, and of that which is falſe. *Error* cannot be without *Ignorance*, but *Ignorance* may be without *Error*: For he that is *ignorant*, is not conſtantly guilty of an *Error*, but is only one who thinks he knows that which he does not know; but it is otherwiſe in reſpect of *Error*.

[e] Dd. in l. 11. C.4.5.
[f] C.4.5.11.
[g] D.22.6.7. & 8. C.1.18.7.

There is one ſort of *Error*, which is ſtiled an Error of *Law*, and another which is called an Error of *Fact*, as I have ſaid before touching *Ignorance*. An Error in point of Law, is, when a Perſon falſely thinks that to be lawful for him to do according to the Laws, which is not thus lawful; or that not to be lawful, which is notwithſtanding lawful. An Error in Law, on the part of the Judge, happens either *ex Theſi*, that is to ſay, by a general Deciſion, or

elſe *ex Hypotheſi, viz.* by an *Individuum*, when Perſons and Cauſes are named, and the Judge is miſtaken from ſome Circumſtances ariſing from thence; as when he believes ſuch a thing to be true in Law, barely from ſuch a Conſideration or Suppoſition of the Fact. A *Thetical* Error is null and void *ipſo Jure*; but an *Hypothetical* Error is not null and void, tho' ſuch Error be unjuſt. An Error in point of *Fact* may be conſider'd in a two-fold manner, *viz.* when a Perſon is ignorant of a Fact which is done, or thinks that to be done which is not done: And this kind of Error may either be of a Man's own proper Fact, or elſe of the Fact of another Perſon. And though an Excuſe lies for each of theſe, yet it is with ſome Diſparity in point of degree: Becauſe a Perſon, that commits an Error in relation to the Fact of another Man, is more eaſily heard and excuſed than he who is guilty thereof in reſpect to his own Fact[h]. And thus an Error of Fact, is, either when a Perſon knows not that which is done, or thinks that to be done which is not done. An Error of a Man's own Act, or of the Fact of another Man, is ſometimes juſt, and ſometimes blameable: That is ſtiled *juſt*, unto which no Fault can be objected, *viz.* becauſe the Perſon erring had not a true and certain Knowledge of the Thing, or the Conſequences thereof: But a *blameable* Error is that which may be reprehended upon the Account of Neglect in not inquiring into the Truth of the Thing. An Error of *Fact* committed by the Plaintiff or Defendant either in confeſſing ſomething that is falſe, to his own prejudice; or elſe in omitting to do ſomething that is incumbent on him, ſhall not hurt or prejudice him thereby, but ſuch an Error may be revoked. And this is true, till ſuch time as the Cauſe is decided either by a Sentence, or an amicable Compoſition, called a *Tranſaction*; or elſe by a Concluſion in the Cauſe: But, after ſuch a Deciſion, it is otherwiſe; becauſe then it ſhall not affect him, and it ſhall be revoked, when the Error is committed in a judicial manner. This proceeds in an Error of *Fact*, but not in an Error of *Law* committed in a judicial Proceſs; becauſe it ſhall then affect him as ſure and certain Knowledge thereof ſhall do, and cannot then be revoked: But it is otherwiſe in an extrajudicial Error.

[h] D. 22. 6. 3.

It is to be obſerved, that an *Error* may happen either in reſpect of the Subſtance of a Thing, or elſe in reſpect of the Quality and Accidents of it. An *Error* is then ſaid to happen in reſpect of the Subſtance of a Thing, when the Perſon contracting believes that he makes his Contract touching ſuch an individual Thing, and he afterwards finds the Matter or Thing to be otherwiſe: As when a Man does in his own Imagination or Apprehenſion buy Gold, and afterwards finds it to be Copper; or when the Buyer deſigns to purchaſe Wine, and the Seller delivers him Wine diluted with Water. And an Error is then ſaid to happen in reſpect of the Quality and Accidents of a Thing, when any one contracts for a Thing, which is affected with certain Accidents or Qualities, and afterwards diſcovers that Thing to be deſtitute of thoſe Accidents and Qualities: As when a Man buys a Horſe, believing ſuch Horſe to be a ſpeedy and mettleſome Beaſt, or ſound both in Wind and Limb, and afterwards finds him to be an arrant Jade, and broken in his Wind. There is alſo an Error *in corpore*, an Error in Quantity, an Error in Name, and an Error *in causâ*. An Error *in corpore*, is, when one Field or Eſtate is written for another, or one Heir for another; and this is called *Error perſonæ*, if it regards Perſons. *Ulpian* diſtinguiſhes an Error *in corpore* from an Error in Subſtance: As when Vinegar is ſold for Wine; for here they agree in the Body, but differ in the Matter[i]; and here he joins the Matter and Quality together in reſpect of the Error[k]. An Error in Name is, when a Perſon ſells his Eſtate at *Tuſculum*, for his Eſtate at *Firmianum*. And ſo of other things. On theſe Premiſes I ſhall here *firſt* conſider, whether an Error in reſpect

[i] D. 18. 1. 9. & 11.
[k] D. 18. 1. 14.

of

of the Subſtance, irritates a Contract. And *Secondly*, whether an Error, in reſpect of the Quality and Accidents of a thing, makes a Contract void. And ſo of the reſt.

Now an Error, in reſpect of the Subſtance of a thing, irritates and renders a Contract void: becauſe, as the Subſtance of a Contract is our Conſent about a thing; ſo the Force and Obligation of every Contract depends on the Will and Conſent of the Perſons contracting. But where an Error happens about the Subſtance of a thing, there can be no ſuch thing as a Contract; becauſe nothing is more contrary to Conſent than Error [l]. Therefore, if Glaſs or a *Briſtol*-Stone be deliver'd to a Perſon in the place of a Gem or Jewel, the Perſon believing that he has bought a Gem or Jewel, ſuch Contract is invalid through a defect or want of Conſent. For the Buyer conſented not to the Purchaſe of Glaſs or a *Briſtol*-Stone, but to the Purchaſe of a Jewel. And it is the ſame thing in reſpect of an Error about the Quality and Accidents of a thing, as above related. But it is laid down as a Rule in Law; that an Error in the Proper or Sir-name, or in the *Agnomen* or *Prænomen* of a Perſon, does not vitiate a Legacy, nor does it deſtroy the Inſtitution and Appointment of an Heir; provided there be a ſufficient *Conſtat* of the Perſon himſelf [m]: But otherwiſe, without ſuch a *Conſtat*, the Legacy is gone, and the Inſtitution of an Heir is loſt. And what I here ſay of Perſons, may alſo be extended to Things ſold, given or bequeathed. For though an Error ſhall be found in the proper Name of a thing given, bequeathed or ſold; yet ſuch Gift, Legacy, *&c.* becomes due, if there be a ſufficient *Conſtat* of the thing itſelf, which is thus bequeathed [n], given and ſold. And the Reaſon, why an Error in the proper Name does not vitiate a Gift or Legacy, is, becauſe Names are arbitrary things, invented only for the Diſtinction of Perſons, and the Recognition of Things; and conduce nothing to their Subſtance and Being: And, therefore, they may be changed and diſtinguiſhed by any other way; and it matters not by what Names we diſtinguiſh particular Men [o]. Thus he, who has *Stichus* for his Bondman, and by way of Legacy gives unto one his Bondman *Erotes*, makes a good Legacy, if he has no other Bondman but *Stichus*, becauſe he was only miſtaken in his Name. But a Legacy is vitiated through Error in an appellative Name, tho' the Teſtator's Mind and Will appears, and though he himſelf has uſually called it by that Name [p]: As when a Man thinks, that his Veſtments are included under the Appellation of Houſhold-Stuff. And the reaſon of this, is, becauſe appellative Names do not denote any Accident, or the ſimple Deſignation of a Perſon, but rather import the very Nature and Subſtance of the thing itſelf: and, therefore, if the Eſſence of a thing be changed, the thing itſelf is alſo neceſſarily changed. Thus he, who by way of Legacy gives away the Wine which he has at home, makes a fruitleſs Legacy [q], if he has only Oil there; ſince Oil has nothing in common with Wine, in ſuch a manner as to underſtand it left as a Legacy under the name of *Wine*. But ſometimes an Error in the appellative Name does not extinguiſh a Legacy. See more of this hereafter, under the Title of *Legacies*. An Error in the proper or appellative Name of a Perſon, does not vitiate a Stipulation; provided there be a *Conſtat* of the Perſon and Thing. For though a Notary writes thus, *viz. Titius* has contracted with *Sempronius*, and he ought to have written with *Flaccus*; yet ſuch Stipulation is not thereby vitiated. And this has alſo place in Laſt Wills and Teſtaments, as before hinted: for if an Error be in the Name of the Heir or Legatary, or even in the Name of the Eſtate itſelf, it is no Flaw in the Will, if it be otherwiſe well deſcribed and known [r]. Thus if a Teſtator has appointed *Valerius* to be his Heir, and he calls him by the Name of *Titius*, it ſhall not prejudice the Party; provided there be a *Conſtat* of the Teſtator's Intention, that he meant *Valerius*

[l] D. 50. 17. 116.
[m] C. 6. 37. 7.
[n] C. 6. 37. 8. & 7.
[o] C. 7. 14. 10.
[p] D. 33. 10. 4. & 7.
[q] D. 33. 6. 9.
[r] I. 2. 20. 29.

An *Error* as to the Operation of it, according to *Bartolus*, is threefold. The firſt he ſtiles an *unjuſt*, or an unwarrantable Error. The ſecond he terms a *juſt* Error, or ſuch an Error as may juſtify a Man in the doing of ſome Act. And the third *Species* he ſtiles *Error juſtiſſimus*, or a very juſtifying Error. An *unjuſt* Error is an Error in point of Law: as when a Man buys a thing of a Pupil, without the Approbation or Authority of his Tutor, and this through a Miſtake of Law. An Error alſo, in reſpect of a Man's own Act, without the Perſuaſion of another Perſon, may be called an *unjuſt* Error: as when a Man thinks, that he has bought a thing, which he has not bought, for it is not enough for him to think that he has bought it, but it is neceſſary that the thing ſhou'd be really bought[s]. For Ignorance, in reſpect of a Man's own Act, is not to be pleaded or born withal[t], as before noted under the Title of *Ignorance*. A *juſt* Error is ſaid to be that, when a Perſon is induced to believe a thing through the Perſuaſion of another, or the adverſe Party (perhaps,) tho' the thing itſelf conſiſts even in a Man's own Act: As when *Titius* ſays to me, *I deliver'd you the Book, which I promis'd you, ſome time ago*; and I do not remember this. For in this caſe, though I am miſtaken in my own Act, yet it is called a *juſt* Error; becauſe I have given credit to the Aſſertion of *Titius*. But that which is called *Error juſtiſſimus*, goes yet higher, and has relation to the Act of another Perſon, and is entirely founded on the Perſuaſion of him, on whom the Fact depends: as when my Servant, Proctor, or Guardian ſays, that he has bought ſuch a thing in my Name, when in truth he has not bought it. Such an Error, I ſay, is called *Error juſtiſſimus*[u]. This laſt kind is alſo cauſed and has its riſe from publick Fame, and the Opinion of the Vulgar: as when publick Fame ſays, that my Father bought ſuch an Houſe or Eſtate. And *Bartolus* likewiſe aſſures us, that this kind of Error is produced from the Aſſertion of a good and honeſt Man: for a ſiniſter Preſumption is deſtroy'd by the Probity and Credit of ſuch a Perſon[x].

[s] I. 2. 6. 11.
[t] D. 16. 1. 7.
[u] D. 41. 4. 11.
[x] D. 6. 1. 21. pr.

As *Error* is defin'd to be a wrong Notion of the Mind, touching a thing which is doing, or to be done; ſo, generally ſpeaking, an *Error* or *Miſtake* renders an Act as not done at all[y]; becauſe Intention and Deſign, from whence every Act is to be eſtimated, is neceſſary to the eſtabliſhment of ſuch an Act. But then this Error muſt be in a ſubſtantial Part of the Contract, and not in the Name[z] of it, or in the Cauſe, or in ſome other *external* Circumſtance or *Opinion* about it. An Error in the Form of any Act, is an intrinſick Flaw or Defect; and is the Cauſe that ſuch an Act can never be valid: for, the Doctors ſay, *Potentior eſt forma quàm materia.* An Error is preſumed, by proving the Truth to be otherwiſe than it appears to be: And it is an approved Maxim in Law, that he who alledges an Error, ought to prove the ſame. And this is ſo far received for a Truth, that *liquid* Proof ought to be made thereof, ſince an Oath is not ſufficient in Defect or Failure of other Proof. But let him, on whom it reſts to prove an Error, conſider, that an Error cannot be proved after a Concluſion in the Cauſe, if it be a pernicious Error. Though an Error ought not to prejudice the Truth of any thing; yet a common Error ſometimes makes that to be Law, which otherwiſe is not, as I ſhall obſerve more largely hereafter in another place of this Work. That which was a light Error at firſt, afterwards (perhaps) increaſes, and grows to a head; and, therefore, all Error ought to be avoided, as much as poſſible. But yet Error ſometimes is of advantage to a Man, as when it is a common Error; for then it excuſes. *Secondly*, when it is about a thing pretended to be due; for then it induces a Recovery, if ſuch thing be paid to a Man's own Wrong[a]. *Thirdly*, it is of advantage to a Man in a doubtful Caſe, when he cannot conſult a skilful Perſon. And this holds good even in an

[y] D. 50. 17. 79.
[z] D. 18. 1. 9.
[a] D. 12. 6. per tot.

Error of Law; for then it excuſes, and does not induce a *Mala Fides* or Knavery. When I ſay, that it is of an advantage, I mean, a Perſon ſhall have relief from thence: for the Law relieves Perſons in an Error, and not Fools.

TIT. XVIII.

Of Condition, *what it is*; *diſtinguiſhed*, firſt, *into* poſſible *and* impoſſible: ſecondly, *into* poteſtative, caſual, *and* mixt; *and what they are*; *what Words are neceſſary to make a Condition*, &c.

A *Condition* is a future Event, unto which ſome Act, Order, or Diſpoſition or other is reſerved, by a Suſpenſion of Time, and of the thing itſelf; for the Effect of a Condition, is the Suſpenſion of an Act: And, therefore, a Condition, is, when the Execution of an Act is ſuſpended, till ſuch time as ſomething is perform'd or done, which may be, or may not be[a]. And this is the beſt Definition, which I can any where find, of a Condition. For a Condition has not any regard to the Time paſt or preſent, but only to the Time to come. Wherefore, a Condition, which is made in the Preſent or Preter-perfect Tenſe, does not ſuſpend an Act; nor does it render ſuch an Act *conditional:* But a Covenant ſhall be immediately true or falſe, according to the Truth or Falſhood of a Condition. As I will give you ten Pounds, if *Titius* be made a Doctor; or if *Cæſar* be now fighting. For ſuch Conventions or Covenants are immediately true, if you will allow the Truth of the Condition; or falſe, on allowing the Falſhood of the Condition. And though it be a Doubt with us, whether *Cæſar* be now fighting or not; yet in the nature of things it is no Doubt[b]. And, therefore, a Condition, as it is not ſaid to be a thing preſent or paſt, but ſomething which has a reſpect to Futurity, is in our Books ſtiled *Cauſa ſub dubio*, viz. The Reaſon or Cauſe of doing a thing, which is yet in doubt and not determin'd. If the Event of the Condition be certain, the Gift is *abſolute*[c]: For there the Gift is not ſuſpended, but only the Payment or Performance thereof delay'd; as when I ſay, *I will or do give you a hundred Pounds, when I die.* A Condition of the preſent or preter-perfect Tenſe does not ſuſpend a thing, tho' the Parties be ignorant thereof: But a Condition of the future Tenſe ſuſpends a thing. *Ex.gr. Titius* ſtipulated to pay me ten Pounds, if the King of *Parthia* be living at this Time, or if *Seius* was Conſul, or if the Pope was dead. Theſe are conditional Stipulations indeed. But *quære*, Whether ſuch Conditions do ſuſpend the Obligation of Payment? or whether I, that am the Creditor, may immediately demand the Debt? or whether I may be compelled to wait the Truth thereof? The Lawyers, 'tis true, do make a Condition to be threefold, *viz.* either ſuch as has a relation to ſomething hereafter, or ſuch as relates to the Time paſt, or ſuch as relates to the Time preſent: But theſe two laſt are improperly ſtiled *Conditions*. A Promiſe, which is made under a Condition including or relating to the Time paſt or preſent, is due immediately, or not due[d]. For if the Stipulation be true in Fact, touching the Time paſt or preſent, it is immediately valid, and conſequently the thing promis'd is im-

[a] Bart. in l. 1. D. 35. 1.

[b] D. 12. 1. 37. & 38.

[c] D. 35. 1. 79.

[d] l. 3. 16. 6.

mediately due: But if it appears, that the Fact is not true, the Stipulation inſtantly falls to the ground, and is extinct; nay, it is ſuppoſed to have fallen to the ground *ab initio*; and thus the thing promis'd is not due. And this may ſerve to ſolve the foregoing Doubts or Queries. For if the King of *Parthia* be now living, or if *Seius* has been Conſul, *&c.* ſuch Condition does not ſuſpend the Obligation of Payment, but I that am the Creditor may immediately demand the Debt; becauſe the Stipulation is true in Fact: and from hence, the Obligation not being in a State of Pendency, it
[e] I. 3. 16. 4. is not defer'd as it is wont to be in a true *conditional* Stipulation [e]. But if the King of *Parthia* be not at this Day living, or if *Seius* has not been Conſul, that which is promis'd is not immediately due; nor does any Obli-
[f] D. 12. 1. 37. & 38. gation ariſe from thence, ſince the Fact is not true [f].

The firſt Diviſion of *Conditions* is into a *poſſible* and an *impoſſible* Condition. I call that an *impoſſible* Condition, which cannot have an Exiſtence
[g] I. 3. 20. 21. either by Reaſon of ſome natural Impediment [g]; or elſe, *ſecondly*, thro' an Impoſſibility *of Law*; or, *thirdly*, thro' an Impoſſibility *of Fact*. And that is ſtiled a *poſſible* Condition, which may happen and come to paſs thro' the Nature of Things. I ſhall here firſt ſpeak of an *impoſſible* Condition, which may be ſaid to be ſuch three ſeveral ways, as aforeſaid. As *firſt*, that Condition is ſaid to be *impoſſible*, which cannot happen by reaſon of ſome natural Impediment: as if I ſhould ſay, *If you ſhall touch the Heavens with your Finger*, or *ſhall drink up the Sea*, and the like. And this, properly ſpeaking, can only be called an *impoſſible* Condition. And becauſe we are ſaid to be able to do, that which we may do according to Law and
[h] D. 50. 16. 125. the Rules of Honeſty [h]; we are, on the contrary, believed not to be able to do thoſe things, which are repugnant to the Laws, and contrary to
[i] D. 28. 7. 28. fin. Good-manners [i]: And, therefore, in a larger Signification, that Condition is alſo ſaid to be *impoſſible*, which is contrary to Law and Good-manners,
[k] D. 36. 1. 63. 7. though it may *de facto* come to paſs [k]. And as this cannot be fulfilled as the Law is, through a Prohibition of Law to perform the ſame, it may be an *impoſſible* Condition through an Impoſſibility *of Law*. As for inſtance, when the Condition is, that you ſhall not redeem your Father upon his being taken Priſoner by the Enemy, or that you ſhall not allow Alimony or Maintenance unto your Parents, or that you ſhall kill a Man, or commit
[l] D. 28. 7. 1. 2. 14. & 24. Adultery, and the like [l]: for ſuch a Condition is contrary to Law and Good-manners. And as ſuch a Condition carries Turpitude along with it, it may in *Latin* better be ſtiled *turpis conditio*, than an *impoſſible* Condition in *Engliſh*, ſince it is in a larger ſenſe of the word *Impoſſible*. And, in theſe two *Species* of an *impoſſible* Condition, a Condition is reputed *pro non*
[m] I. 2. 14. 10. D. 35. 1. 3. D. 28. 7. 14. *ſcriptâ* in the Elogies or Declarations of Laſt Wills and Teſtaments [m], tho' in Contracts it is otherwiſe: For Contracts are ſo vitiated and deſtroy'd, on the account of an *impoſſible* Condition added thereunto, that even a natural Obligation does not ariſe from thence; ſince a Man making a Promiſe under an *impoſſible* Condition, ſeems not to be willing to oblige himſelf thereby. And the reaſon of this Diverſity, *viz.* that one thing is obſerv'd in Teſtaments, and another in Contracts, is, becauſe in Contracts the Will of the Perſons contracting ought to be conſider'd; and they muſt blame themſelves, if they have not clearly and plainly ſet forth the Condition and Law of the Contract: For 'tis not likely they intended to do any thing, if they inſert a Condition, which they know to be *impoſſible*. But in Laſt Wills we more largely interpret the Minds of Teſtators for the publick advantage; it being highly expedient thereunto, that a Teſtator's Laſt Will, after his deceaſe, ſhould have a good Iſſue and Effect. Hence it is, that tho' the Teſtator ſhould add an *impoſſible* Condition to a Will, yet it ſhall be the ſame thing, as if he had made a *pure* and *abſolute* Diſpoſition of his Eſtate: For it cannot be ſuppos'd, that a Teſtator ſhould add any thing willingly

to his Teſtament, which ſhould impugn and deſtroy his own Judgment [n]. *Thirdly*, we ſay, that a Condition is impoſſible in point of *Fact*, which is almoſt impoſſible by reaſon of the Difficulty of the Event: As when a private Man thus ſtipulates, *viz. If I ſhall give you a golden Mountain, will you give or do ſuch a thing* [o]? Or *if you carry the* Alps *beyond Sea*, &c. But, I think, *Accurſius*'s Example of a golden Mountain, which ſet *Faber* and *Porcius* at variance, is very ridiculous: Becauſe a Mountain being the Work of Nature, it ſeems very abſurd to dream, that ſuch a Quantity of Gold can be found in one Hill, as that it ſhould be heaped up with it: And, therefore, *Angelus* diſtinguiſhes between a *natural* and an *artificial* Mountain of Gold. According to *Viglius*, thoſe are called *golden* Mountains, which have Veins of Gold in them: And then ſuch a Condition as this, *viz. If you ſhall give a golden Mountain*, ſhall not be deemed impoſſible according to the Quality of the Perſon. *Fourthly*, a Condition is ſaid to be *impoſſible*, which is *poſſible* in its own Nature, but ſome perplexing Circumſtance renders it *impoſſible*; becauſe it ſo recurs and revolves on itſelf, that it cannot exiſt; the Rules of Law being contrary thereunto. As for inſtance, If *Titius* ſhall be Heir, let *Seius* be my Heir; if *Seius* ſhall be Heir, let *Titius* be my Heir. Here neither of them ſeems to be Heir, becauſe the one oppoſes the other, and there is a mutual Claſhing with each other. Wherefore, ſuch a *perplex'd* Condition renders a Stipulation ineffectual, and of no advantage, ſince the Condition cannot exiſt.

[n] I. 2. 14. 10.

[o] Accurſ.

Baldus and *Cynus* obſerve [p], That a *Condition* is manifold. For there is one kind of Condition which is ſtiled *neceſſary*; another which is termed *poſſible*; and a third which is called an *impoſſible* Condition, as already remarked. A *neceſſary* Condition is that which has a certain and infallible Cauſe; that is to ſay, it is both neceſſary and certain that it will exiſt and have its Event at ſome time or other. And this is alſo two-fold. That is ſaid to be certain *omni certitudine*, or to carry a full Certainty along with it; provided there is a *Conſtat* even touching the Time: As when it is ſaid, *if the* Sun ſhall riſe to-morrow Morning. But the other, though it be neceſſary, yet it does not carry any Certainty in reſpect of Time: As when it is ſaid, *I will give you ten Pounds, if* Titius *ſhall die.* For *Titius*'s Death is certain, though we know not the Time when it ſhall happen, ſince nothing is more uncertain than the Hour of Death [q].

[p] In l. 1. C. 6. 25.

[q] D. 35. 1. 1.

A *poſſible* Condition is that which may either happen or not happen, as before hinted, ſince it depends upon Chance or Fortune. And this alſo is ſubdivided into a three-fold Species, as an *impoſſible* Condition is, *viz.* into a *poteſtative*, *caſual*, and *mixt* Condition. For there are Conditions, which are entirely in our own Will and Power; and, therefore, they are called *poteſtative* Conditions: which *Viglius* (as being nearer the *Latin*) ſtiles *arbitrary* Conditions. As *if you ſhall aſcend the Capitol*, or *go to* Naples, *I will give you a thouſand Pounds.* For it is in a Man's power to do either of theſe things. There are other Conditions, which entirely depend on the Event, or on ſome fortuitous Matter; which the Doctors term *caſual* Conditions; and others (nearer the *Latin*) ſtile them *fortuitous* Conditions. As *if the Emperor of* Germany, or *if the* French *King ſhall come to* London *on the Calends or firſt of* March *next, I will give you ſuch an Eſtate.* And there are other Conditions placed in our Will, which (notwithſtanding) we cannot fulfil at all times through ſome Impediment or other: And theſe are called *mixt* Conditions; becauſe they partake of the Nature of the other kinds of *poſſible* Conditions, *viz.* of a *poteſtative* and a *caſual* Condition. A *mixt* Condition may be underſtood two ways. As *firſt*, when it depends on my Power and on the Will of Fortune. And *ſecondly*, when it depends on my Power, and on the Power of another Perſon. And a *mixt* Condition,

tion, if it may be eaſily fulfilled, has the Force of a *poteſtative* Condition. As *I promiſe you ten Pounds, if you ſhall return out of* France.

Another Diviſion of a *Condition*, is, that it is either *expreſs* or *tacit*. An *expreſs* Condition is properly that which is expreſſed by the Word (*if*) or by any Term analogous thereunto: For it matters not by what Words it be *expreſſly* introduced. A *tacit* Condition, or a Condition *imply'd*, is underſtood ſeveral ways. *Firſt*, that is called a *tacit* Condition which neceſſarily flows from the Nature of the thing: As when the Teſtator bequeaths the Profits which ſhall ariſe from an Eſtate. *Secondly*, a Condition of Law is called a *tacit* Condition, becauſe it is imply'd and underſtood from the Law: And though this Condition ſhall be expreſſed by the Teſtator; yet it is a Condition of *Law*, and not of *Man*. A *tacit* Condition is inherent in all Promiſes from the Nature of the thing. As for inſtance, I promiſe unto *Titius* all the Fruits which ſhall grow on ſuch an Eſtate. Here is a *tacit* Condition even by the Conſent of the Parties contracting, according to the Nature of the thing, becauſe the Fruits may periſh through the Inclemency of the Weather: and ſo of the like Conditions.

It has been already hinted, That that is properly ſaid to be a Condition, when any thing is given upon an uncertain and doubtful Event, which may either be or not be: For if it be given upon the account of any thing paſt or preſent, the Condition is certain, (for it either is, or is not,) and then it is not properly a Condition [r]. And thus Conditions muſt reſpect a future Uncertainty: And if the Perſon, who is to have the Advantage by the Condition, be willing to perform it, cannot by reaſon of the Refuſal of other Perſons, who are neceſſary to the fulfilling of that Condition, the Condition ſhall in this caſe be eſteemed to be perform'd on the Part of him that is thus willing [s]. Thus when a Condition, which is repeatable, is added and preſcribed unto ſeveral Perſons, it is not enough that one of them do fulfil the Condition for the advantage of all of them, but it is ſufficient for the advantage of that ſingle Perſon [t]. *Sempronius* left unto *Titius*, *Caius*, and *Seius*, a Legacy of five hundred Pounds, if they did erect a Monument unto his Memory. And the Queſtion was, whether they were all of them together oblig'd to erect this Monument, or whether it was ſufficient if one of them did it? And it was adjudg'd, that every one of them muſt fulfil the Condition, and that then each of them ſhould have and receive according to his proportion in the ſaid Legacy that accrued to him: But if one of them only fulfilled the Condition, he ſhould obtain the whole Legacy on the Neglect or Refuſal of the others. Hence he, who fulfilled the Condition, ſhall be called to the Legacy; and he who did not, muſt impute it to himſelf.

[r] Jaſ. in l. 37. D. 12. 1.

[s] D. 28. 7. 3.

[t] C. 6. 46. 6.

A Condition, which ſavours of Madneſs, or includes any Act of Inhumanity, is not to be regarded, but ought to be rejected and ſet at nought: As when a Man in his Will makes ſuch a Perſon his Heir under ſuch a Condition as this, *viz. If his ſaid Heir ſhall throw his Corpſe or Reliques into the Sea.* This Condition ſavours of Madneſs and Inhumanity; becauſe it is contrary to the way of human Sepulture. But *quære*, whether ſuch Heir ſhall be ſet aſide the Heirſhip, becauſe the Teſtator at the time of making his Will, by ſuch a Command or Order, ſeemed to be a Perſon not of ſound Memory? And it is held by ſome, that he ſhall, unleſs the Heir proves the Teſtator to be a Perſon then *compos mentis:* For a Man is a Madman preſumed from abſurd and incongruous Expreſſions, and not to be a Perſon in his right Senſes, unleſs the contrary be proved. But the Law here quoted [u] ſays, that he ſhall not be ſet aſide or ouſted of the Heirſhip, but ought to be commended for his Non-compliance with the Teſtator's Will, in point of throwing his Corpſe into the Sea, for that he delivered it to human Burial. And thus the Teſtator's Will is not always to be obey'd, as may be

[u] D 28. 7. 27.

further ſeen under the Title of *Teſtaments*. Such Conditions alſo as are contrary to good Manners, are likewiſe to be rejected [u], as above related: As when a Perſon leaves a Legacy to another, on condition that the Legatary ſhall not ranſom his Father taken by the Enemy, or ſhall not allow his poor Parents a Maintenance; for the Perſon in this caſe ſhall have his Legacy, notwithſtanding ſuch Conditions, becauſe they are inſerted contrary to good Manners [v].

[u] D. 21. 7. 14.

[v] D. 28. 7. 9.

Every Act which is done *ſub conditione*, can have no effect before the Condition exiſts and has its Event. Thus a Demand cannot be made on a *conditional* Debtor, before the Event of the Condition appears. Nor is a Sale that is made under a Condition perfected, till ſuch time as the Condition has an Exiſtence. Thus it is rightly ſaid, That that which is ſuſpended by the adding of a Condition, or a Day, which makes a kind of Condition, *non eſt pro eo, quaſi ſit* [w], viz. is not the ſame as if the thing actually was: For we muſt wait till ſuch time as the Condition happens in Event, or the Day exiſts. If Conditions are added *conjunctively*, they muſt all of them be performed; as *I will give you ten Pounds if you go to* Conſtantinople *and* Rome [x]: But if the Condition be put *disjunctively*; as *if you will go to* Conſtantinople *or* Rome, it is ſufficient to comply with one of the Terms of the Conditions. In Conditions which conſiſt in not doing (as I give you a hundred Pounds if you ſhall not go into the Capitol) a Legacy paſſes as ſoon as the Security is given, that you will not go into the Capitol [y]. This Caution was contrived by *Quint. Mutius*, and therefore called *Cautio Mutiana*. But in Contracts upon ſuch a Condition, the Death of the Perſon to whom the Gift is made muſt be expected; for it ſeems to be the Deſign, that the Heir only ſhould have the Benefit of it.

[w] D. 50. 17. 169. fin.

[x] I. 2. 24. 11.

[y] D. 35. 1. 7.

TIT. XIX.

Of a Modus, *and the Nature of it in Contracts and other Diſpoſitions; how it differs from a Condition; and of* modal *and* conditional *Expreſſions, and the Force thereof.*

AS the word *Modus* is a Term frequently made uſe of in our Law-Books in reſpect to Contracts, Legacies, and the like; I beg leave here to ſay ſomething of it, and to declare the Meaning of the Word. Now a *Modus* is ſaid to be the End and Purpoſe for which any thing is given, promiſed, or bequeathed [z], or the final Cauſe of bequeathing or giving a thing extended to ſome future Event. As for example, I bequeath unto *Titius* a thouſand Pounds, or ſuch an Iſland, to the end, or provided *that* he pays five hundred Pounds of this Money, or gives ſuch an Iſland unto *Mævius* [a]. Thus a *Modus* is a Modification added to a Diſpoſition, which hinders not the execution of the Diſpoſition; and ſuch a *Modus* is made to diſtinguiſh the Matter from a Condition, which always hinders the execution of a Diſpoſition: wherefore, Words that import a *Modus* and a Condition, ſometimes imply the one, and ſometimes the other, according to the Order in which they are placed. Becauſe if any thing be bequeathed under a *Modus* of doing ſomething, under the Condition of an Incumbrance or *Onus*, it is a Condition, if the Fact or *Onus* ought to precede the principal thing or-

[z] C. 6. 45. 1.

[a] C. 6. 45. 2.

der'd, or the principal Diſpoſition: But it is a *Modus*, when it ought to be ſubſequent thereunto.

Whenever a Legacy is left to any one *ſub modo*, as *that* he ſhould do this or that thing, he may indeed receive the Legacy; but if he ſhall not perform the *Modus* thereof, he ſhall be obliged to refund or reſtore ſuch Legacy: For in Legacies, and the like, a *Modus* is the Event of a Condition. But if a Legacy be left to a Woman, to the end that ſhe ſhould marry *Peter*, and after ſhe has received the Legacy, *Peter* refuſes to marry her, ſhe ſhall not (according to the *Synopſis Baſilicωv* [b]) be obliged to return the Legacy, becauſe it was not through her means that the Condition was not performed. And thus a *Modus* is, as it were, a Condition, and ſo it is often called in Law [c]; though ſtrictly and properly ſpeaking, it is not a Condition, as appears in the Text here quoted [d]. But a *Modus* and a Condition are frequently in Law compared unto each other; and if it be not by the Fault of him, who ought to fulfil the ſame, it ſhall be imputed to him [e], as before hinted. In a doubtful Caſe, a Condition is rather preſumed than a *Modus*: For when Words are ſo doubtful, that it becomes a Queſtion whether they import a Condition or a *Modus*, they always rather imply a Condition than a *Modus*.

[b] Tit. 28. c. 2.
[c] D. 28. 7. 8. 7.
[d] D. 33. 1. 21. 3. D. 35. 1. 71. D. 39. 5. 4. D. 40. 4. 17. 2.
[e] C. 6. 45. 1.

As a Condition is made by the words *ſi* and *cum* [f], &c. ſo a *Modus* is formed by the word, *ut* or *that*; as *lego tibi decem libras ut nubas illi*, I bequeath unto *Mævius* ten Pounds, to the end *that* he ſhould marry *Seia*. This is a *Modus*, or a Legacy *ſub modo* [g]. But though a *Modus* and a Condition be alike (as aforeſaid) if we conſider the End and Effect; yet if we conſider the *Principium* or Foundation, they are different things. For in a Condition, an Action does not lie, unleſs the Condition be extant and fulfilled: But in a *Modus* it is otherwiſe, for an Action lies there, but then the Perſon muſt give Caution or Security for the fulfilling of the *Modus* [h]. Heretofore, indeed, an Action did not ariſe from a *Modus*, becauſe it was added for the ſake of itſelf: but at this day an Action proceeds from thence [i]. It has been juſt now noted, that the word *ut* or *that* imports a *Modus*, and not a Condition, according to *Baldus* [k]: But if the word *ut* be added to a Term that depends on Fortune, it imports a Condition, and not a *Modus*, elſe it is otherwiſe [l]. The words *amplius non peti* import a *Modus*, but the words *prius non peti* denote a Condition, as *Baldus* obſerves [m]. The word *dummodo* alſo imports a *Modus*; and ſo of other Words of the like nature.

[f] D. 45. 1. 45. 3. D. 12. 6. 4.
[g] C. 6. 45. 2.
[h] D. 33. 1. 21. 3.
[i] C. 6. 45. 2.
[k] Conf. 150. lib. 5.
[l] Alex. Con. 95. lib. 7.
[m] Conf. 219. lib. 2.

TIT. XX.

Of Demonſtration, *what it is, and how it is induced; and how it differs from a* Cauſe, Mode, *and* Condition: *Of the Effects of Demonſtration in Gifts, Legacies, and Laſt Wills and Teſtaments,* &c. *and of Certainty and Uncertainty,* &c.

DEmonſtration, as uſed and ſignified in our Law-Books, is a clear and certain Deſcription or Pointing out of a Thing, which is either given by Deed of Gift *inter vivos*, or elſe by way of Legacy after a Man's Death. And it is generally induced and made by a Pronoun Relative joined to a

Verb of the preſent or preter-perfect Tenſe: For it does not relate to the Time to come (as a Condition does,) but only to the Time preſent, as *I bequeath* Stichus, *who is my Bondman*; or elſe to the Time paſt, as *I bequeath* Stichus, *whom I have bought of* Seius, *&c.* And it may alſo be made by Adjectives, which denote an Office, or any thing elſe, by means of which the Thing named is rendred more certain [n]: For Demonſtration depends on the Certainty of a Thing deſcribed and pointed out to us; and thus it is a kind of Knowledge, which we acquire from preſent or paſt Accidents. [n] D.35.1.8.4.

Demonſtration differs from a *Cauſe*; for that a *Cauſe* or *Conſideration* is that, which moves the Mind of a Donor or Teſtator to make a Gift, or to bequeath a Legacy, whether it be antecedent or ſubſequent to ſuch Gift or Legacy; and ſuch a *Cauſe* does not vitiate a Legacy, though it be falſe, unleſs it be either proved, that the Teſtator would not otherwiſe have bequeathed ſuch a Legacy [o]; or unleſs the *Cauſe* was formed conditionally [p]. A *Mode* is the final Cauſe of the Act, which ſhews what the Teſtator would have done, by reaſon of the Legacy, and the Legatary is obliged to perform and fulfil the Mode added thereunto, and cannot otherwiſe obtain his Legacy; for a *Modus* is to be obſerved as a Condition [q]. A *Demonſtration* differs from a *Condition*; for that *Demonſtration* does, for the moſt part, ſhew a thing to be already done: But a *Condition* points out ſomething to be done hereafter [r]. *Secondly*, *Demonſtration* points out the thing itſelf, which is bequeathed or given: But a *Condition* ſuſpends the Tranſmiſſion or Delivery of it to the Legatary, or the Perſon to whom it is given. A *Demonſtration* is, for the moſt part, made by Words of the preſent or preter-perfect Tenſe; but a *Condition* is made by Words or Verbs of the future Tenſe: yet ſometimes *Demonſtration* may be made by Words of the future Tenſe. The Relative *qui* or *who* being join'd to a Verb of the preſent Tenſe, makes a *Demonſtration*; but being joined to the future Tenſe, makes a *Condition*. As for example, *Sempronius* having appointed certain Heirs, bequeathed *Stichus* unto *Titius*, in this manner, ſaying, *I bequeath* Stichus, *who ſhall be my Bondman, when I die, unto* Titius. Now theſe Words, Stichus *who ſhall be my Bondman*, import a Condition, as if he had ſaid, Stichus, *if he ſhall be my Bondman*. But if the Teſtator had ſaid, *I bequeath* Stichus, *who is my Bondman*, and the like, it imports a Demonſtration, and ſuch Legacy is tacitly due, becauſe theſe Words, *who is my Bondman*, make a Demonſtration, and not a Condition. [o] D.35.1.72.6. [p] D.35.1.17.2. & 3. [q] C.6.45.1. & 2. [r] D.35.1.34. fin.

When an Heir is appointed, or a Legacy given to any one, it is neceſſary that the Teſtator ſhould point out and demonſtrate the Perſon of ſuch Heir and Legatary, in ſuch a manner that no Miſtake can enſue thereupon. And Perſons are not only pointed out by their Names, but may likewiſe be thus pointed out and deſcribed in certain by other ways and means, to the end that ſuch an Appointment of an Heir or Legacy ſhould be valid [s]. And, generally ſpeaking, in all parts of the Law, Demonſtration performs the Office and Part of a Man's Name [t]. And in conſequence hereunto is that Law, *viz.* that if a falſe Name be added or inſerted through a miſtake of the Teſtator; yet the Inſtitution or Legacy is valid, and ſhall be accounted equally good, as if no Name at all was added, provided we may be ſure of the Teſtator's Meaning by ſome Demonſtration or other of his: And a Demonſtration may be made, by expreſſing the Quality of the thing demonſtrated. Whatſoever is added to a thing already ſufficiently demonſtrated, beyond the neceſſary Demonſtrations of it, is vain and uſeleſs; but it does not vitiate a Diſpoſition, though ſuch Addition or Thing added ſhould be falſe. Nor does a falſe Demonſtration vitiate a Legacy, if there be a *Conſtat* of the Thing or Body bequeathed: As when I give to *Titius* a hundred Pounds, which I owe to him; for though there was nothing due, yet ſuch a Legacy is good. The Intention of the Teſtator is to give and to be liberal, and the [s] D.28.5.9.8. D.37.11.8.2. [t] D.12.1.6. D.35.1.34.

Sum

Sum is deſcribed by him; but if the Sum had not been mention'd, in *this caſe* nothing could have paſs'd. See afterwards touching *Legacies*. For it matters not, whether the Demonſtration be true or falſe, provided there be ſomething certain, which the Teſtator has demonſtrated. A falſe Demonſtration is cauſed by pointing out ſomething which is not: But if the Thing bequeathed be *in rerum naturâ*, a falſe Demonſtration of it does not deſtroy the Legacy or Gift. If any one ſell an Eſtate or Farm, with an hundred Vaſſals appertaining to it, the Sale is good and valid; yea, even as to the Eſtate, tho' the Vaſſals are not appendant to it. But if a Man bequeaths ten Pounds of Silver, which he has in a certain Cheſt, whereas (notwithſtanding ſuch a Bequeſt) he has truly nothing therein (at leaſt) of Silver; ſuch a falſe Deſcription or Demonſtration of the Legacy vitiates the Bequeſt, becauſe the thing deſcribed or pointed out is not found therein. Demonſtration cauſed by a Term very particular and ſingular, is ſufficient.

As a thing preſent is the proper Object of Demonſtration, and not a thing uncertain, and to happen hereafter; I ſhall here ſay ſomething of *Certainty* and *Uncertainty*, more than I have yet touched on in the Title of *Conditions*. Now that is ſaid to be certain, which in a liquid manner appears to us from our Senſes, and of which we have ocular Demonſtration; for I ſpeak not here of a mathematical Certainty [t]. And ſo, on the contrary, that is ſaid to be uncertain, touching which we have not ſuch Proof and Evidence. In the Buſineſs of Stipulations, Certainty ariſes from the Circumſtances of the Stipulation itſelf: As when we conſider, what and how much the thing ſtipulated is, and of what Nature and Quality; and if all theſe things evidently appear to us [u], it is then called *Certainty*. On the other hand, when it does not appear, what *Mævius* has ſtipulated, nor how much, and the like; ſuch is ſtiled an *uncertain Stipulation* [v]. That alſo is ſaid to be certain, which is in a certain place at the time of the Stipulation; as Wine in ſuch a Cellar, Wheat in ſuch a Barn, *&c.* And that is ſaid to be uncertain, which has not a Being or Exiſtence in the nature of Things [w]. And, laſtly, according to *Bartolus*, that alſo may be ſaid to be certain, which though it be uncertain now, yet it is not to be doubted, but that it may be certify'd by ſome indiſputable Sign or other [x]: And that I call an indiſputable Sign, which cannot deceive us. A thing by nature may be ſaid to be certain in a twofold manner, *viz.* either from the Cauſe, or from the Thing itſelf: As when the Clouds are heavy and full of Water, it is certain that it will rain, though it does not actually rain at preſent; but if it actually rains, it is certain from the Thing itſelf. But the Laws chiefly ſpeak of ſuch a Certainty as has a reſpect unto Time [y], Place [z], Quantity [a], Quality, Form, and the like: and unto all theſe things Uncertainty may be apply'd. In the Buſineſs of Certainty, *Pedius* obſerves in his Treatiſe of *Stipulations*, it matters not whether the thing be pointed out by the Finger, or be demonſtrated by certain Words and Names, which equally perform the Buſineſs of Demonſtration. And as Uncertainty in reſpect of any Sum, Quantity, or Thing, vitiates a Legacy [b]; ſo it likewiſe vitiates a Stipulation, and every Diſpoſition of Law or Act of Man. But yet in favour of *Alimony*, an uncertain Legacy is well ſupported, it being herein explained and declared to proceed according to the Teſtator's Eſtate, and the Quality and Dignity of the Legatary: The Gloſs on the Law extending to ſuch Legacy, on the account of its likeneſs unto Legacies left to charitable Uſes. And, according to *Baldus*, this proceeds and holds good, tho' ſuch Alimony or Maintenance be left to a Man of Wealth, becauſe the Laws make no diſtinction herein.

[t] Alciat. in l. 6. D. 12. 1.

[u] D. 50. 16. 74.

[v] D. 50. 16. 75.

[w] D. 45. 1. 75. 4.

[x] Arg. D. 34. 5. 5.

[y] D. 5. 2. 8. 11.

[z] D. 41. 2. 26.

[a] D. 12. 1. 6. & 9.

[b] D. 31. 1. 34. pr.

TIT.

TIT. XXI.

Of the Roman *Citizens*; *and the ſeveral Claſſes and Orders of them, as antiently divided*; *of their Aſſemblies, Colonies and Provinces*, &c.

IN ſpeaking of the *Roman* Citizens, and of the ſeveral Claſſes, Orders, and Diviſions of them, I ſhall firſt diſtinguiſh them according to their Birth, State, and Condition, as they were either ſtiled *Ingenui*, *Liberti*, or *Servi*; that is to ſay, Freemen from the Time of their Birth; Freemen from being releaſed from Bondage; and Bondmen or Servants properly ſo called. For he who was a Freed-man as ſoon as he was born, (whether he was deſcended from two *ingenuous* Parents, or two *Libertines*, or from one *Libertine*, and the other an *ingenuous* Perſon[c]) was and is in *Latin* termed *Ingenuus*, or in *Engliſh* a Gentleman, ſince we have no better Word in our Language to expreſs it by. And it was the ſame thing, if a Perſon was born from a Mother that was a Freed-woman, though the Father was a Bondman or Servant, or though he was begotton *ab incerto Patre*, whom we call a *putative* Father, and the *Latins* ſtile *Pater conceptus* or *quæſitus*. For in reſpect of Freedom, *Partus ſequitur ventrem*, the Child born follows the State and Condition of the Mother[d]. And this was introduced in favour of Children, the Freedom of the Mother being at three ſeveral times of advantage to them, as before remembred, *viz.* at the time of Conception, at the time of their Nativity, and in the intermediate time. Hence it came to paſs, That if a Freed-woman, and (afterwards being made an Hand-maid) did bring forth, yet (notwithſtanding this) the Child which was born became a Freed-man. For whenever any Queſtion or Action ariſes which concerns the advantage of the Child, the Child though then in the Womb is looked upon as a Perſon born[e]; and the Mother's Calamity ſhall not prejudice the Child in the Womb. But the Father in Procreation of Children has only one time, *viz.* the time of Conception. Hence it happens in favour of Liberty or Freedom, that in the Conſtitution and Appointment thereof, we ought rather to conſider the Condition of the Mother than that of the Father; nor ſhall the Father's Calamity affect or prejudice the Child in his being free-born[f]. And thus the Father's Crime or Puniſhment ought not to inflict any Stain or Spot on the Child in point of Freedom[g]. And *Porcius* here aſſigns a reaſon for it, *viz.* becauſe the *Jus ingenuitatis* being once acquir'd, cannot be taken away from the Child conceived by any Diſaſter by the Mother[h]: For no one ought to be prejudiced in hatred of another. And as Puniſhments ought only to affect their Authors[i]; ſo the Laws forbid a Child to be puniſhed without a Fault committed by him. Hence it is, that even a pregnant Woman condemned to die, ought to be ſaved, and the Puniſhment deferr'd till after her Delivery; nor can ſhe in the *Interim* be put to the Rack[k]. But otherwiſe, a Child born in lawful Wedlock follows the Condition of his Father in reſpect of Family and Dignity[l], and alſo in regard to the Place of his Birth and Dwelling[m].

The firſt Cauſe or Reaſon of a Perſon's being an *Ingenuus*, is, that he was born from a Mother that is a free Woman, as already obſerved; or

[c] I. 1. 4. pr.
[d] D. 1. 5. 5. C. 3. 32. 7.
[e] D. 1. 5. 7.
[f] C. 3. 33. 17.
[g] D. 48. 19. 26.
[h] D. 50. 17. 11.
[i] C. 9. 47. 22.
[k] D. 1. 5. 18. D. 48. 19. 5.
[l] D. 1. 9. 9. & 10. fin.
[m] D. 50. 1. 6.

that he was born in juſt and lawful Wedlock [n]. A ſecond Method of becoming ſuch, was, when the Perſon was pronounced to be an *Ingenuus* by the Sentence of the Judge; and ſuch Sentence has paſſed *in rem judicatam*: For then he ſhall be accounted and taken for an *Ingenuus*, or a Gentleman born, *ob rem judicatam* [o], which is equal unto Truth it ſelf [p]. The third Method of becoming an *Ingenuus*, is, when a *Libertus* or Bondman is, by the ſpecial Grant of the Prince, reſtored unto the Splendor of his Birth, and priſtine *Ingenuity*, which by the Law of Nature was common to Men [q]. It has been a Queſtion, whether a Perſon that is an *Ingenuus*, or a Perſon entirely a free Man, if he be by chance, or thro' Error, caſt into Bondage, and had in the Place of a Servant, being afterwards manumiſed, ſhall by ſuch Manumiſſion become a Perſon of a *Libertine* Condition, when it appears that he was born an *Ingenuus*, or a free Man, or whether he ſhall recover his native *Ingenuity* or Freedom? And the Emperor here decides it in favour of his *Ingenuity* or entire Freedom [r]: For ſo I uſe the word *Ingenuity* in this Place.

[n] D. 1. 5. 19.
[o] D. 1. 5. 25.
[p] D. 50. 17. 207.
[q] D. 40. 11. 2. Dd. ib.
[r] I. 1. 4. 1.

The Perſons whom the *Civil* Law calls *Libertini* or *Libertines*, were thoſe, who being real Bondmen or Servants, were manumiſed and made free from a juſt Bondage [s]. *Libertines* heretofore were taken in another Senſe than now made uſe of in the Laws, according to *Suetonius* in his Life of *Claudius*. For thoſe were then called *Liberti* that were manumiſed from Servitude; and the Children that were immediately deſcended from thoſe *Liberti*, were ſtiled *Libertines*. Now Manumiſſion is nothing elſe but the granting of Liberty or Freedom unto a Perſon that is in Bondage: For as long as he is in Bondage, he is ſubject to the Power of his Maſter, and being manumiſed, he is releaſed from this Power [t]. And it is termed Manumiſſion, becauſe the Maſter takes his Bondman's Head, or ſome other Member, into his Hand, and then ſays, *nunc hominem liberum eſſe volo*; my Will is, that this Perſon ſhould be free: and after that he lets him out of his hand, that is to ſay, out of his power; for the word *Manus* a Hand, here ſignifies Power. Manumiſſion was heretofore made five ſeveral ways. For *firſt*, it was made in the Church, in the open View of the Prieſt and People, by the Intervention of ſome kind of Writing, in the Place of Acts [u]. *Secondly*, it was made by the means of a Rod or Wand, called *Vindicta*, with which the *Prætor*, or even the *Prætor's* Lictor, touched the Bondman, repeating a ſolemn Form of Words, and then ſaid thrice, *Aio te eſſe liberum*, I declare thee to be a Freeman; and immediately the Maſter, in the preſence of the *Prætor*, turned his Bondman round about, and let him out of his Hand: And by this means the Perſon manumiſed purchaſed greater Freedom than by any other way. *Thirdly*, Manumiſſion was made *extra-judicially* among Friends: In which caſe the Interpoſition of Writing, and five Witneſſes, were neceſſary [w]. *Fourthly*, it might be made by a Letter or Epiſtle ſubſcribed by five Witneſſes, and written or ſubſcribed by the Patron himſelf [x]. And laſtly, it might be made by a Laſt Will and Teſtament, wherein the Teſtator might bequeath Freedom unto his Bondman [y]. In favour of Liberty, Manumiſſion might be made at any Time, and in every decent Place. It was a Matter of *voluntary* Juriſdiction, and meerly depended on the Will of the Maſter. And, therefore, it was not neceſſary that this ſhould be ſped *in figurâ judicii*, the Judge ſitting on the Bench [z]. *Note*, Thoſe things are ſaid to be Matters of *voluntary* Juriſdiction, which the Parties do of their own accord, and without any Compulſion or Diſceptation of the Parties. And thoſe are Matters of *contentious* Juriſdiction, which are done againſt the Inclination of a Perſon [a].

[s] D. 1. 5. 6. I. 1. 5. pr.
[t] D. 1. 1. 4.
[u] C. 1. 13. 1. & 2.
[w] C. 7. 6. l. un. 2.
[x] I. 1. 5. 1.
[y] C. 7. 2. t. t.
[z] D. 1. 16. 2.
[a] D. 45. 1. 83. 1.

Heretofore there were three kinds of *Libertines*: ſome were called *Roman* Citizens; others were ſtiled *Latins*; and a third ſort were termed *Deditii*.

Deditii. But in *Juſtinian*'s Days there was only one kind of them: For all Perſons manumiſed obtain'd a juſt Freedom, and became *Roman* Citizens[a]. Anciently a *Libertine* was ſaid to be him, who was deſcended from two *Liberti*; that is to ſay, whoſe Father and Mother were *Liberti.* And a *Libertus* was he, that had been for ſome time a Vaſſal, and was afterwards by Manumiſſion made free from Servitude. But ſome time after the Cenſorſhip of *Appius Cæcus*, the *Liberti* and *Libertini* were taken for the ſame Perſons: And then thoſe were ſtiled *Ingenui*, who were deſcended from *Liberti* or *Libertines*, viz. from ſuch Perſons as had ſerved for ſome time in Bondage, and were then manumiſed. But ſometimes this Diſtinction was made between theſe two Terms of *Liberti* and *Libertini*, viz. that they were called *Liberti* in reſpect of their Patrons, and *Libertini* in reſpect of thoſe that were called *Ingenui.* And thus by the word *Libertus*, a private kind of reſpect was ſignified; and by the word *Libertinus*, a publick reſpect, *viz.* the Condition of the Perſon was expreſs'd. This Diſtinction or Difference *Laur. Valla* largely explains in his Elegancy of the *Latin* Tongue[a]. And it is the laſt Signification of theſe two Terms, which the *Roman* Lawyers have retained among them, inſomuch that I ſhall not here treat of others, not being ſufficiently acquainted with them. And thus we call him a *Libertus*, who has obtained his Liberty and Freedom by the means of Manumiſſion; and a *Libertus* and *Libertinus* is the ſame thing, only with this difference, *viz.* That the word *Libertus* has always a reſpect to him, whoſe *Libertus* or Freed-man he is, meaning the Patron: But the word *Libertinus* is an abſolute Term or Name denoting him, who is neither a Bondman nor a Freedman.

[a] C. 7. 6. 1. un.

[a] Lib. 4. c. 1.

At this day there is no difference between the *Liberti* and the *Ingenui*, but the *Liberti* have the ſame Liberty as the *Ingenui*, unleſs it be that the *Ingenui* are born free, and the *Liberti* become ſo by Manumiſſion, as aforeſaid. Wherefore, *Azo* declares, that all *Liberti* are at this day reputed as *Ingenui*, who being born again, (as it were) ſeem to be *Ingenui:* which is true in reſpect of other Men, or in reſpect of Things, as in caſe of Matrimony or Dignities. For that which is granted unto the *Ingenui* by virtue of their natural Liberty, is not denied to the *Liberti* that have recovered their natural Liberty by Manumiſſion. But, in reſpect of the Perſon manumiſing, he retains the Right of a Patron over his *Libertus*, and is ſtiled a Patron[b]. Now a Patron's Right over his *Libertus* (whilſt this diſtinction of Patron and Freedman laſted) conſiſted in ſeveral Things. For the *Libertus* or Freedman was bound to yield him due Reverence, the Patron's Perſon appearing ſacred and honourable to him: Inſomuch that he could not ſummon his Patron into Court, without leave firſt obtained, under pain of fifty *Aurei* or Crowns. Nor could he, therefore, commence an Action againſt his Patron; if ſuch Action carry'd any Infamy along with it[c], called *Actio famoſa.* But by a Law of the twelve Tables, it was lawful for a *Libertus* to paſs by his Patron in his Will, without fear of having his Will rupted: For, by this Law of the twelve Tables, the Patron was only called to the Heirſhip or Inheritance, in caſe his *Libertus* died inteſtate, leaving no natural or adopted Child behind him as his Heir. Wherefore, if ſuch *Libertus* had left ſuch Heir of his own behind him, on his dying Inteſtate, the Patron had nothing to do with the Goods of his *Libertus.* Yet by an Edict or Law of the *Prætor*, it was afterwards enacted, That the Patron ſhould have one Moiety of the Eſtate of his *Libertus*, though he had made a Will, if he died without a natural Child, unleſs ſuch Eſtate was acquir'd in the Wars: For Children excluded the Patron, whether they were emancipated, or in the power of the Father, or were only Children by Adoption; provided they were appointed Heirs, or being paſſed by, ſued for the *Bonorum-Poſſeſſio.*

[b] Nov. 78. c. 1.

[c] D. 2. 4. 9. 12.

I have dwelt the longer on this Diviſion of the *Ingenuus*, *Libertus* and *Libertinus* among the *Romans*, though the ſame is now out of uſe, becauſe there is frequent mention made of theſe Terms in the Books of the ancient Lawyers, and in the Writings of the *Roman* Hiſtorians; and the proper Signification not being obvious to every one, or (at leaſt) ſufficiently underſtood by them, I thought it not improper to add ſomething here for the better Illuſtration of them in the following Work: For theſe Words or Terms are not always taken and uſed in the ſame Senſe, but ſometimes in a different manner. Of Bondmen I have already diſcourſed under another Title, and therefore need not repeat the Matter again: only thus much may be obſerved by the way, *viz.* that at this day we make uſe of Servants that are Freemen, and not Bondmen, as heretofore: And therefore, we are not obliged on their account any further than their Wages extends itſelf, as the *Romans* were. And the ſame obtains in reſpect of Children under the power of their Fathers, being Minors. But if Children have any Eſtates or Goods of their own, according to the *Roman* Law, their Fathers are only convened and condemned as lawful Guardians *de Peculio*, viz. touching what they have acquir'd by their Parſimony [d]; and being condemned, are obliged to pay their Childrens Debts out of their Childrens Subſtance. So that, according to the Cuſtom of *Holland*, now whatever Eſtate a Child has, is underſtood as a *Peculium* [e]. But of this hereafter, under that Title.

[d] D. 15. 1. 39.

[e] D. 15. 1. 52. pr.

As to Order and Degree of Dignity, the *Roman* Citizens were divided into three diſtinct Orders or Claſſes, according to the Poet *Auſonius*;

Martia Roma Triplex, Equitatu, Plebe, Senatu.

That is to ſay, into the Order of Senators, Knights, and Plebeians; which laſt we call the Populace, though in a large Senſe of the word *Plebs*, the Knights were alſo couch'd under it. For after the Expulſion of their Kings, the *Romans* were thus diſtributed into theſe three Orders. The Senatorial Order conſiſted of ſuch Perſons as were choſen by the Kings, then by the Conſuls, and afterwards by the Cenſors, into the Senate or great Council of State, whether the ſame were Patricians, Knights, or Plebeians. Thoſe were of the *Equeſtrian* Order, which, being three hundred in number, and choſen by *Romulus* out of the whole Multitude, he called *Celeres*, from *Celer*, (as ſome think) the Murderer of *Remus*: And theſe Perſons were afterwards, by *Tarquinius Priſcus*, increaſed to the number of ſix hundred, and were the *Garde du Corps* to the Emperors after the Fall of the *Roman* Liberties. Thoſe Perſons only were choſen into the *Equeſtrian* Order, who had Eſtates to the Value of four hundred thouſand Seſterces, which amounts to almoſt ten thouſand *Aurei* or *Italian* Ducats; and they had a Horſe given them by the Cenſor, at the publick Charge, and a Gold Ring, to diſtinguiſh them from the Plebeians. The ancient Rules and Inſtitutions touching this Order, were introduced by *Quintus Fabius*.

The firſt Diviſion of the *Roman* People, which was made by *Romulus* himſelf, was into *Patricians* and *Plebeians*. And as the firſt were ſuch Perſons as were illuſtrious on the account of their high Birth, Vertues, and Riches, as times went then; ſo he diſtinguiſh'd them from the poor, obſcure, and lower ſort of People, who being of an inferior Rank and Fortune, were ſtiled *Plebeians*, or the Populace. The firſt were either Senators themſelves, or the Deſcendants of Senators, or that had rendred themſelves eminent in the Service of War, and had the Government of the City committed to them under the Kings, and all the chief Offices of State; and Matters of Judicature did for ſome time belong to them, till theſe Matters were transferr'd to the Knights, out of which the *Centumvirs* being elected, they

they became Judges. The *Plebeians* at firſt had no Right of voting in the State, and were not admitted to any Office of Dignity or Magiſtracy, as being unskilful therein, or not at leiſure to attend the ſame: But yet they underwent the Duties of War, and paid Taxes to the Government. Theſe he called *Ruſticks*, for that they were to till the Ground, and to look after the Cattle, and to follow handy-craft Trades, *&c.*

The *Roman* People had for Counſel, and the Diſpatch of Buſineſs, divers Aſſemblies or Meetings: ſome of which were ſtiled *Calata Comitia*; and theſe were ſummoned or called together by a lawful Magiſtrate, to determine any Matter by way of giving their Voices. They were called *Comitia à Coeundo*, viz. from their coming together, without the Addition of any other Word; or elſe *Comitia Calata*, from their being called together: and this either from the *Greek* word καλέω, or the old *Latin* Verb *calo*, ſignifying to call or ſummon: Though in proceſs of time theſe general Aſſemblies of the People, called *Calata Comitia*, were only held on great and ſolemn Occaſions, either for the Inauguration of ſome *Pontiff*, *Augur*, *Flamen*, or Perſon ſtiled *Rex Sacrorum*; or elſe for the ſettling of Laſt Wills and Teſtaments, and the like: And from hence Wills, that were made in theſe grand Aſſemblies, were ſtiled *Teſtamenta Calatis Comitiis*. For theſe Aſſemblies were only called together twice a Year, by the Sound of a Horn or Trumpet, that Teſtators might, in their Preſence, declare and execute their Wills, by making the whole Body of the People, as it were, Witneſſes thereunto: And this was done in time of Peace, to prevent Forgery. Yet theſe Aſſemblies differ'd from a Council, becauſe when theſe Aſſemblies were called, by a Horn or Trumpet, all the People were commanded to be preſent: But a Council was, when the People were aſſembled by the Magiſtrates, on the ſcore of ſome judicial Matter or Proceeding.

A Council at *Rome* conſiſted of Knights and Senators; and in the Provinces of Aſſeſſors, whom we call Counſellors, or the Members of the Council: And hence the Laws make frequent mention of Manumiſſion in the preſence of the Council; for theſe Courts or Councils exerciſed *voluntary* as well as *contentious* Juriſdiction. Theſe kinds of Aſſemblies were ſometimes in *Latin* termed *Comitia Pontificia*, (for I ſpeak of the auguſt Aſſemblies) and ſometimes *Comitia Sacerdotum*, in the ſame Senſe as others were ſtiled *Conſularia* and *Ædilitia Comitia*: Becauſe the Pontiffs were choſen in theſe, as the Conſuls and Ædiles were in thoſe. But,

As the City of *Rome* was divided into Wards, Tribes, and Centuries, there were ſeveral ſorts of Aſſemblies or *Comitia*, (as *Aul. Gellius*, *Varro*, and *Alex. ab Alexandro* tell us:) And theſe Aſſemblies were either ſtiled *Comitia Curiata*, *Comitia Tributa*, or *Comitia Centuriata*. The *Comitia Curiata* or Ward-Motes were the firſt and moſt ancient of the *Roman* Aſſemblies, wherein all Matters of State were debated and tranſacted. For before the *Comitia Centuriata* and *Comitia Tributa* were founded, all Matters relating to the Government of the Commonwealth were handled herein. In theſe Aſſemblies Kings [f], and other Magiſtrates, were created; and all Laws, which were made even at that time, were formed and enacted there, and ſo likewiſe were Matters of Judicature determined there: ſo that all Things, which were diſpatched by the Suffrages of the People, were managed in no other Places than in theſe Aſſemblies of the Wards or *Curiæ*. *Dionyſius Halicarn.* aſſures us, that *Numa* was declared King in theſe Ward-Motes; and, I think, he ſays the ſame of *Servius Tullius*: For all the Kings, except *Tarquin*, ſurnamed the *Proud*, were created there. And the ſame Author in his fourth Book, ſpeaking of the *Comitia Centuriata*, founded by *Servius Tullius*, obſerves, that theſe three Things were in the power of the People, *viz.* the Right of creating Magiſtrates, the Buſineſs of confirming or

[f] Liv. lib. 1.

abrogating Laws, as well reſpecting civil as military Affairs, and the power of decreeing War or Peace; and theſe things were tranſacted in the Ward-Motes by Suffrages. But the Authority of the Senate was added in the final Concluſion of all theſe Matters. The Kings had at firſt the Right of convening theſe Ward-Motes, as having the ſupreme and ſovereign Authority veſted in them. But when the ancient Form of Government was changed into a Commonwealth upon the creating of Conſuls, this Method and Right of convening the People to the *Comitia Curiata*, was transferr'd to other Perſons, as to the Conſuls, Prætors, Dictators, *&c.* No certain Time was ſettled for holding this Aſſembly, but it was entirely left to the Neceſſity and Exigency of publick Affairs to determine the ſame: But this was not to be done on all Days indiſcriminately, but only on *comitial* Days. The Manner and Form of convening this Aſſembly was ſolemn and religious; but as the Rites and Ceremonies were many, it will be too tedious to enumerate them in this place: wherefore I muſt refer the Reader to the *Roman* Antiquities.

As the *Comitia Curiata* were ſo called from the *Curiæ* or Wards, ſo the *Comitia Centuriata* had their Name from the Centuries. Wherefore, I ſhall firſt conſider what the Centuries were, and by whom inſtituted; by the Knowledge whereof we ſhall the better underſtand what the *Comitia Centuriata* were, and the Nature of them. *Servius Tullius*, the ſixth King of the *Romans*, according to *Livy*, and other Writers, was the Author and Founder of theſe Centuries[g]. This Prince was entirely a Republican, notwithſtanding his Dignity; yet could not bear to ſee the Government thus depend on the Dregs of the People, as it did: he reſolved to tranſfer all the Authority into the Body of the Nobility and *Patricians*, where he hoped to meet with juſter Views. The Enterprize was attended with great Difficulties, (for he had to do with a People of the World the moſt haughty and jealous of their Rights,) and, therefore, to bring them to remit part, he muſt deceive them with the Bait of ſome Advantage more conſiderable. The *Romans* at that time paid certain Impoſts by Head into the publick Treaſury; and as at the beginning every Man was much upon an Equality, they had been all ſubject to the ſame Tribute, which they continued to pay upon the ſame Equality, though Succeſſion of Time had made great difference between the Eſtates and others. *Servius*, to dazzle the People, and to know the ſtrength of his State, repreſented in an Aſſembly, that the number of the Inhabitants of *Rome*, and their Riches, being conſiderably increaſed by the multitude of Strangers that had ſettled in the City, he thought it not juſt a poor Citizen ſhould contribute to the publick Expence as much as the richeſt; and that thoſe Impoſitions ſhould be proportion'd to every one's Ability: But that in order to get an exact Knowledge of this Particular, all the Citizens, upon the greateſt Penalty, ſhould be obliig'd on Oath to give in a faithful Account of what they were worth, to ſerve as a Rule to the Commiſſioners, which the Aſſembly of the People ſhould appoint, to ſettle this Proportion. The People, who ſaw in this Propoſal nothing but their own eaſe, received it with great Applauſes; and the whole Aſſembly unanimouſly gave the King power to eſtabliſh in the Government whatever he ſhould think moſt agreeable to the Good of the Publick. That Prince, to effect his purpoſe, firſt divided all the Inhabitants of the City, without diſtinction of Birth or Rank, into four Tribes, called *the Tribes of the City*. He diſpoſed into twenty-ſix other Tribes the Citizens that dwelt in the Country and Territory of *Rome*. And then he inſtituted the *Cenſus*, which was nothing more than a Liſt or Roll of all the *Roman* Citizens, containing their Age, Subſtance, Profeſſion, and the Name of the Tribe and *Curia*, and the Number of their Children and Slaves.

[g] Liv. lib. 1. c. 42, & 43.

Slaves. There was found to be then in *Rome*, and its Territory, above fourſcore thouſand Citizens able to bear Arms.

Servius divided this great number into ſix Claſſes, compoſing each Claſs of divers Centuries of Foot. He put into the firſt fourſcore Centuries, into which he admitted none but Senators, Patricians, or Men remarkable for their Wealth; and each was to be worth a hundred *Minæ*, or ten thouſand *Drachmæ*. Theſe fourſcore Companies of the firſt Claſs were divided into two Orders: The firſt conſiſting of the moſt antient, all above forty-five Years old were allotted for the Guard and Defence of the City; and the other forty Companies, made up of thoſe from ſeventeen to five and forty, were to march into the Field, and to War. They had all the ſame Arms, offenſive and defenſive: The Offenſive were the Javelin, Pike, and Halberd, and the Sword; and their Defenſive were the Head-piece and the Cuiraſs, *&c.* They likewiſe diſpos'd under the firſt Claſs all the Cavalry, whereof they made twelve Companies, conſiſting of the richeſt and chiefeſt Men of the City, and ſix other Companies that were not of ſo high a Rank. To theſe were added two other Centuries of Artificers, who follow'd the Camp unarmed, and whoſe Buſineſs was to prepare and manage the Machines of War. The ſecond Claſs conſiſted but of twenty Centuries, of thoſe that were worth at leaſt ſeventy-five *Minæ*. They uſed much the ſame Arms as the Citizens of the firſt Claſs, and were diſtinguiſhed only by the difference of their Shield. There was, in like manner, but twenty Centuries in the third Claſs, and a Man was required to have fifty *Minæ* to be admitted into it. The fourth Claſs was compoſed of the ſame number of Centuries as the two former; and thoſe that were placed in this Claſs, were to be worth at leaſt twenty-five *Minæ*. In the fifth Claſs there were thirty Centuries, in which were placed all thoſe that had at leaſt twelve *Minæ* and a half. Their only Arms were Slings, and generally they fought out of Rank, and upon the Wings of the Army. The ſixth Claſs had but one Century, which indeed could not ſo properly be called a Century, as a confuſed Multitude of poor Citizens. They were called *Proletarii*, as being no otherwiſe uſeful to the State, than by ſtocking it with Children; or *Exempts*, becauſe they were excuſed from going to the Wars.

Servius having eſtabliſhed this Diſtinction among the Citizens of the ſame Republick, ordain'd, that the People ſhould be aſſembled by Centuries, whenever there was occaſion to elect Magiſtrates, make Laws, declare War, examine into Crimes committed againſt the Commonwealth, or againſt the Privilege of any Order. The Aſſembly was to be held out of the City in the Field of *Mars*. And it belonged to the Sovereign or Prime Magiſtrate to call theſe Aſſemblies, as well as the *Curiæ*; and all Deliberations were here to be preceded by *Auſpices*, which gave great Authority to the Prince and *Patricians*, who were veſted with the chief Offices of the Prieſthood. It was further agreed, that the Votes ſhould be gather'd by Centuries, whereas before they were reckon'd by Tale; that the ninety-eight Centuries of the firſt Claſs ſhould give their Votes firſt. *Servius* by this Regulation actually convey'd the whole Authority of the Government into this Body, made up of the great Men of *Rome*; and without openly depriving the *Plebeians* of their Right of Suffrage, he, by this Diviſion, made it of no uſe to them. For the whole Nation conſiſting but of one hundred and ninety-three Centuries, and ninety-eight of theſe being in the firſt Claſs, if there were but ninety-ſeven of the ſame Opinion; that is to ſay, a Majority of the one hundred ninety-three [h], the Affair was concluded: And then the firſt Claſs, compos'd as aforeſaid, of the chief Men in *Rome*, had alone the making of all publick Decrees. But if any Voices were wanting, and ſome Centuries of the firſt Claſs were not of the ſame Opinion with the reſt,

[h] Dion. lib. 3.

reſt, then they called in the ſecond Claſs, and when thoſe two Claſſes were of the ſame Mind, it was utterly unneceſſary to proceed to the third. Thus the common People had not the leaſt power when the Votes were gather'd by Centuries; whereas when they were taken by *Curiæ*, the Voices being reckon'd by their number, the meaneſt *Plebeian* had as much weight as the greateſt Senator. After this the Aſſemblies, by *Curiæ*, were only held for the Election of the *Flamens*, viz. the Prieſts of *Jupiter*, *Mars*, and *Romulus*, and to chuſe the chief *Curio*, and ſome Under-Magiſtrates, which we ſhall ſpeak of in their proper place.

Laſtly, it is to be obſerved, That theſe Aſſemblies of the Centuries were convened by the Conſuls then in being [i]; and if there were no ſuch Perſons then exiſting, they were then to be ſummoned by the *Inter-reges* and *Dictators* [k], for the ſake of creating ordinary Magiſtrates of the greater Rank and Quality [l], and likewiſe for making of Laws of the higheſt Importance [m] (from thence called *Leges Centuriatæ*,) for declaring of War; and decreeing Impeachments for Treaſon, ſtiled *Judicia Perduellionum* [n]. Beſides the Perſons already mentioned, the *Prætors* oftentimes called theſe Aſſembles together for the ſake of other judicial Matters inferior to Treaſon [o]. And in theſe Aſſemblies, all Perſons had the Right of Suffrage, that were regiſtred as Citizens and Freed-men of *Rome* [p]: But the Senators were the Authors and Beginners of all Matters propounded in them [q]. A Law was here propounded twenty-ſeven Days at leaſt before it could paſs into an Act, during which time all Perſons had the power of perſuading or diſſuading the paſſing of a Law [r]. In the Choice of Magiſtrates they proceeded by ballotting, and every Perſon that gave his Vote had as many Tablets given him, as there were Candidates, marked with the Letter or Name of the Candidates [s]. In making of Laws, two Tables were given to each Perſon having a Vote therein; one with the Letters *U. R. uti rogas*, inſcrib'd; and the other with the Letter *A.* viz. *antiquo*. See *Cicero*'s Epiſtles to *Atticus* [t]. All of the Voters paſſed over narrow Bridges, according to their Centuries, on being called by the Cryer; and there ſtood at the Entrance of theſe Bridges, Perſons who gave them out their Tablets. When they had paſſed over theſe Bridges, they came into a Coop or Penn, at the Entrance of which the *Rogators* or Scrutineers received the Tablet in an Urn or Box, as every one was diſpoſed to vote [u]. Theſe Scrutineers kept and numbred their Votes by pricking Holes in the Tablet [w]; and as the Majority was inclin'd, declar'd and publiſh'd the Scrutiny. The Magiſtrate who was choſen, was notify'd to the People by the Voice of the Cryer, and then carry'd out of the *Campus Martius*, attended by the Acclamations of a numerous Multitude. And whether a Law was accepted or not, it was alſo pronounced by the Voice of the common Cryer [x]. We have been thus particular in our Account of this new Plan of Government, and theſe Matters, only becauſe, without the Knowledge thereof, it would be difficult to underſtand what we ſhall hereafter relate touching publick Offices, and the like.

[i] Liv. lib. 10. c. 11.
[k] Aul. Gell. lib. 13. c. 15.
[l] Liv. lib. 3. c. 34.
[m] Lib. 31. c. 6.
[n] Lib. lib. 6. c. 20.
[o] Liv. 26. c. 3.
[p] Cic. de ll. lib. 3. c. 19.
[q] Liv. lib. 1. c. 17.
[r] Liv. lib. 3. c. 1.
[s] Cic. de ll. Lib. 3. c. 16.
[t] Lib. 1. Epiſ. 11.
[u] Liv. lib. 10
[w] Cicer. Phil. 2. c. 33.
[x] Cic. in Ver. lib. 5. c. 15.

The third Aſſembly of the People was that called the *Comitia Tributa*, wherein all the inferior Magiſtrates, as well ordinary as extraordinary, were created. This Aſſembly of the Tribes decreed the Provinces unto Perſons, and aſſigned other Curators of the Colonies. Among the Prieſts, at firſt only the *Pontifex Maximus*, or High-Prieſt, was created by it; but afterwards by a Law of *Domitius*, the other Pontiffs, and many other Prieſts, were created by it. The Laws, which the Commons enacted, were made in this Aſſembly, as touching Peace [w]; and ſome judicial Matters were alſo diſcuſſed and handled here. A Triumph was ſometimes decreed, and Freedom of the City, and Right of Suffrage was alſo granted by this Aſſembly [x]. It was held either by the Conſuls or the Tribunes of the People, or by the

chief

chief Pontiffs, if the Buſineſs of creating Prieſts was in Agitation[y]: And it was held either in the *Campus Martius*, or in the Capitol, or in the *Prata Flaminea*, or at the *Roſtra*, without conſulting the Senate, or any ſacred Rites, unleſs it were by ſuch *Omens* as were obſerved from the Heavens. The Commons voted according to their Tribes, excluſive of the Nobility. And though this Aſſembly was governed almoſt in the ſame manner as that of the Centuries[z]; yet the Magiſtrate who called it made different Speeches from that of the Centuries.

[y] Liv. lib. 25. c. 5.

[z] Plin. lib. 18. c. 6.

Provinces among the *Romans* were thoſe Countries into which they ſent their Pro-conſuls and Lieutenants, for the Adminiſtration of Juſtice; and they were ſo called, according to the Grammarians, *quaſi procul victæ*. But *Bartolus* ſays[a], that a Province among the *Romans* was that State or Country which was diſtinct and ſeparated from *Italy:* which Notion of his I think to be falſe, becauſe they had their Provinces even in *Italy* itſelf. But, to conſider the matter a little more clearly, the *Romans* underſtood the word *Province* in a three-fold Senſe, *viz. Firſt*, for that Country which they had either ſubdued by their Arms, or brought into their Power by ſome other means; and ſuch Country they ſubjected to the Adminiſtration of one of their own Magiſtrates. *Secondly*, for any other Country, wherein the *Roman* Generals waged War in the Name of the Publick. And, *thirdly*, for the Adminiſtration of any publick Office. *Bartolus* likewiſe aſſures us[b], that a Province may be ſaid to be a State or City that has a diſtinct Territory, which acknowledges no Superior, as *Tuſcany*, *Lombardy*, *&c.* But I ſhall here ſpeak of Provinces in the firſt and proper Signification of the Term.

[a] In l. 99. D. 50. 16.

[b] In l. un. C. 11. 21.

Now there were ſome Provinces, whilſt the *Roman* Commonwealth ſubſiſted, that were ſtiled *Conſular*, and others that were called *Prætorian* Provinces. After the Fall of the *Roman* Liberties, there were ſome Provinces in the Diſpoſition of the Emperors, and others that the People had the Diſpoſal of. The *Conſular* Provinces were thoſe that were under the Government of the Conſuls reſiding in the City, and which they obtained by a conſular Right; and hence Pro-conſuls were ſent unto theſe, and they were often called Proconſular Provinces. The *Prætorian* Provinces were ſuch, as the Prætors in the City obtained as Prætors; and hereunto Pro-Prætors were ſent. But there were certain Provinces by name, over which the Conſuls had the Super-intendance; and not any over which the Prætors had the Care, but only as it caſually happen'd; and they took their Name from the Name and Office of the Magiſtrates that obtained them. Both theſe kinds of Provinces were in the Gift of the Senate before the time of the Emperors: But the Nature of the Government, and Diſpoſal of each, was different. For the *Conſular* Provinces were decreed to Perſons the Year following after their Conſulſhip ended. And the *Prætorian* Provinces were decreed unto the Prætors the preſent Year; but their Creation did not take effect till the Calends of *January*, after they had quitted their Office of Prætor.

In proceſs of time, when the Emperors ſeized ſome of the Provinces into their Hands, they ſent Preſidents, and the People ſent Pro-conſuls and Pro-prætors into theirs: And this Diviſion of the Provinces was made by an Inſtitution of *Auguſtus Cæſar*. For when he had got the Adminiſtration of the whole Empire into his Clutches, and had the Power of Peace and War, he made this two-fold Diviſion of the Empire, by aſſuming that Part of it to himſelf, which wanted the Defence and Protection of the Soldiery; and the other Part, which might eaſily be in ſubjection, without the Help of Arms, he gave unto the People. He made ſeveral Provinces; ſome of which were called *Imperial*, and others *Popular* Provinces. See *Suetonius* and *Strabo*. All Cities or States that were ſubject to one Pre-

ſident or Metropolitan, made a Province. But ſome ſay, there may be two Mother-Cities in one and the ſame Province: which ſeems monſtrous, becauſe there cannot be two Heads to the ſame Body. Yet one Province may be divided into two, but not ſo without the Emperor's Reſcript or Grant. And ſo, on the contrary, one Province may be made of two, with the Prince's Grant. I ſhall cloſe this Title with the Subject of Colonies.

Now a *Colony* is a drawing out or diſgorging of this or that State of ſome of its Inhabitants, where it abounds with People, and ſending them into other Parts, where they are wanted to till the Ground, and do other Works of Drudgery in Husbandry, and the like: And it was ſo called, becauſe the *Coloni* or Husbandmen were the Perſons that were thus ſent abroad. Colonies differ from what the *Romans* ſtiled *Municipia.* For Colonies were thoſe that had their Original from the City of *Rome:* But the *Municipia* were thoſe States or Cities that were received by the People of *Rome* into a Fellowſhip of Honours and Offices with the *Romans* themſelves, and in the *Interim* made uſe of their Laws and Rights [c]. *Flaccus* the *Sicilian,* in his Book *de Condit. Agrorum* thinks, they were called *Colonies,* becauſe the *Romans* ſent the *Coloni* or Husbandmen into their *Municipia.* And *Aggenus Urbicus* approves of this Account, ſaying, they were ſo called from their new Application of themſelves to the Tillage of Land. Now *Coloni* might alſo be added to the old Inhabitants or Huſbandmen. The *Roman* Colonies were of two kinds, ſome were ſtiled *Latin* Colonies, and others *Italian* Colonies: And the *Latins* had the Right of the *Italians* in reſpect of the City, of voting and being Magiſtrates, if they had ever been Magiſtrates in their Colony. But the *Italian* Colonies had not the Rights of the City, and of voting; for thoſe that were drawn out into theſe Colonies, entirely loſt the Freedom of the City; but they were Freemen, and paid no Tribute or Taxes.

[c] Gœdd. in l. 18. D. 50.16.

TIT. XXII.

Of Magiſtrates *in general; and how the* Romans *diſtinguiſhed theirs,* viz. *into ſuperior and inferior Magiſtrates; and who theſe ſuperior and inferior Magiſtrates were.*

THE word *Poteſtas,* or Power, has various Significations in Law; and, among theſe, we may include that of the Magiſtrate: For he has the power of the Sword, called in other Terms *merum Imperium*; and may puniſh wicked Men [d]. It is ſtiled *merum, quaſi liberum;* becauſe as Offences are either aggravated or extolled from ſeveral Cauſes, it is in the Diſcretion of the Judge to inflict what Puniſhment he thinks fit, when none is preſcribed by Law: which is not ſo in pecuniary or civil Cauſes, wherein the Judge ought to pronounce Sentence according to what has been proved. St. *Paul,* in his Epiſtle to the *Romans* [e] ſays, *Let every Soul be ſubject to the higher Power*; that is, to the Magiſtrate, who is a publick Perſon veſted with ſome Power in the State [f], whereby he has not only a Right of commanding thoſe things, which ought to be done, but likewiſe a Power of puniſhing delinquent and diſobedient Perſons; *for he beareth not the Sword in vain* [g]. And thus the proper Office and Duty of a Magiſtrate, (or, as *Cicero* [h] ſtiles it, the *Vis Magiſtratus*) is to command thoſe things which are

[d] D. 2. 1. 3.
[e] Cap. 13. v. 1.
[f] Ariſt. Polit.
[g] V. 4.
[h] Lib. 3. de Legib.

are right, profitable, and honeſt, in conjunction with the Laws, and to animadvert on bold Offenders. This Power and Authority the Magiſtrate has from God himſelf, as St. *Paul* aſſures us in the aforeſaid Epiſtle [i], tho' the Bounds and Limits thereof are preſcribed by the Laws of Man, as well as by the eternal Decrees of God: For it was God who firſt eſtabliſhed civil Magiſtracy among Men, and would have the Authority thereof to be inviolable; and he puniſhes ſuch as oppoſe themſelves thereunto, whilſt it is duly executed, as the Scripture, as well as profane Hiſtory, informs us, in reſpect to factious and ſeditious Men.

[i] Cap. 13. v. 1.

Magiſtrates are diſtinguiſhed ſeveral ways, according to the variety of Circumſtances. For *firſt*, in reſpect of Time, there are ſome Magiſtrates that are ſaid to be *perpetual*, as having their Adminiſtration granted them for the Term of their Lives: And others, that are ſtiled *temporary* Magiſtrates, as being appointed only for ſome certain ſpace of Time; and ſuch were the *Roman* Conſuls, Tribunes, *&c.* And among this laſt kind of Magiſtrates, there are ſome of long continuance in their Office, being choſen for two, three, or more Years; and ſome whoſe Office is of a ſhorter Period or Duration, as for a Month, half a Year, a Year, *&c.* And hereunto may be alſo referr'd this diſtinction, *viz.* that there are ſome Magiſtrates, that are only once choſen, and no more; and others that are often elected to the ſame Office, but yet by Intervals of Time. *Secondly*, in reſpect of Place, ſome are ſtiled *Municipal*, and others are called *Provincial* Magiſtrates: ſome are Magiſtrates in the City; and others in the Suburbs only. *Thirdly*, in reſpect of Perſons, ſome are Magiſtrates of the higheſt Rank of Nobility, as in an Ariſtocracy; and others that are of the richeſt of the Nobility, as in an Oligarchy; and others that are termed Plebeian Magiſtrates, as in a Democracy or Commonwealth, properly ſo called. In reſpect of their Election, they are diſtinguiſhed three ſeveral ways: For they are either choſen out of all the Orders of Citizens or Members of a State, or elſe out of ſome particular Order. *Secondly*, they are either choſen by all the Citizens *collectively* met together in a general Aſſembly of the People, or elſe *diſtributively*, as they are divided into Tribes, Wards, and the like.

In the Choice of the Sovereign, or any other Magiſtrate, three things are to be conſidered. *Firſt*, His Love to that Form of Government which is to be committed to his Charge: For hereby all the Toils and Labours which he ought to undergo for the ſake of the State, will ſit the lighter on his Shoulders. The ſecond thing to be regarded is the Abilities of the Perſon that is to govern, and his Skill in the Adminiſtration of publick Affairs. And the third thing to be enquired into, is the Virtue and Juſtice of the Perſon to be choſen. And if all of theſe three things do not concur in one and the ſame Perſon, we ought then to have our chief regard to that Qualification, which is moſt neceſſary in the Office or Magiſtracy to be intruſted to him. As for example, in the General of an Army, or a warlike Commander, the chief thing requir'd is military Science; in a Judge, Juſtice; in a Senator, Prudence; and in a Lord High-Treaſurer or *Quæſtor*, Honeſty and Fidelity: and ſo of others.

In the Choice of Magiſtrates, great care ought to be taken, that the ſame be not made venal, or expoſed to Sale; eſpecially in regard to the Choice of ſuch as have the power of Juriſdiction, and ſit in Courts of Judicature, becauſe ſuch a Practice is the Riſe and Fountain of all Iniquity. For the Deſire of Honour, which is a wild kind of Ambition, will induce and find many Purchaſers that are entirely unfit for ſuch Employments in the State [k], and only ſeek after the ſame for the ſake of aggrandizing themſelves, by the Oppreſſion of their Fellow-Citizens. For which reaſon, *Auguſtus Cæſar* made an Edict in purſuance of the ancient Laws againſt ſollicting for Offices, ordaining, That whoever ſollicited any Office of Magiſtracy

[k] Nov. 8.

ſtracy by the means of Preſents or Largeſſes to the People, ſhould be rendred incapable of any Office for five Years afterwards. See *Dionyſius Halicarnaſſæus*[l]. Magiſtrates, who have the Adminiſtration of civil Affairs committed to them, ought to be Men of clean Hands, not given to plunder the People, but contented with their ordinary Salaries. They ought not to ſhew greater Clemency and Humanity than the Law enjoins, (for that would ſavour of an evil Popularity) but they ought to obſerve the Laws, and to give Judgment in purſuance thereof[m]. But a Magiſtrate ought to ſhew himſelf affable and eaſy of Acceſs, whenever he is apply'd unto for Buſineſs; and always grave and ſober in giving an Anſwer unto all Demands[n]. He ought likewiſe to command ſuch Things as are honeſt and decent, that Subjects may pay a more ready Obedience unto his Decrees and Orders: And as it is the Buſineſs of a Magiſtrate rightly to govern; ſo, on the other hand, it is the Duty of Subjects to yield an humble Obedience unto all his lawful Commands. The Affronts offer'd to Magiſtrates are reputed to be done to the Prince himſelf: For it is his Authority which they reſiſt, and not the Perſon of him who exerciſes it, as *Tacitus* obſerves in his Annals[o]. Magiſtrates are ſaid to be offended by Contumacy, Calumny, reproachful Cavils among the Litigants, and their Council, and if their Juriſdiction be invaded: For it is lawful for every one to defend his own Juriſdiction. And here it is to be noted, that a ſlight Diſobedience ought not to be puniſh'd in a grievous manner: nor ought any one to be taken *pro confeſſo* on the ſcore of a light Act of Diſobedience, nor be therefore puniſhed in the Loſs of his whole Cauſe. Magiſtracy, as I have ſaid before, is by the Approbation or Appointment of God himſelf, without which no City, State, or Kingdom can long ſubſiſt, but Anarchy and Confuſion will enſue: For a State or Kingdom can no more be ſafe without a Magiſtrate, than a Ship without a Pilot. *Ulpian* ſays[p], that it is the Duty of a Magiſtrate to take care of Women, Pupils, and other helpleſs Perſons, tho' no one makes Application to him in their behalf.

[l] Lib. 54.
[m] Nov. 82.
[n] D.1.18.19.
[o] Lib.1.c.38.
[p] D.1.16.9.4.

A Magiſtrate in the common and large Acceptation of the Word, according to *Ulpian*, denotes every one that is veſted with civil Power in the Government of a State. And in this Senſe the *Roman* Magiſtrates were heretofore ſuch as were ſtiled the Dictators, Conſuls, Cenſors, Ædiles, Tribunes of the People, Quæſtors, and the like: which were reckon'd among the ſuperior Magiſtrates. But, in the proper Senſe of the Word, he is ſaid to be a Magiſtrate, who has the Right of judging, commanding, and of being conſulted. The chief and peculiar Note of a Magiſtrate is to have the Power of commanding: For a Magiſtrate is by this diſtinction diſcerned from all other Prefects and Commiſſioners, who have no Juriſdiction. And as there are many and various kinds of Affairs to be adminiſtred in a State, eſpecially in ſuch as are of a large extent, there are, therefore, requir'd ſeveral Prefects for the Government and Adminiſtration of ſuch matters: All which Perſons may (improperly) be comprized under the Appellation of *Magiſtrates*. There are ſome Perſons that have their proper Functions and Commiſſions for the Management of publick Affairs, without any Power and Authority of commanding: But Magiſtrates have their publick Functions joined with a commanding Power.

Heretofore the ſuperior Magiſtrates among the *Romans*, ſuch as the Conſul, *Pretorian*-Prefect, Prætor, and other ſuch like Magiſtrates, could not ſue or be ſued in any Court of Law, if they were veſted with Juriſdiction, and had a coercive and punitive Power during the time of their Office: But at the end of their Office they might[q]. Wherefore, leſt Force ſhould prevail in civil Matters (for this Exemption only extended to civil Cauſes) it was for good reaſons ordained, That they ſhould make no Contracts with Perſons ſubject to their Juriſdiction, and that Judges ſhould neither purchaſe

[q] D.5.1.48.

chaſe real or perſonal Eſtates, or build Houſes, *&c.* unleſs it were with the ſpecial Decree of the Emperor. But yet ſuch Magiſtrates, if they committed any Crime in their Office, might be convened before the Determination of their Magiſtracy. And, moreover, it was ordained, That they ought to continue fifty Days in the Cities, where they preſided as Judges or Magiſtrates, or in certain Places aſſigned them for that purpoſe, after they had quitted the Adminiſtration of their Office, to the end that all Perſons might have a free Power and Liberty of preferring their Complaints againſt them, for any Theſts or Crimes by them done during the execution of their Office; and that they might anſwer the Suits of all ſuch Perſons as were willing to impeach them, according to the Methods which the Laws require. But a Magiſtrate may, according to *Bartolus* [r], be accuſed or impeached during his Office, when ſuch Accuſation or Impeachment would otherwiſe, through Limitation of Time, be barred.

[r] In, l. 24. D. 48. 5.

The inferior extraordinary Magiſtrates among the *Romans* (for I ſhall ſpeak of the ſuperior Magiſtrates hereafter, under particular Titles by themſelves) were the *Præfectus Annonæ*, the *Præfectus Vigilum*, the *Duumviri Navales*, &c. The *Præfectus Annonæ*, or Surveyor of Proviſions, had the Care of all Proviſions, eſpecially in Time of Dearth or Famine. And, among other things, he was to go into Bakers Shops to weigh their Bread, and to examine the Goodneſs thereof. And he had criminal Cognizance of all ſuch Matters as related unto Proviſions. The *Præfectus Vigilum* was the Overſeer or Surveyor of the Night-watch, ſomething like unto our Conſtables in *London*. Theſe laſt Officers were, in extraordinary Caſes, conſtituted according to the Exigency of the Time, and other Occaſions. They could not, by their Authority, take Cognizance of capital Cauſes in the City of *Rome*, nor determine any thing about them; but if any thing happened of this kind, they were to make a Report thereof to the Sovereign Judge [t], *viz.* to the Governor of the City. Theſe Officers were to be provided with Hooks and other proper Inſtruments for the extinguiſhing of Fire, and to admoniſh all Perſons to take care thereof, leſt through their Negligence a Fire ſhould break out. And to extinguiſh the ſame, every Houſholder was to keep Water in their Garrets or Upper-Rooms. They were created, becauſe it was not ſo decent or ſuitable to the Character of the ſuperior Magiſtrates to be abroad in the Night-time [u]. The next Officers I ſhall mention here were *Duumviri Navales*, who were conſtituted for the ſake of Repairing and Equipping out their Navy; and were ſuch as preſided over the Sea-Coaſts. Out of the thirty-five Tribes were elected the *Centumvirs* to judge in private Cauſes: which Perſons, though they conſiſted of one hundred and five in number, were yet ſtiled the *Centumviri*, from the roundneſs of their number, and for the more commodious way of judging. Theſe had a Spear erected to them, that they might know the Time of ſpeaking: The Remains of which Spear are to be ſeen even at this day in the Courts of Judicature at *Rome*. For the Judge, whom the Vulgar call *Sculteto*, is wont to aſſert his judicial Authority by a ſolemn Staff carry'd in the hands of the Beadle, or Sheriff, as ſtiled with us, as a Badge of his Office, in Imitation of a little Spear. The Emperors reſerving the Provinces unto themſelves, were wont to ſend Preſidents thereinto, after the likeneſs of Proconſuls, who governed thoſe Provinces in their Name [x]. And, among thoſe, who governed in *Egypt*, was the *Præfectus Auguſtalis*, peculiarly ſo called. But as theſe, and many other *Roman* Magiſtrates, are now at an end, I will ſay no more of them in this place: only thus much I thought fit to mention, for the Illuſtration of the following Work. Though municipal, and other inferior Magiſtrates come under the Name of *Magiſtrates*, *cæteris paribus*; yet, for the moſt part, only thoſe Perſons were included under

[t] C. 1. 43. 1.

[u] D. 1. 2. 31.

[x] D. 1. 17. 1.

the Name of *Magiſtrates*, who were in the higheſt Power; as the Conſuls, Prætors, *&c.*

In ſome Cities in the *Roman* Empire there was no Magiſtrate beſides the
[u] C. 8. 5. 30. Defenſors [u]: But in moſt Towns, there were Perſons ſtiled municipal Magiſtrates, *Decuriones* or Burgomaſters, *&c.* The chief of theſe were called the *Duumviri*, and like unto the two *Roman* Conſuls: Becauſe as the *Roman* Senate conſiſted of two Conſuls, and many Senators; ſo after that example, a municipal Magiſtracy conſiſted of the *Duumviri*, and many
[x] Nov. 38. Aldermen or Burgomaſters, ſtiled *Curiales* [x]. The *Duumvirs* were taken out of the *Decurio's*, or Order of Burgomaſters, as the *Defenſors* were out of the Commons: But the Emperor *Leo* would have the Creation of all
[w] Nov. 46. & 47. Magiſtrates to depend on the Will of the Prince [w]. Yet it was neceſſary, that they ſhould be named three Months before they were created, that if any juſt Complaint ſhould be lodged againſt them, they might be diſmiſſed
[z] C. 1. 56. 1. from their Office, and another ſubſtituted in their room [z]. If an Election be rightly made, and the ſame be confirmed, they cannot wave the Office impoſed on them: And they performed the Parts of their Province in thoſe Matters which were of ſimple Juriſdiction; but they had not the *Imperium Merum*, or the Power of the Sword. Wherefore, they had only ordinary Juriſdiction in Cauſes of leſſer Importance, and not in Cauſes of greater
[y] D. 50. 1. 28. weight, unleſs it were by Conſent of Parties [y]. They might execute any
[z] D. 9. 2. 29. Sentence, and order the taking of Bail [z]; and they might inflict moderate
[a] D. 2. 1. 12. Correction on Servants, but not on Freemen [a]. They might impriſon Perſons charged with the greater Crimes, and give notice thereof to the Preſi-
[b] Nov. 15. dent of the Province [b]. And laſtly, they had the Power of aſſigning Tutors or Curators unto Pupils and Adults, if their Eſtates did not exceed five
[c] C. 1. 4. 30. hundred *Aurei* or Crowns [c]. They were to be aſſiſted in their Juriſdiction by the Aid of the ſuperior Judges: For if they commanded Pledges to be taken on the account of a Sentence demanded to execution, and the Defendant reſiſted the Apparitors, they had not power of fining him, but
[d] D. 2. 3. l. un. muſt implore the Aid of the ſuperior Judge [d], as at this Day inferior Judges do in the Exerciſe of their Juriſdiction where Perſons are diſobedient. The ſuperior Magiſtrates might puniſh diſobedient Perſons, in virtue of their Juriſdictions, either with the greater or leſſer Puniſhments, according to the Quality of the Fact: But the inferior Magiſtrates, who were ſtiled the *Duumvirs*, could not do this, as being excepted out of this Law. But our *municipal* Magiſtrates, who are conſtituted either for a time, or *in perpetuum*, by the Authority of the Prince, have a larger Power: For they not only take Cognizance of civil, but alſo of criminal Cauſes, and determine the ſame. They aſſign Guardians, bring Actions at Law, have the care of the Watch, and of Proviſions, and of all Things which conduce to the Peace and Welfare of their Fellow-Citizens.

The *Defenſors* of Cities were of a two-fold kind. For there were ſome, who did in the Name of the City, take care of its Law-Suits, and manage them and other matters: And theſe are called *Syndicks* and Actors, as I ſhall hereafter obſerve in ſpeaking of Proctors. There were, and are, other *Defenſors* of Cities endued with Power and Magiſtracy, who are alſo ſtiled *Defenſors of Places*, if there are no Towns or Cities, or if they have not
[e] C. 1. 56. 3. their Denomination from them [e]. And ſome are ſtiled *Provincial* Defenſors, to whom a larger Truſt is given; and to whom many Things and Ci-
[f] C. 1. 56. 4. ties are committed for their Defence [f]. In a City there may be one *Defenſor* alone, whom we call the *Mayor*; and other *municipal* Magiſtrates joined
[g] C. 8. 54. 30. with him [g], with us termed *Aldermen*. So that from hence it appears, that they may either have a ſeparate Juriſdiction and Power, or elſe a concurrent one. They are called *Defenſors* from the care of thoſe Things over which they are placed, in order to defend them from all Injuſtice. Now theſe

Defensors ought to be chosen out of the more noble and best Inhabitants of the Cities, as out of the Persons that have been *Duumvirs*, &c. Nor is it lawful for Citizens to repudiate this Office imposed on them [h]. The *Defensors* are like unto the Tribunes of the People, which were heretofore in the City of *Rome:* And, therefore, they are often called the Defenders of the Commonalty, Patrons, Parents of Men of low Fortunes; and they had a Power of defending the meaner sort, if they were oppress'd by the great ones [i]. So that they seem to bear a Resemblance of Magistracy, and do represent the Person of the President in his Absence [k]. Wherefore, as they are to be chosen out of the Chiefs of the City: so they ought to be Men of Probity, and to be endued with orthodox Principles in respect to Religion [l]: But they could not be chosen out of the Order of the *Decurio's*, nor out of the Body of the *Cohortales*. When they were elected, they were bound even against their Will to accept of the Office, under a pain of five Pounds Forfeiture in Gold, and could not excuse themselves by any exception of Privilege, Warfare, or high Dignity [m]. But before they exercised the Function of their Office, they ought to be confirm'd either by the *Prætorian-Prefect* [n], or by the *Quæstor* [o]: An Oath being given them to do all Things according to Law and Justice [p]. This Office of the *Defensors* heretofore lasted for five Years [q]: But by a *Novel* of *Justinian* it was afterwards reduced to two Years [r].

[h] C. 1. 56. 10.
[i] Nov. 15. pr.
[k] Nov. 15. c. 2. pr.
[l] C. 1. 55. 8.
[m] Nov. 15. c. 1. & 6. fin.
[n] C. 1. 55. 8.
[o] Nov. 7. 5.
[p] C. 1. 55. 4.
[q] Nov. 15. c. 1. fin.
[r] D. 50. 16. 29. 5.

A *Decurio*, who was another kind of Magistrate or Order in the *Roman* State, was so called from the word *Decem*. For when the *Romans* began to increase and grow numerous, some were sent abroad to some other Parts, afterwards called *Colonies*, and a Decury of ten Men were chosen for their Council or Senate. And from hence, as some think, were the Council or Senators of Cities called *Decuriones* or Burgomasters. But, I rather think, the Council or Senators of Cities were so called from the Decuries of the *Roman* Senate; the Senate thus dividing themselves after the Death of *Romulus:* And to these Decuries or Committees the Government of the State was entrusted in particular Matters; and each Decury was to have the Rule for five Days, and then be succeeded by another such Committee. And this kind of Magistracy was stiled *Magistratus Quinqueduanus*, according to *Rosinus* in his Antiquities. Again, some will have a *Decurio* to differ from a *Curialis*; because (say they) a *Curialis* is a *Genus*, and a *Decurio* is a *Species:* But, I think with *Pithou* [s], that there is no difference between them, a *Curialis* being an Alderman or Chief of the Ward, and so is a *Decurio*. A *Decurio* has an Honour, as well as an *Onus* or Incumbrance attending his Office: an Honour, because he is not to be put to the Rack or Question at the Determination of his Office [t]. In this Office, a Person that has Children, is prefer'd unto a Person that has none; because 'tis presumed that he will be more careful of the Good of the City: But the Laws forbid illiterate Persons the execution of this Office [u]. Nor can any Persons be elected hereunto, that suffer'd Relegation or Banishment, or have been removed from their Order with Ignominy [w], or Persons guilty of capital Crimes, or such as bear any other Office of Magistracy [x], or such as have born this Office some small time before [y]. They were wont to be chosen out of all sorts of Men almost, and might be compelled to bear the Office: And even Bastards or spurious Persons, for want of other Men, were admitted [z]. But where there was a Plenty of others, the rich and better sort were elected by the President [a]; and they were to be advanced *gradatim* [b]. But Plebeians, and old Men borne down with Age, were exempted, and so were Minors. They transmitted their Privileges to their Children [c]. Their Office and Business was to demand Tributes and Taxes [d], to receive and keep the Money of the Towns or Cities [e], to take care of Provisions [f], to treat of all publick Affairs relating to the Towns or Cities over which they

[s] In l. 3. l. 5. 5.
[t] C. 9. 41. 17.
[u] C. 10. 31. 6.
[w] D. 50. 2. 2. 3. & 13.
[x] D. 50. 2. 17. 3.
[y] D. 50. 1. 18.
[z] D. 50. 2. 6.
[a] D. 50. 2. 6.
[b] D. 50. 2. 11. & 13.
[c] D. 50. 2. 2. 5.
[d] D. 50. 2. 17. 7.
[e] D. 50. 2. 2. 1.
[f] D. 50. 2. 8.

[d] D.50.1.28. Nov. 15. they preſide; and they might exerciſe Juriſdiction after a certain manner[d]. Theſe *Decurio's* were ſuch as preſided in publick Council in Towns and [f] C.9.41.33. Cities, and were among the *Romans* ſtiled *municipal* Magiſtrates[f].

Heretofore among the *Romans*, Magiſtrates were wont to elect and chuſe [g] C.11.33.1. their own Succeſſors, as may be ſeen from a Law in the *Code*[g]; but then this was to be at their own Peril: But as at this day no one chuſes his own Succeſſor; ſo thoſe Perſons who name and chuſe Magiſtrates through the Neceſſity of their Office, are not accountable for the Male-Adminiſtration of Magiſtrates. The *Romans* did not allow of perpetual Magiſtrates in the Purity of the Commonwealth, but new Magiſtrates were choſen every two or three Years, or elſe the old ones were re-elected: And it was this that preſerved the Liberty of that State for many Years. But though a Magiſtrate may have the power now of naming his own Succeſſor, yet it muſt be the City that chuſes him. The Magiſtrate of a City is only ſaid to be a Member, and not the City itſelf: And, therefore, though it be the Buſineſs of the Magiſtrate to propoſe Matters in Council; yet he himſelf cannot conclude or enact any thing. By the *Roman* Law the civil Magiſtrate may, in ſome Caſes, puniſh the Thoughts of the Heart, if known, though they proceed not to Action. And by the ſame Law, if a Son was a Magiſtrate, the Magiſtrate was exempt from the Power of the Father, but not as a Son.

TIT. XXIII.

Of Emperors, Kings, Princes, *and the like*; *and of their Office and Duty both in Peace and War*, &c. *and of Allegiance due to them.*

THE word *Imperator*, or Emperor, was anciently a Name or Appellation, by which the Generals and chief Commanders were wont to be called. For *Cicero* in his *Philippicks* writes, that the *Roman* Senate uſually gave this Stile or Title unto him, who had given the beſt Inſtance, or the moſt pregnant Proof of his Conduct and Valour in the Buſineſs of War, by the Diſcomfiture of foreign Enemies. And hence it is, that Generals and Leaders of Armies, by having the Command over military Forces, are by ancient Hiſtorians called *Imperatores*: And not only theſe, but alſo thoſe Perſons who had the Government and Adminiſtration of Provinces, were ſaluted with this Appellation and Title of Dignity. Afterwards the word *Imperator*, in a metaphorical Senſe, came to ſignify the ſacred Dignity of the *Roman* Prince or Emperor, veſted with ſovereign Power and Authority; and in this Senſe it is underſtood throughout all the Titles of *Juſtinian's* Inſtitutions. After the time of *Julius Cæſar*, the Emperors began to be called *Cæſars*. I do not here mean thoſe who had the actual Adminiſtration of the Government in their hands, but ſuch as were appointed by Deſignation to ſucceed the Emperor then on the Throne. And theſe Perſons that were then called *Cæſars* or *Viceroys*, are at this day ſtiled Kings of the *Romans*; and in *France* they are termed the *Dauphines* of *France*. But now we call him *Emperor*, who is advanced to the Monarchy of

Chriſtendom, or the *Roman* Empire, by the Suffrages and Conſent of nine of the principal Men in *Germany*, ſtiled the Electors of the *Roman-German* Empire. And thus the Election of the Emperor belongs to certain Princes of *Germany*, viz. to three Biſhops, and to ſix Lay-Princes: And tho' an Election thus made by the major part of theſe be valid and binding; yet the *Canoniſts* ſay, that it belongs to the Pope to examine, approve, anoint, conſecrate, and crown the Perſon choſen, if the Pope ſhall adjudge him a fit and proper Perſon, or elſe to reject him as unworthy, if he be a Tyrant, Heretick, Heathen, or a Perſecutor of the Church, or a ſacrilegious, or an excommunicated Perſon, *&c.* And if theſe Electors will not elect, the Pope is to ſupply the Choice: And, on a Parity of Voices among them, if they cannot determine the Election by a Majority, the Pope may gratify whom he pleaſes, by a Devolution to him. But though ſome of the *Canoniſts* will have the Confirmation of the Emperor's Election to be by the Pope; yet *Calderinus* ſeems a little more modeſt, ſaying, it ſhall be approved by the Pope: Becauſe that neither the *Canon*, nor any other Law proves, that the Emperor's Election ſhould be confirmed by the Pope.

We read, that the Emperor *Auguſtus* ſeemed pleaſed with the Title of *Prince of the Senate*; not that he deſired leſs ſovereign Power than his Uncle *Julius Cæſar* aimed at, but that he conceived this to be a more popular Appellation. But, according to the common Definition of a *Prince* now, under which Title we may alſo reckon that of a *King*, he is that Perſon who is the firſt and chiefeſt Perſon in the State, and ought to be the beſt too: For St. *Paul* calls the Prince *God's Miniſter upon Earth.* And *Seneca*, the Moraliſt, ſets the Gods as an example to Princes, ſaying [h], they ought to behave themſelves in the ſame manner to their Subjects, as they would have the Gods themſelves behave towards them. Wherefore, the proper Virtue of a Prince is Prudence, and there is no Perſon to whom Wiſdom is more ſuitable, than to him: The Ornaments of a Prince (ſays the Moraliſt) are Juſtice, Piety, Clemency, Religion, Wiſdom, and Courage. He ought to be free from all Vices; for the ſmalleſt Offences of a Prince ſeem great ones, as he ſits conſpicuous in the ſight of all Men:

[h] De Clem.

Tanto conſpectius in ſe
Crimen habet, quanto major qui peccat habetur.

If the Head be infected, it tranſmits Pain and Grief to all the other Members. The Vulgar prognoſtick the Ways and Lives of Princes by exterior Marks; and truly ſay, that they are unfit to govern others, who cannot govern themſelves. Thus a Prince ought to take care, that he be not the occaſion of Evil to his People; and as he is the Image of the divine Majeſty, he ought not to tyrannize over his Subjects, nor to be a Plague to his Neighbours. *Philo Judæus* obſerves, that learned Princes ought rather to remember themſelves to be Men than Princes, and not to deſpiſe any thing that is human. And if they would daily refreſh their Memories with this Doctrine, and let themſelves down from that high Pinacle of Power, to Things below, ſo as in ſome meaſure to equal themſelves with their Subjects, that the Diſparity of their Condition ſhould not give offence, they would retain the Affections of their People in a much better manner. For the Enſigns, Badges, and Powers of Princes, which carry a kind of daily Grandeur with them, do not take away the Nature of Man, *viz.* Humanity itſelf; but only ſerve to render Princes more free and intrepid in their Affairs. But there is not any one, or (at leaſt) very few, who have not fallen from that Dignity into a remarkable Inſolence or Folly. For what is more fooliſh or inſolent, if we would conſider Matters rightly, than to lord and domineer over others, and to invade our Neighbour's Property without a ſufficient Cauſe given? What juſt Cauſe had *Alexander* to ſignalize his Name (as

he did) throughout all the World, with ſuch infinite Slaughters as attended his Conqueſts? Was it not a boundleſs Ambition and Thirſt after Glory by wrong meaſures? What was a more fooliſh Wiſh than that of *Midas*, who had Aſs's Ears placed on him for his extravagant deſire of Gold? But this is enough to ſhew the Weakneſs of Princes, that are governed by irregular Paſſions, and, not by right Reaſon. For *Alexander* himſelf, whom one World could not contain, is only now become a Theme for Schoolboys Declamations.

A King or Prince in his own Kingdom acknowledges no Superior beſides the Law, which is the meaſure of the Subjects Obedience to him, and by which he ought to govern; but is *totum in toto*, and has a Plenitude of Power in many caſes, which we call *Prerogative*. And this is that ſpecial Power, Pre-eminence or Privilege, which the King has over and above other Perſons, and above the ordinary Courſe of the common Law, in right of his Crown. For the Laws of *Edward the Confeſſor* ſay [i], that the King may *lege dignitatis ſuæ*, pardon him (if he pleaſes) that has even deſerved death. The *Civilians* uſe this word *Prerogative* in the ſame Senſe: But among the *Feudiſts* it is termed *Jus Regalium* and *Jus Regaliorum*. And as the *Feudiſts*, *ſub Jure Regalium*; ſo do our common Lawyers, *ſub Prerogativâ Regis*, comprize all that abſolute height of Power, which the *Civilians* call *Majeſtatem*, *Poteſtatem*, or *Jus imperii*, ſubject to God alone. The *Feudiſts* divide the *Regalia* into two ſorts, *viz.* the greater and leſſer: For to uſe their own Words, *quædam Regalia ad Dignitatem*, Prærogativam *& imperii Præ-eminentiam ſpectant*; *quædam verò ad utilitatem & commodum pecuniarium immediatè attinent*, *& hæc propriè fiſcalia ſunt & ad jus Fiſci pertinent*. See *Peregrinus de Jure Fiſci* [k]. By which it appears, that the Statute touching the King's *Prerogative*, made in the ſeventeenth of *Edward* the Second, contains not the King's whole *Prerogative*, but only ſo much thereof as concerns the Profit of his Coffers, growing by virtue of his regal Power and Crown: For it is more than manifeſt, that his *Prerogative* extends much farther, yea even in the matters of his Profit, which that Statute eſpecially conſiſts of. For the King has many Rights of Majeſty peculiar to himſelf, which the Learned in the Law term *Sacra Sacrorum*, and *Individua imperii*, becauſe they cannot be ſever'd from the royal Dignity; and theſe are many and various. And if the Reader would be ſatisfy'd herein, he may read *Stamford* of Prerogative, Statute 17 *Edward* II. *Plowden* in the Caſe of Fines. The learned *Spelman* calls it *Lex Regiæ dignitatis*.

[i] Cap. 18.

[k] Lib. 1. cap. n. 9.

A King may in his Dominions create and degrade Dukes, Marqueſſes, *&c.* and make Contracts with foreign Princes in the Name of all his Subjects. He may make a valid Grant and Alienation of his own Patrimony, provided he does not in any great meaſure injure his royal Dignity, and that of his Succeſſors: But he cannot grant and alienate the Rights of the Kingdom, as his Caſtles and Juriſdictions. Kings in private Caſes ſubmit their Concerns to be adjudged and determined by the Judges, which they themſelves make; for their private Acts are ſubject to the Law.

That which the *Civilians* affirm, *viz.* that the Covenants which a King enters into with his Subjects, do oblige by the Law of Nature only, and not by the Civil Law, is ſomewhat obſcure. For that is ſometimes corruptly ſaid by the Law-givers, *naturally* to oblige, which is only agreeable to the Rules of Honeſty, but yet cannot be ſaid to be due: As for the Executor to pay the entire Legacies without any Defalcation, though he has not the fourth part of the Teſtator's Eſtate left him; or to pay a juſt Debt, though the Creditor be made uncapable by the Law of receiving it: each of which cannot be recovered by any Action at Law. Again, ſometimes that is more properly ſaid *naturally* to oblige, which is indeed truly obligatory,

gatory, whether it be ſuch as transfers a Right unto another, as in Contracts; or ſuch as transfers none, as in a full and firm *Pollicitation*. *Maimonides* the *Jew* very aptly diſtinguiſhes between theſe three, *viz. Firſt*, whatever comes more than is due, falls under the Notion of *Mercy*, which is but the Overflowing of a good Nature, ſuch as good Works done meerly out of Bounty and Munificence. *Secondly*, to perform what we are ſtrictly bound to do, which the *Hebrews* call *Judgment*: But to do that which in Honeſty and Conſcience only we ought to do, this they call *Righteouſneſs* or *Equity*. Moreover, a Man may be ſaid to be *civilly* bound by his own Act, either in this Senſe, that the Obligation ſprings not from the meer Right of Nature, but from a civil Right, or from both; or in ſuch a Senſe as that an Action at the Civil Law may lie againſt him. We, therefore, conclude, that from the Covenants and Promiſes which a King makes with his People, there may ariſe ſuch a true and proper Obligation, as may confer a Right unto them: For ſuch is the Nature both of Promiſes and Contracts, even between God and Men. If the Acts of a King be ſuch as may be done by any other Man, the Civil Laws ſhall bind him: But if they are ſuch as are done by him as a King, the Civil Laws reach him not; which Difference was not ſufficiently obſerved by *Vaſquez*. Yet an Action may ariſe from either of theſe Acts, ſo far forth as to evidence the Right of the Creditor; but there can be no Enforcement by reaſon of the Quality or Condition of the adverſe Party. For that Subjects ſhould compel him, whoſe Subjects they are, is not lawful, which Equals may do againſt Equals by the Right of Nature, and Superiors againſt Inferiors by the Civil Laws. But touching the Obligation of Princes to obſerve their Contracts with Subjects, *Grotius* in his Treatiſe *de Jure Belli*[1], &c. is full; to which I refer the Reader.

[1] Lib. 2. c. 14.

Princes are ſometimes ſaid to be Tyrants, and that two ſeveral ways: *Firſt*, in point of Government or Adminiſtration alone, *viz.* when they unjuſtly burthen their Subjects by ſevere and heavy Taxes, and by making it their Buſineſs to ſow Diſcords and Diſſenſions among them, to the end they may the better deſpoil them of their Goods, Eſtates, and vexing them by all poſſible means, that they may enrich themſelves thereby. *Secondly*, a Perſon may be ſaid to be a Tyrant by uſurping and invading another's Kingdom; as when by Arms, and other violent means, he unjuſtly ſeizes upon another's Dominions, and diſpoſſeſſes the rightful Owner. But, notwithſtanding ſuch tyrannical Adminiſtration, it is not lawful for a private Man to kill a lawful Prince or Sovereign, that is, a Tyrant in point of Government and Adminiſtration only, becauſe ſuch a Perſon is a true Sovereign, though a bad Paſtor of his People. Yea, he cannot be thus ſlain, though he ſhould unjuſtly deprive us of our Eſtates, theſe being not of ſo great moment as to render it lawful to kill a Sovereign in defence thereof, though 'tis lawful to kill a private Man in defence of our Goods and Eſtates. But 'tis lawful for a private Man to kill a Tyrant, that does, without Title, uſurp and invade another Prince's Dominions, if theſe Conditions intervene, *viz. Firſt*, when recourſe cannot be had to the lawful Power: For if recourſe can he had thereunto, 'tis unlawful to kill ſuch a Tyrant, ſince we may obviate this Evil by other means than death. *Secondly*, when it appears, that he is a Tyrant *Titulo imperii*. *Thirdly*, when it appears to be the Will, or (at leaſt) the preſumptive Will of the State, which deſires his death. And the reaſon why it is lawful to kill him on a Concurrence of theſe Conditions, is, becauſe he is not then ſaid to be a King or Sovereign Prince, but an Enemy to the State, it being lawful for every one to repel Force with Force when it is neceſſary. But ſuch a Tyrant, being an unjuſt Invader, conſtantly offers Force to the State which he invades; and, therefore, it is not only lawful for a Perſon, that is a Member of the State, to kill him, but alſo for

for any other Perſon that is no Member, having a Commiſſion from the State. For it is not only lawful to kill another in defence of one's Life, but even on the account of the Publick Weal, if Authority be given, and thus to divert the Oppreſſion of innocent Perſons. This is warranted not only by the *Civil* Law, but by the Law of Nature and Nations. I will not here take upon me to determine how far the collective or repreſentative Body of a Nation may proceed againſt a Tyrant in point of Adminiſtration, but ſurely they may depoſe him; and the Hand that writes this, has always been ready to aſſiſt in reſcuing its Country from ſuch Monſters in Power, and to reſtore People willing to live dutifully with a good Prince.

All Things belong to the Prince in reſpect to his Juriſdiction and Protection of them, but not in reſpect of their Property. For tho' a Prince may by the Plenitude of his Power ſell the Goods of a private Man for the good of his Country, according to the *Roman* Law, becauſe the Emperors were abſolute Princes; yet he cannot take away the Property without a ſufficient Cauſe. A Prince may compel his Subjects to return to the Place of their Birth, and inhabit there: Becauſe though they may conſtitute a Dwelling unto themſelves in another Place; yet if they have Goods and Eſtates in his Dominions, they cannot renounce the Right of their Allegiance according to the *Civil* Law. And this the Prince may compel his Subjects to do, under pain of Confiſcation of their Goods and Eſtates in the Place where they have Goods and Eſtates lying in his Dominions. A Prince that takes any one under his Protection, is not obliged to defend him, unleſs it be when he is unjuſtly aggrieved. But a Prince may, for the ſake of making Peace, remit Injuries and Damages done to his own Subjects. When confederated Kings or Princes are mutually bound to aſſiſt each other, they ought not to yield Aid and Aſſiſtance to a Perſon that makes an unjuſt War. Though a Prince may, by his Charter or Reſcript of Pardon, remit a pecuniary Puniſhment or Fine that is to be apply'd to the Exchequer; yet he cannot remit the Penalty which is given unto the Party. If a Prince grants or confirms any thing, he is always preſumed to do it, with a *Salvo* to another's Right.

The two principal Arts belonging to Kings, are, *firſt*, a thorough Acquaintance in the Laws of the Country they are to govern: And, *ſecondly*, a Knowledge in the Art of War. And this, that they may govern and defend the Commonwealth as they ought to do both in time of Peace and War. Arms and Laws ſtand in need of each other's Aſſiſtance. A Prince is chiefly ſet over his People to judge and govern them by good and wholeſome Laws, and his Breaſt ought to be the Storehouſe and Receiver of all Laws, and to be filled with Philoſophy. *Plato* ſaid, that Commonwealths might then be ſaid to be happy, when either the Kings were Philoſophers, or when Philoſophers became Kings. But the Laws are their chief Concern. For as a Mariner ought not to be ignorant of the Rules of Navigation, if he be ſet over a Ship for the Steerage thereof: ſo neither ought a King to be ignorant of the Laws by which he is to govern. But as to Arms, he often governs by his Generals and chief Commanders in the Army, who ought to be expert in the whole Buſineſs: Yet the Prince himſelf, whether he goes into the Wars in Perſon, or not, ought ſo far to be acquainted with military Affairs, that he may know whether the Soldiery do their Duty.

Kings are ſuch either by Deſcent or Election; and among the ſeveral ways of chuſing a King, I ſometimes find, that the Ancients uſed that of ballotting or drawing Lots, as *Marſilius* obſerves in his Book *de Bello Pelaſgico:* where treating of *Atius* King of *Mæonia*, he ſays, that whereas a Kingdom would not admit of two Kings; and having two Sons, *viz. Lydus* and *Tyrrhenus*, he made *Lydus* his Succeſſor, by caſting Lots, and

order'd *Tyrrhenus* to go abroad with a greater part of the People, to ſeek out new Settlements and Habitations for themſelves, becauſe the Sterility of the Soil would not ſuffer a great number of People to live there. And this new way of chuſing a King by Lot was practis'd among the *Septemviri*, as we may read in *Juſtin* and *Herodotus*, when the Conteſt was among them, who ſhould be King. For they came to this Agreement, *viz.* That mounting their Horſes about Sun-riſing, they ſhould ride into the Field about the Suburbs, and he ſhould obtain *Cambyſes*'s Kingdom, whoſe Horſe neighed firſt. And the Lot fell on *Darius* the Son of *Hydaſpes*, by the Art of *Oebaris* his Groom, or the Rider of his Horſe, who the Night before the Day of Election, brought a Mare into the Place of Election, and there tied her, and then brought *Darius*'s Horſe, and led him about the Place where the Mare was; and this cauſed *Darius*'s Horſe to neigh. It is not to be doubted, but the beſt and moſt natural way of coming at Kingly Power, is by the Election of the People, if Factions in the State, and other corrupt Methods of chuſing, could be avoided; becauſe the People do by the very Act of Choice, approve of the Perſon elected: whereas in Governments that happen by Deſcent, Birth alone gives a Right to the Perſon, whether he be a good or a bad Prince, and the People muſt ſubmit to it.

Having thus far treated of the Power and Obligations of a good King or Prince towards his People, and others; I ſhall next ſpeak of the Duty and Obedience of Subjects towards their Prince, which *Iſocrates*, under the Perſon of *Nicocles*, finely deſcribes, by giving Orders unto his Courtiers, great Men, and the reſt of his People. This Duty depends on the Allegiance or Fidelity of Subjects towards their Prince, which renders Majeſty ſafe, and the higheſt Breach thereof makes it Treaſon. Now *Allegiance*, in the proper Senſe of the Word, is that Submiſſion which a Liege-man owes unto his Lord; and this is the common Notion of the Term among the *Feudiſts*, who ſometimes ſtile it Fealty or Fidelity. When it is due from a Subject unto his Prince, it is often with them called *major Fidelitas*, to diſtinguiſh it from that Fealty which is to be performed by every Feudatory at the time of his Inveſtiture or Inſtitution, unto his Lord, whether the Fee be an *ignoble* or a *noble* Fee. For it is the Eſſence of this Bond or Contract between Lord and Tenant, that the Tenant by Fealty ſhould pay this Fealty unto his Lord in the higheſt manner, ſaving the Allegiance which is always due unto his Prince as Lord-Paramount. This of the Subject to the Prince the grand Cuſtumier of *Normandy* calls a *general* Fealty or Allegiance, and was in *England*, by an Oath in the Sheriff's Torns, and in the Leets, demanded and performed by all Perſons within the Precinct of the County or Leet, being twelve Years of Age compleat, otherwiſe they had not a Title to remain in the poſſeſſion of their Lands[l]. But anciently this Oath of Allegiance was not impoſed on Perſons before they were fourteen or fifteen Years of Age. See *Britton*[m], and *Bracton*[n], who in expreſs Terms gives us the Form of the Oath, though *Britton* is more ſuccinct. That which the Law ſtiles *ſpecial*, is two-fold, *viz.* that which was taken by Freemen, and that which was taken by Villains. But I ſhall not here diſcourſe of *ſpecial* Fealty, having reſerved it for the ſecond Volume of this Work, under an Inſtitute of the *Feudal* Law.

[l] Flet. lib. 1. cap. 5.
[m] Cap. 12.
[n] Lib. 3. Tr. 2. c. 1.

My Lord *Coke* in *Calvin*'s Caſe[o] has conſidered Allegiance to the Prince in a general Diſcourſe, though not directly within the Concluſion of the Caſe, and therein firſt ſets down the general Nature of it, *viz.* that it is a mutual Bond between an *Engliſh* King and his People: and then he more particularly ſets forth the Nature of this Bond, in the ſeveral Duties of Obedience and Fealty[p], and alſo thoſe in their ſeveral Properties, *viz.* natural, abſolute, and due to the King *omni ſoli & ſemper*[q], in his natural and

[o] Rep. 7.
[p] Fol. 5. a.
[q] Fol. 7. & 12. a.

and not publick Capacity[r]. When he ſays, that this Bond is natural, he means that it is a Duty by Birth[f]. By abſolute, if I miſtake him not, he means that it is indefinite, and not circumſcribed by Law, but above Law, and before Law[s]; and that Laws were afterwards made to enforce the ſame by Penalties[t]: and therefore he concludes, that his Allegiance is immutable. Having thus ſtated *Coke*'s Doctrine as truly as I can, both for the Nature of Allegiance, and the Object thereof, *viz.* the King, and not the People, otherwiſe than in order to the Honour and Safety of the King's Perſon, conſider'd in his natural Capacity as a Man; I ſhall next examine the Grounds of this ſtrange Doctrine, as they are ſeverally ſet down by the Reporter, and therein lead the Reader no further than his own Conceſſions. And,

[r] Fol. 10. a.
[f] Fol. 7. a.
[s] Fol. 13. a.
[t] Et b.

Firſt, Whereas it is ſaid, that *Engliſh* Allegiance is natural, and grounded on the Birth of each Party, within the King's Dominions and Protection, it needs no debate, provided the ſame be taken *ſano ſenſu*, viz. for a qualified Allegiance barr'd of thoſe Sublimities of abſolute, indefinite, immutable, *&c.* For otherwiſe, if ſuch high Strains of Allegiance be due from every *Engliſhman* by Birth, then all the *Magna Charta*, or Laws touching the Liberties of the People, come too late to qualify the ſame, becauſe they cannot take away the Law of Nature[u]; and thus the Party once *Engliſh* born, muſt for ever remain abſolutely obliged to the King of *England*, though (perhaps) he lives not two Months under his Protection all his Lifetime afterwards. *Secondly*, the Allegiance of an *Engliſhman* to his King ariſes from that civil relation between the two Denominations of *King* and *Subject*; and therefore it is not a natural Bond which cannot be diſſolved. The firſt is true from the Reporter's own Conceſſions; *Protectio trahit Subjectionem*, and *Subjectio protectionem*[v]. And, therefore, though it be granted that Magiſtracy in general is from Nature, as he ſays[w], yet that is a weak Inference which he makes, *viz.* That *Engliſh* Allegiance is a Principle in Nature: unleſs we admit, that all Perſons upon Earth that ſubmit to *Engliſh* Allegiance do ſin againſt Nature. The difference then will ſtand thus, *viz.* Magiſtracy is founded in Nature, therefore Allegiance alſo. But *Engliſh* Magiſtracy is from the civil Conſtitution, therefore *Engliſh* Allegiance is in the like Nature.

[u] Fol. 14. a.
[v] Fol. 5. a. & 9. b.
[w] Fol. 13. a.

In the next place, *Coke* ſays, That Kings did *dare jura*, before any municipal Laws were made; and for an example, he mounts as high as the *Trojan* Age, according to the Teſtimony of *Virgil*: But, I believe, he did not rely on this, ſince every one knows that it is in the Scriptures, that there were municipal Laws given concerning the Office of a King, by *Moſes*, which were more ancient than thoſe of *Troy*, and long before *Virgil*'s Time, who neither tells us in what manner thoſe Laws were made, though the Kings gave them, nor (if all were according to the Reporter's Senſe) is the Teſtimony of a Poet (who ſometimes uſes his *Poetical Licence*) to be taken in *Terminis*. Then the Reporter vouches the Teſtimony of *Forteſcue*[x], which is *toto cœlo* oppoſite to the Point in hand, as any Pen can declare it. For he tells us of ſeveral ſorts of Kingdoms, ſome gotten by Conqueſt, as thoſe of *Nimrod*, *Belus*, &c. But he ſays, there is a Kingdom Politick, founded on the Aſſociation of Men by conſent of Law, making one Chief, who is made to defend the Laws, and the Bodies and Eſtates of his Subjects, and he cannot govern by any other Power; and of this Nature (ſays he) is the Kingdom of *England*[y]. *Secondly*, this Opinion of the Reporter is taken *ab inani*, viz. it is a vain thing (ſays he) to preſcribe Laws, unleſs People are bound to obey them by a preceding Allegiance: But this compar'd with the Words of *Forteſcue* before mentioned, falls of itſelf to the ground; and, therefore, I ſhall not further enlarge thereon.

[x] C. 12. & 13.
[y] Fol. 30. 31. & 32.

Thirdly,

Thirdly, To help the matter, *Coke* brings in the Conſent of the Law in ancient Times, by certain Caſes cited to that purpoſe. The firſt concerning the Allegiance of Children to Parents; which comes not up to this Caſe, becauſe it is an Allegiance of Nature, and this Allegiance here treated of is yet under a litigious Title; and (I ſuppoſe) will in the Concluſion be found to reſt only on a civil Conſtitution. Again, he ſays, that a Man attainted and out-law'd, is nevertheleſs within the King's Protection; for this (ſays he) is a Law of Nature *indelible* and *immutable*, and no Statute of Parliament can take this away [z]: And, therefore, he concludes, that as well the Allegiance of the Subject, as the Protection of him by the King, are both of them from the Law of Nature. An Opinion that ſpeaks much Mercy, but it ſeems ſtrange, if we conſider the Pen of the Writer. For if it be a Law of Nature, and immutable for the King to protect Perſons attainted, then no ſuch Perſon muſt ſuffer: For if he be under the King's Protection by the Law of Nature, it cannot be changed by any poſitive Law, as the Reporter ſays, nor can the King be ſo bound by any ſuch Statute, but that by a *non obſtante* he cannot ſet himſelf at liberty when he pleaſes: and then the Iſſue will be this, *viz.* the King has a natural Power to protect the Perſons of Law-breakers from the Power of the Law: Therefore, much more their Eſtates, and then farewell all Law, but this of the King's natural Protection. Theſe things are of a high Strain, if we conſider what the Reporter ſays elſewhere [a]. But to purſue this Inſtance, he ſays, that the King has power to protect an attainted Perſon, and if any one kills him without warrant, he is a Man-ſlayer; and yet this Perſon has loſt his legal Protection. This is true, but not to all Intents; for by the Sentence of the Law, his Life is bound up under the Law of that Sentence, *viz. He muſt not ſuffer in any other manner than the Sentence determines* [b], nor *before Warrant of Execution iſſues forth to that end.* And notwithſtanding the Sentence, the Law leaves him the liberty of purchaſing, or inheriting, though to the Uſe of the Crown: And, therefore, in ſome reſpects the Law protects his Perſon ſo long as he lives, and the King's natural Protection is in vain in ſuch caſes.

[z] Fol. 13. b. 14. a.

[a] 11 Rep. Fol. 88. 8 Rep. Fol. 20.

[b] 35 H. 6. 63.

Laſtly, Suppoſe the King has a power of *non obſtante*, if the ſame be allowed him in a limited way by the Law, it is no Argument to prove the King's natural Power, which is driven under natural Allegiance, much leſs if it cannot be made out, that the Law allows any ſuch Power of *non obſtante* to ſubſiſt; but by the Iniquity of the Times, permitted the ſame, only to avoid Contention, as it came into this Kingdom by way of Uſurpation. And thus having ended the Lord *Coke*'s Doctrine of natural Allegiance, as he has ſtated it, and given full Anſwers thereunto, I ſhall paſs on to conſider the ſecond Property of Allegiance, viz. *That it is abſolute* [c].

[c] Fol. 5. b. & 7. a.

Now the Word *abſolute* is a Term of vaſt extent, which rather ſerves to amaze the Minds of Men, than to enlighten them; and therefore *Coke* does not trouble himſelf, or the Reader, in clearing thereof, but leaves it rather to be believed than underſtood: nor ſhall I in the negative; for God himſelf can have no other Allegiance from a Man than abſolute Allegiance; and Kings being (as other Men) ſubject, eſpecially in this point of Prerogative, are much rather ſubject thereunto, being miſ-led by ſuch Doctrines as thoſe are, advanced by Sycophants. Another Property of Allegiance, is, that it is *indefinite*, according to *Coke*; which he explains to be *proprium quarto modo*, ſo as it is both univerſal and immutable [d], and neither defined by Time, Place, or Perſon: As touching the Time and Perſon, the Reporter ſays little; and therefore I ſhall leave the Reader to chew on the Point, ſuppoſing himſelf to be in the firſt Times of *Edward* the Fourth, when *Henry* the Sixth was alive, and let him reſolve to which of them his Allegiance was due, conſidering them both in their natural Capacity,

[d] Fol. 5. b.

Capacity, as the Reporter would have it. But touching the Place, 'tis ſaid, that *Engliſh* Allegiance is not only due from an *Engliſhman* to an *Engliſh* King in *England*, but in all Places of the King's Dominions, tho' otherwiſe foreign, by the Law of *England*; yea, as far as the King's Power of Protection extends. And yet this had not been enough, if we grant the Premiſes; for if this Allegiance, whereof we ſpeak, be abſolute, and *omni ſoli & ſemper*, then it is due from an *Engliſhman* to the King, in all Parts of the World. But to take the Reporter in a moderate Senſe, we may conſider, whether *Engliſh* Allegiance, in the Days of *Edward* the Third, extended as far as the King's Power extended, when he had the Kingdom of *France* in a foreign Right to that of *England*. In this the Reporter is very poſitive on many grounds, which he inſiſts on.

Firſt, he ſays, that *Verus* and *Fidelis* are Qualities of the Mind, and cannot be circumſcribed within the Predicament of *ubi*; and upon this ground he might conclude, that this Allegiance is due to the King from an *Engliſhman* all the World over, as well as in all the King's Dominions: But, touching this ground of his Opinion, it may be denied; for though ſimply in itſelf conſidered as a Notion, Verity and Fidelity are not circumcribed in place; yet being Qualities of the Mind, and that being in the Body, it may in reſpect thereunto be in the Predicament of *ubi*; for wherever that Body and Soul is, there is Faith and Truth according to its Model, which though not abſolute and indefinite, yet according to the Laws of the Place wherein a Man lives, he is truly ſaid to be *Verus* and *Fidelis*. *Secondly*, the Reporter argues, that the King's Protection is not local, or included within the Bounds of *England*, and therefore Allegiance is not local: For *Protectio trahit Ligeantiam*, and *Ligeantia Protectionem*. Had this Reaſon been formed into a Syllogiſm, it had appear'd leſs valid; for the Protection of an *Engliſh* King, *quâ talis*, of an *Engliſhman*, is local, and included within the Bounds of the Kingdom: But if the ſame King be alſo King of *France*, or Duke of *Aquitain*, and an *Engliſhman* ſhall travel into thoſe Parts, he is ſtill under the ſame King's Protection, yet not as King of *England*, but as King of *France*, or Duke of *Aquitain*; otherwiſe let the Party be of *France*, or *Aquitain*, or *England*, it is all one, he muſt be (whether *French* or *Engliſh*) under an unlimited abſolute Protection, without regard had to the Cuſtoms or Laws of the Place; yea, contrary to them, which the Reporter (I believe) never intended to affirm. *Thirdly*, the Reporter cites Matters of Fact, and tells us, that the King of *England* did often, *de facto*, grant Protections to Perſons in Places out of the *Engliſh* Confines, and this will not be denied: But he never thus granted any abſolute and indefinite Protection; for a Protection extends to a Defence from Injury; and all Injury is to be expounded and judged according to the Laws of the Place. Nor do any of the Precedents quoted by the Reporter, prove, that the King of *England* granted, as King of *England*, Protection to any *Engliſhman*, in any Parts of the King's Dominions beyond the Seas, which was not qualify'd according to the Laws and Cuſtoms of that Place: eſpecially, it being apparent, that an *Engliſh* King may hold Dominions in foreign Parts, in Allegiance under a foreign King, as *Edward* the Third held the Dutchy of *Guien*; and therefore cannot grant abſolute Protection in ſuch Place, nor receive abſolute Allegiance from any Perſon there being. *Fourthly*, the Reporter ſays, that the King of *England* has power to command his *Engliſh* Subjects to go with him into his Wars, as well without as within the Realm of *England*: Wherefore, the Allegiance of an *Engliſhman* to his King is indefinite, and not local, or circumſcribed by Place, or within the Realm of *England*. Though the firſt of theſe be granted, yet the Inference will not hold; for poſſibly this may ariſe from the Conſtitution of a poſitive Law, and not from natural

or

or abſolute Allegiance, nor does any Authority cited by him juſtify ſuch Allegiance. But I cannot agree to his firſt Poſition, for that the King has not any ſuch power from his own perſonal Intereſt; nor does the Authority of former Ages warrant any ſuch matter.

The fourth Property of *Engliſh* Allegiance, is, that it is due to the King's natural, and not to his politick Capacity [c], or due to the Office of a King in regard to the Perſon of the Man, and not to the Perſon in regard of the Office. And becauſe this is of no ſmall Importance, nor eaſily granted, nor underſtood, he therefore backs his Opinion with many Reaſons. *Firſt*, that the King ſwears to his Subjects in his natural Capacity; therefore, the Subjects ſwear to him in the ſame Capacity. This Reaſon was deſigned to be taken from *Relatives*, and then it ſhould have been thus, viz. *A King ſwears to his Subjects in their natural Capacity; therefore, Subjects ſwear to a King in their natural Capacity.* But, it being otherwiſe taken, it proves not the Point. Yet, if we take the Reporter *ſano ſenſu*, doubtleſs the Oath is made to the natural Capacity; yet not *terminative*, more than a Tenant's Oath to his Lord, which *Coke* couples with the mutual Dependance between King and Subject [f]. Nor does an *Engliſhman*'s Oath bind him to the Obedience of all, or any Commands, which the King ſhall give in relation only to his natural Capacity, or in oppoſition to his politick Capacity. Nor will the Reporter himſelf allow, that the King's politick Capacity can be ſeparate from his natural Capacity [g]. And yet 'tis evident, that the King may in his natural Capacity command that, which his politick Capacity cannot allow of. The ſecond Reaſon of this Opinion he takes from the Nature of Treaſon, which the Reporter ſays is committed againſt the natural Perſon of the King: And this is againſt due Allegiance, according to the Form of Indictments, in that caſe provided. This is not demonſtrative, becauſe that Crime which is done againſt a Man's natural Perſon, may as well extend to it in reſpect to his Place or Office; and ſo may Treaſon be plotted againſt the King's natural Perſon, as he is King: Nor is there any other difference between the Murder of a King, and a private Man, but only in regard of the King's Place and Office, which makes this Murder Treaſon; for which reaſon all Indictments concluding *contra Ligeantiæ debitum*, conclude alſo *contra Coronam & Dignitatem*, &c. *Thirdly*, ſays he, a Body Politick can neither give nor take Homage: Therefore, the King in his politick Capacity cannot take Allegiance. The firſt muſt be granted only, *ſub modo:* For though it cannot take Homage immediately, yet by the means of the natural Capacity it may take ſuch Service. And, therefore, that Rule holds only where the Body-Politick is not aggregate, and not one Perſon in ſeveral Capacities. For the Tenant that performs his Service, performs it to his Lord in his natural Capacity, but it is in reſpect to his politick Capacity, as he is his Lord: For Lord and Tenant, King and Subject, are but Notions, and neither can give nor take Service. But that Man who is Lord or Tenant, King or Subject, may; even as the power of Protection is in the King, not as he is a Man, but as he is a King. The laſt Reaſon I ſhall conſider, is, from the Teſtimony of the Parliament: For it is ſaid, that this damnable Tenet of Allegiance to the King in his politick Capacity, is condemned by two Parliaments: But in truth I can find but one under that Title, which mentions this Opinion, *viz.* the *Exilium Hugonis*, which in ſum is nothing elſe but Articles, containing an Enumeration of the particular Offences of the two *Spencers* againſt the State, and the Sentence thereupon. The Offences are for compaſſing to draw the King by rigour to govern according to their Wills: For withdrawing him from hearkening to the Advice of his Lords; for hindering and an oppreſſion of Juſtice. And (as a means hereunto) they cauſed a Bill or Schedule to be publiſh'd, containing, that Homage and Allegiance is

[c] Fol. 20.

[f] Fol. 4. b. 5. a.

[g] Fol. 10.

due to the King, rather in reſpect to his Crown, than abſolutely to his Perſon, becauſe no Allegiance is due to him, before the Crown is veſted on him. That if the King governs not according to Law, the Liegers are in ſuch a caſe bound by their Oath to the Crown, to remove him either by Law or Force.

This is the Subſtance of the Charge, and on theſe Articles exhibited, the Lords, *ſuper totam materiam*, baniſh'd them before their Caſe was heard, or themſelves had made any Appearance thereunto. So as to the matter of this Schedule (which contains an Opinion ſuitable to the Point in hand, with ſome additional Aggravations) the Parliament determin'd nothing at all: But to the publiſhing of the ſame, to the Intent to gather a Party, whereby they got power to act other Enormities mentioned in the Charge; and in relation to thoſe Enormities, the Lords proceeded to Puniſhment: All which was done in the King's Preſence, and by his Diſſent; as may appear by his Diſcontent thereat, as all Hiſtorians of thoſe Affairs witneſs. And 'tis not probable, that the King would have been diſſatisfy'd with the Lords Proceeding in aſſerting the King's Prerogative, in that manner of the Schedule, if he had perceived any ſuch thing in their Purpoſes. Add hereunto, that the Lords themſelves juſtify'd the Matter of the Schedule in their own Proceedings, all which tended to force the King to govern according to their Councils, and otherwiſe than ſuited with his pleaſure. By Force they removed *Gaveſtone* from the King's Preſence formerly, and afterwards the *Spencers* in the ſame manner.

Touching this Doctrine of Allegiance, I ſhall lay down the Opinion of all ſober Writers, who flatter not Princes with ſlaviſh Tenets to their ruin: And it is this, *viz.* That we owe the King Allegiance according to the Laws, as the Word itſelf imports; and not a natural, abſolute, or indefinite Allegiance. The Inference is neceſſary, for the Laws are the Meaſure of our Obedience; but the other is boundleſs, and we know not what. And the Reporter himſelf ſays, That the municipal Laws of the Kingdom have preſcribed the Order and Form of legal Allegiance[h]; and, therefore, he hereby cuts his own Throat. But his Buſineſs was to flatter a weak Prince, that loved Power and Prerogative; and this ended in the Ruin of his Son *Charles* the Firſt.

[h] Fol. 5. b.

TIT. XXIV.

Of the Roman *Dictator*; *for what End conſtituted*; *and of his Power and Office*; *and of his Maſter or General of the Horſe.*

THOUGH a *Dictator* was not an ordinary Magiſtrate among the *Romans*; yet, becauſe he often occurs in our reading of the *Roman* Hiſtory, and in ſome part of the Laws themſelves, I ſhall here give him a place in this Work. *Feneſtella* aſſures us, that a Dictator was ſuch a Magiſtrate as was never otherwiſe created, but when ſome ſudden and extraordinary violence threatned Ruin and Deſtruction to the *Roman* State.

And his firſt Riſe, was, when the *Latins* were at the Gates of *Rome* ready to enter the City in *Tarquin*'s Time, upon a Diviſion of the *Patricians* and *Plebeians*, who were oppreſſed by the former on the ſcore of their Debts. For the common People, grown deſperate by the cruel Uſage of their Creditors, declared, They would have an Abolition of all their Debts, or elſe would leave it to the rich and great Men to take care of the War; being unwilling to defend a City, in whoſe Safety they thought themſelves no longer concerned than they could live eaſy, and which indeed they were ready to quit and abandon. The Senate was hereupon obliged to create one ſupreme Magiſtrate, that ſhould be equally above the Senate itſelf, and the Aſſembly of the People, and who ſhould be endued with abſolute Authority. In order to obtain the Conſent of the People, they repreſented to them, in a publick Aſſembly, That upon this Emergency in which they had their domeſtick Quarrels to decide, and the Enemy to repulſe at the ſame time, it was neceſſary to put the Commonwealth under a ſingle Governor, ſuperior to the Conſuls themſelves, who ſhould be *Arbiter* of the Laws, and, as it were, the Father of his Country: And that leſt he ſhould make himſelf a Tyrant, and abuſe this uncontroulable Authority, they ought not to truſt him with it above ſix Months. So jealous were the *Romans* of their Liberties, and willing to preſerve them.

The People, over-joy'd with the Thoughts of having a Magiſtrate above the Conſuls and Senate, agreed to his Election: And it was ordained, that the firſt Conſul ſhould have the power of naming him, as a kind of recompence or amends for the Authority he loſt by his Creation. Whereupon *Clelius* preſently named his Collegue *Titus Largius*, the firſt *Roman*, that, with the Title of *Dictator*, enjoy'd this ſupreme Dignity; which may be called an abſolute Monarchy in a Republican Government, though not durable. And, indeed, the moment he was named, he had the power of Life and Death over all the Citizens, of every degree, and without any Appeal. The Authority and very Functions of all other Magiſtrates ceaſed, or elſe were ſubordinate to him. He had the naming of the General of the Horſe, who commonly was a Man of conſular Dignity, as he himſelf was. This Perſon was ſubordinate to the Dictator, wholly at his Command, and could not attempt or enterprize any thing without the Dictator's Orders: As we read of *Quint. Fabius* and *Marc. Minutius*, who were brought into great danger of their Lives, for engaging the Enemy in the Abſence of the Dictators, and contrary to their Orders; and they had ſurely loſt their Heads, if they had not been ſet at liberty by the Intreaties of the People, as *Livy* and *Plutarch* relate the matter. Indeed, *Marc. Minutius*, in the time of the ſecond *Punick* War, had equal power given him with the Dictator, which never happen'd to any before him. The Dictator had Lictors armed with Axes, like a King; and might raiſe Troops and disband them at his pleaſure. He might alſo make Peace or War, without asking Advice either of the Senate or People; and when his Authority was expired, he was not obliged to give an account of any thing he had done during his Adminiſtration. *Titus Largius*, being the firſt that was inveſted with this high Dignity, named, without Participation of the Senate or People, *Spur. Caſſius Viſcellinus* as General of the Horſe. As to the Power and Dignity of the Maſter or General of the Horſe, the Lawyer *Pomponius* pretends, that it was almoſt the ſame with the Tribunes of the Light-Horſe, or Colonels of the Guards in the time of the Kings, and after the Empire was tranſlated on the Emperors, the *Pretorian* Prefects had. The Dictator, who was alſo termed the *Maſter of the People*, being ſeated upon a high Chair like a Throne, which *Titus Largius* cauſed to be ſet up in a publick Place of the City, and being ſurrounded with his Lictors armed with Axes, order'd every Citizen to be called over, one after another. The *Plebeians*, without daring

daring to ſtir a Finger, came in and offered themſelves to to be enliſted; and every one full of Awe ranged himſelf under his Banners. And thus this prudent Dictator carried on the War, and ſaved the Commonwealth.

Marcus Varro tells us, That a Dictator was ſo called, *à Dictando*, becauſe future Magiſtrates were dictated by this Magiſtrate alone, on the Determination of his Power and Authority. And *Livy* likewiſe ſays, That it was the ancient Cuſtom to chuſe the Dictator in the dead and ſilent time of the Night. And our Annals teſtify, that a Dictator was ſometimes choſen *clavi figendi causâ*; who, if he could drive a Nail into a Poſt, upon any Diſcord ariſing in the Minds of the Citizens, was thought to cure that Diſeaſe, and to put an end to ſuch Diſſenſion.

TIT. XXV.

Of the Conſuls, *their Power and Office; how, when and where choſen; and when firſt introduced,* &c.

LIVY obſerves, that Kingly Government, and the Power of one Perſon over many, in proceſs of time, grew very irkſome and grievous unto the *Roman* People, who deſired to be a free State, that they might the better ſucceed and proſper in their Affairs: Wherefore, on the Expulſion of their Kings upon the ſcore of their Tyranny, they aſſerted their Liberties; and, on the Expiration of that Monarchy, they created Conſuls in the Place of Kings, without kingly Power entirely given to them. For this new Power
[i] D.1.2.2.16. of Government, though large in ſome reſpects, was yet limited and annual [i], leſt they ſhould behave unſeemly: Their Power not laſting for any longer time than one Year; and there were always two at the ſame time, to adviſe and check the Actions of each other, in caſe of any Exorbitancy or Male-Adminiſtration. They were the firſt ordinary Magiſtrates in the *Roman* State of ſuperior Note, after it became a Commonwealth, or rather an Ariſtocracy, and they had the firſt and chief Seat of Power. They were taken at firſt out of the Body of the Senate, that they might bear ſome Authority in their Perſons; and, for that they had made themſelves acquainted with the Buſineſs of Government by their Years and Education. The People gave them the humble and modeſt Title of *Conſuls*, *à Conſulendo*, to put them in mind of their Duty, that they were not ſo much the Sovereigns of the State, as her Counſellors; becauſe they were to conſult and take care of the Commonwealth; and the only Object of their Concern was to be her Preſervation and Glory: But, having the Government and Adminiſtration of Affairs committed to them, they were deemed
[k] D.1.2.2.16. *illuſtrious* Perſons. For *Pomponius* tells us [k], that, after the Subverſion of Monarchy, the ſupreme Authority was lodged with theſe Perſons during their Office, which was for one Year; and being thus created, they were to be the fitteſt and beſt qualified Perſons of the *Patrician* Order.

And thus *Rome* became partly an Ariſtocracy for ſome time; that is to ſay, the Nobility got into their hands the greateſt part of the ſovereign Authority; and, inſtead of one perpetual Prince or Tyrant, as *Tarquin* the Proud was, there were many Tyrants among the Nobility: For tho' the Royalty was aboliſh'd; yet the domineering Spirit of Royalty was

not extinguiſhed. The Senate, delivered from the Awe of the Royal Power, was for bringing into its own Body the whole Authority of the Government. By poſſeſſing the civil and military Dignities, which were appropriated to that Order, they enjoy'd all the Power and Riches, which are the Effects and Conſequences of them; and the chief Object of their Politicks was ſtill to keep People in Indigence and Subjection. So that tho' theſe Conſuls were at firſt choſen out of the Body of the *Patricians* or Nobility; yet afterwards, when the Government became more popular by the Choice or Creation of *Tribunes*, they made a Law [l], that the People ſhould be impowered to chuſe *Conſuls* either out of the Nobility or Commonalty. And thus after this Matter had been diſputed between the *Patricians* and *Plebeians*, for ſome length of time, *Lucius Sextius* at laſt [m], was the firſt of the *Plebeians* that was made Conſul; as *Brutus*, the Reſtorer of the *Roman* Liberty, was the firſt Conſul among the Nobility.

[l] A.U.C. 310.

[m] A.U.C. 389.

After the People had aboliſhed the Power of the *Decemvirate*, on a Tumult happening among the Populace, by reaſon of the arbitrary and deſpotick Power of the *Decemvirs*; *Luc. Valerius* and *Marc. Horatius* were created Conſuls [n], without any Injury or Offence given to the Fathers. The Conſuls were created in the *Comitia Centuriata*, or the great and general Aſſembly of the People, held in the *Campus Martius*, on an Election made *vivâ voce*, by a Majority of Voices, and then proclaimed in the Reign of the former Conſuls: ſo that their Deſignation for the Conſulſhip, was ſaid to be made for ſome ſmall time before they entred on their Office. And then the Conſuls elected had the firſt Place in the Senate, after the Conſuls in being. In the beginning, or at the time when this kind of Magiſtracy was firſt founded, the Conſuls entred on their Office on the Calends of *Auguſt*; becauſe in the early State of that Commonwealth, the *Roman* Year then began. Afterwards the Calends of *May* became the ſolemn time for taking this Office on themſelves. And then again the Ides of *December* were ſolemnized to this End and Purpoſe. But in proceſs of time, the *Comitia* for chuſing Conſuls, were held the twelfth Day before the Calends of *March*, provided they entered on their Office on the very Ides of *March*. Yet in the latter Ages of the Commonwealth, when the beginning of the Year was fixed to the Calends of *January*, theſe Calends were appointed to enter on their Office [o].

[n] A.U.C. 306.

[o] D. 3. 5. 1. 36.

Theſe Perſons were the Preſidents of the Senate, and had all kingly Power granted to them, except only that their Office and Authority was annual, as before hinted; and that only one of the Conſuls had the *Faſces* or Rods carried before him: For the Axes and Rods being bound up together, were carried before theſe new Governors, as the Enſigns and Badges of their Office. The painted and purple Gown, and the golden Crown, were only taken from them by reaſon of the Pride of their Kings, whom they were not to perſonate or aſſimilate in any things. They had not a Plenitude of Power; neither could they put a *Roman* Citizen to death without the Order and Decree of the People, having only Authority given them of coercing and impriſoning their Perſons [p]. But out of the City they might execute the power of the Axe, and behead Criminals by their Sentences. But in the City theſe Conſuls had no ſuch thing as a *contentious* Juriſdiction, tho' *Azo* in his Sums has with little or no Foundation of Reaſon aſſerted the contrary: For they had only a *voluntary* Juriſdiction, as when any one was manumiſed, emancipated, or the like [q]. If any Buſineſs or Matter was commenced before one of them, ſuch Buſineſs was not taken out of his hands by the other Conſuls interfering, unleſs the firſt was hindred from diſpatching the ſame by ſome reaſonable Cauſe or other: Neceſſity having no Law.

[p] D. 1. 2. 2. 3.

[q] D. 1. 10. l. un.

From the Time of the Emperors, when the *Roman* Liberties were loſt, the Conſuls were only a bare Name, without any Power. For though the Conſuls before that Time were the firſt Order in reſpect of Degree, which was in the Government of the *Roman* State, (the Senate and People being added to them as a Council of State, unto which all Affairs of Importance were referr'd:) Yet this Power being firſt diminiſh'd, and afterwards taken away under the Emperors, they began from thence to be ſtiled the ſecond Dignity in the Empire, being reckoned next unto that of the Emperors, as *Juſtinian* himſelf has ſometimes expreſſly declared it, when he had a mind to flatter and cajole the People. But he has even in ſome places of the Law preferr'd the Dignity of the *Patricians* to this Power and Order, by making the *Patricians* the ſecond Degree after the Emperors. As in the Time of the *Greek* Emperors, the Power of the *Patricians* was the chief Dignity after the Emperors: And this was granted not by way of Succeſſion, but according to the Will and Pleaſure of the Prince. Thus *Charlemagne* was by Pope *Adrian* ſtiled a *Patrician*, before he became Emperor of the *Romans*. And the *Patricians* had at that time the Care of the Commonwealth, as Fathers have of their Children.

It has been related, that the Time for the Conſuls to remain in the execution of their Office, was a whole Year: But *Julius Cæſar* brought up a Cuſtom of ſubſtituting Conſuls at any time for a Month or more, according as he pleaſed; and theſe were ſtiled *Suffecti*, as the others were termed *Ordinarii*. See *Dion. Caſſius*[r]. According to the *Julian* Law, the Conſul that had moſt Children had the Precedency, though by the *Valerian* Law, the Precedency was given to the eldeſt. All Perſons to be choſen Conſuls were to be forty-two Years of Age (at leaſt) before they could arrive at this Dignity: And the ordinary way of coming at the Conſulſhip, was through the ſeveral Degrees of Offices, as that of *Quæſtor*, *Ædile*, *Prætor*, &c. Between which Offices, there ought regularly to be the Interval of two Years. The Conſulſhip was rarely conferr'd more than once or twice on the ſame Man; and we find none but *Marius* that was Conſul ſeven times.

[r] Lib. 43.

TIT. XXVI.

Of the Præfectus Urbi, *and his Office: The Creation of the Tribunes, Ædiles, and their Office.*

THE Prefect or Governor of the City of *Rome*, was an ordinary Magiſtrate, firſt inſtituted by *Octavius Auguſtus*, through the Advice of *Mecænas*, according to *Dion. Caſſius*[t], and was a Perſon choſen out of ſome principal Men of the City, who had went through all Offices of Magiſtracy but this: and his Buſineſs was not to govern the State in the Abſence of the other Magiſtrates, as ſome have imagined; but with others to preſide over the City in civil Matters, and to hear Cauſes of Appeal, and all capital Cauſes, ſome few excepted, happening in the City, and within ſuch a diſtance out of the City, and to give Judgment therein[u]. But his chief Buſineſs was, according to *Ulpian*, to hear the Complaints of Servants touching their Maſters; and, on the other hand, the Accuſations of Maſters againſt their Servants; to ſit in Judgment on Freedmen that proved ungrateful to their Patrons, and to take Cognizance of ſuch Crimes as were alledged

[t] Lib. 52.

[u] D. 1. 12. 1. 4.

alledged againſt Tutors and Curators, to puniſh the Frauds of Bankers and Money-Changers [t], to take care that wholeſome Proviſions of Fleſh were brought into the City; to coerce unlawful Companies; and laſtly, to regulate the Diſcipline of Shows and Paſtimes [u]. His Juriſdiction reached one hundred Miles round the City; and he might puniſh whatever Crimes of this kind were committed therein. But though he might hear the Complaint of a Servant complaining of the Cruelty of his Maſter; yet if ſuch Servant was willing to accuſe his Maſter, he could not receive ſuch Accuſation. His Power was ſuperior to all other Magiſtrates in the City [v] beſides that of the *Prætorian* Prefect, to whom he gave place in Power, but was equal to him in Dignity [w].

[t] D. 1. 12. 1. & 2.
[u] D. 1. 12. 1. 11. & 12.
[v] C. 12. 4. 7.
[w] C. 12. 4. 1.

Rome, by the Eſtabliſhment of the Tribuneſhip, changed the Form of her Government a ſecond time, as I have already hinted. It had paſſed before from a monarchick State, to a kind of Ariſtocracy, where the whole Authority was in the hands of the Senate and the great Men: But by the Creation of the Tribunes, there aroſe inſenſibly, and by ſlow degrees, a kind of Democracy, wherein the People, under different pretences, got the poſſeſſion of the better Part of the Government. The Senate at firſt ſeemed to have no occaſion to apprehend any danger from the Tribunes, who had no power but to interpoſe in the Defence of the *Plebeians*. Nay, thoſe new Magiſtrates had at firſt neither the Quality of Senators, nor any particular Tribunal, nor any Juriſdiction over their Fellow-Citizens, nor the Power of calling the Aſſemblies of the People. Habited like meer private Men, and attended by one ſingle Servant called *Viator*, which was indeed but very little different from a Footman, they ſat upon a Bench without the Senate, and were never admitted into it, but when the Conſuls called them in to ask their Opinion upon ſome Affair that concerned the Intereſts of the People. Their whole Authority conſiſted in a Right to oppoſe the Decrees of the Senate, by the *Latin* word *veto*; that is to ſay, *I forbid it*, which they wrote at the bottom of the Decree, when they thought it contrary to the Liberty of the People; and this Power was confined within the Walls of *Rome*, or at moſt to a Mile round. And that the People might always have in the City Protectors ready to take their part, the Tribunes were not allow'd to be abſent from the City any one whole day, except in the *Feriæ Latinæ*. For the ſame reaſon, they were obliged to keep their Doors open Day and Night to receive the Complaints of ſuch Citizens as ſhould ſtand in need of their Protection. One of the firſt Steps of theſe Tribunes, was to ask permiſſion of the Senate to chuſe two *Plebeians*, that, with the Title of *Ædiles*, might aſſiſt them in the multitude of Affairs, with which they ſaid they were overloaded in ſo great a City as *Rome*, and eſpecially in the beginning of a new Magiſtracy: The Senate always divided, and having loſt ſight of the fixed Point of their Government, ſuffered themſelves to be carry'd away juſt as theſe ambitious Men would have it; whereupon they alſo granted them this new Demand [x]. Such was the Origin of the *Plebeian Ædiles*, the Creatures and Miniſters of the firſt Tribunes; but afterwards they took to themſelves the Inſpection of the publick Edifices, the Care of the Temples, Baths, Aqueducts, and the Cognizance of a great many Affairs [y], which before belonged to the Conſuls: And this was a new Breach made by the Tribunes on the Senate's Authority. Theſe *Ædiles* the Tribunes yearly choſe out of the Body of the Commons; and at the beginning they were only their Agents: *Roſinus* for Diſtinction ſake calls them *Ædiles Plebis*; becauſe there were other *Ædiles*, as I ſhall immediately relate. Beſides the Duty above-mentioned, they had ſeveral other Employments of leſſer Note, as to attend on the Tribunes of the People, and to judge in ſome inferior Cauſes by their Deputation, to rectify the Weights and Meaſures,

[x] A.U.C. 260.
[y] D. 1. 2. 2. 21.

[a] A.U.C.389. Meaſures, to prohibit unlawful Games, and the like. Some time after[a] two more *Ædiles* were elected out of the Nobility, to inſpect the publick Games. They were called *Ædiles Curules*, becauſe they had the Honour of uſing the *Curule* Chair, which derived its Name *à Curru* [a], becauſe they ſat upon it as they rode in their Chariots. *Lipſius* fancies, they owe their Name, as well as their Invention, to the *Curetes*, a People of the *Sabines*. The *Curule Ædiles*, beſides their proper Office, were likewiſe to take care of the Buildings, Theatres, Temples, and other Structures, and were appointed Judges in all Cauſes relating to the ſelling or exchanging of Eſtates. And laſtly, *Julius Cæſar* [b] added two more *Ædiles* out of the Nobility, with the Title of *Ædiles Cereales*, from *Ceres*, becauſe their Buſineſs was to inſpect the publick Stores of Corn, and other Proviſions, to ſuperviſe all the Commodities expoſed to Sale in the Market, and to puniſh Delinquents in all Matters concerning buying and ſelling [c].

[a] Agell. lib. 3. c. 18.

[b] A.U.C.710.

[c] D.1.2.2.21.

TIT. XXVIII.

Of the Prætors; *how divided, and their Number; of their Power, Dignity, and Office.*

THE word *Prætor* was at firſt made uſe of to denote and ſignify every ſuperior Magiſtrate. But, in proceſs of time, either through the Diſſenſions of the People, or otherwiſe, when the Conſuls had the Command of the Army in foreign Countries, and being called abroad, abſented themſelves from the City on the account of thoſe Wars which the *Romans* had with the neighbouring States; and by this means there being often no one left to adminiſter Juſtice in the City, the Office of *Præfectus Urbis* growing into diſuſe, it came to paſs [d], that a *Prætor* was created, ſtiled *Prætor Urbanus* [e], or the City Judge, who, in the Conſul's Abſence, was to have Juriſdiction, and to be veſted with the Power of a Judge in the City. And he was ſtiled *Prætor*, either becauſe *præeſſet Juriſdictioni*, he preſided over a Juriſdiction, or as a *Præitor*, *præibat jus populo*.

[d] A.U.C.387.

[e] D.1.2.2.27.

This Office, at firſt, when one of the Conſuls was always choſen out of the *Plebeians*, was only granted to the *Patricians*, who were the only Perſons that claimed this Prerogative of pronouncing Judgment in Matters of Judicature. Afterwards [f] *Quint. Publius Philo* was the firſt of the *Plebeians* that was created *Prætor*. The power of all publick and private Right was lodged in the hands of this Magiſtrate, that he might either take Cognizance thereof himſelf, or elſe depute Judges for that end [g]; and to him it did belong to preſcribe the Forms of commencing Actions, and proſecuting judicial Pleas among ſuch Litigants as requeſted the ſame [h]. But he referr'd Matters of leſſer moment to the *Judex Pedaneus*, or inferior Judge. Yea, in the Abſence of the Conſuls, the *Prætor* diſcharged their Office too, and repreſented their Perſons in the City. He had alſo the executive Power in all Matters that were *mixti imperii*, and of *voluntary* Juriſdiction [i], equally with the Conſuls themſelves: And made and propos'd Edicts for the ſake of aiding, ſupplying, and amending the Law; and theſe Edicts, in Honour of the *Prætor*, were called *Jus Honorarium* [k].

[f] A.U.C.418.

[g] D. 1. 14.

[h] C. 2. 58.

[i] D. 2. 1. 1. & 2.

[k] D.1.1.7.1.1.

Afterwards, in courſe of time, by reaſon of the great multitude of Strangers that flock'd to the City, there was another Officer or Magiſtrate

created, ſtiled *Prætor Peregrinus*, who was to have Juriſdiction, and be as a Judge to theſe Strangers. Then, after the Reduction of *Sicily* and *Sardinia*, there were four other Prætors made, and theſe *Prætors* had the *Roman* Provinces cantoned out to them. After the ſecond *Punick* War, the *Roman* Provinces increaſing in number, two more *Prætors* were added, who had the *hither* and *further Spain* allotted them. So that on their entring on the Magiſtracy, as they did on the Calends of *January*, there ſhould always be two remaining in the City, and the others ſhould have the Provinces allotted them. Sometimes the Management and Adminiſtration of the War was granted to them. In the Times of the Emperors, the Number of *Prætors* was increas'd even to ſixteen. Theſe Perſons in the City made uſe of two Lictors, with the Rods or *Faſces*; and thoſe in the Provinces made uſe of ſix Lictors.

The Edicts of the Prætors were at firſt only yearly Laws, whereby every one during his own Year was wont to pronounce both Law, and Equity. But when through a malignant Iniquity of Mind, they grew negligent of their Decrees, and would ſometimes judge one way, and ſometimes another, according to their own arbitrary Wills, even contrary to their own former Decrees, for the ſake of filthy Lucre; *Cornelius* made a Law to oblige the Prætors to make their Decrees according to their own Edicts, which were now made perpetual. Theſe Edicts were afterwards collected into one Body (as it were) by *Oſilius* and *Salvius Julianus*, and called the *perpetual* Edict. It is to be noted, that thoſe Laws which had their Riſe from the twelve Tables, and the *Civil* Law, though they were afterwards ſupply'd by the Prætors, yet did not ceaſe to be reckoned among the *Civil* Laws, but retained their former Force and Condition. The City-Prætor could not be abſent from the City more than ten Days during his Office.

TIT. XXVIII.

Of the Provincial Preſident; *and of his Power and Office*, &c.

THE word *Preſident* is a general Term or Name extending to all ſuch Magiſtrates as have the Government of Provinces committed to them, with the Power of the Sword [l], whether they are Pro-conſuls or others: For even Senators themſelves, that had this Government or Regency committed to them, were ſtiled Preſidents [m]; the word *Præſes* being derived *à Præſidendo*, which is a Word of a large Signification. But a Perſon could not be ſtiled a *Proconſul*, unleſs he was ſent out in the Place or Stead of a Conſul. A Preſident ſometimes ſignifies a Deputy, Lieutenant, Provoſt, Vice-roy, and the like. But a Preſident, properly ſo called, had the largeſt Juriſdiction of all other Magiſtrates, and was next in Authority unto the Prince, in ſuch Province whereunto he was ſent [n]; and executed the Office of all other Magiſtrates at *Rome*. For, in the Province where he preſided, he had the Cognizance of all Cauſes, touching which the Prefect, Conſuls, Prætorian Prefect, Prætors, and other Perſons had, which had Cognizance of Cauſes at *Rome*. And thus Preſidents in their Provinces exerciſe the ſame Functions as all other Magiſtrates do at *Rome* [o]. Hence the Edicts that

[l] D. 1. 18. 6.
[m] D. 1. 18. 1.
[n] D. 1. 18. 3.
[o] D. 1. 18. 10. & 11.

that were propounded by them, after the manner the *Prætor* propounded his, were ſtiled *Provincial* Edicts. But he had no Lieutenant or Deputy, as the Proconſuls had, becauſe he himſelf was but a Deputy [p]. It did belong to the Preſident's Office to reſtrain all Acts of Fear and Violence, and to hinder not only the Outrage and Concuſſion of his own Soldiers, but alſo of all other Perſons; to defend the Poor [q], and to mitigate Puniſhments on the ſcore of Poverty, if Perſons incurr'd any: And if a Penalty was remitted hereupon, it was not afterwards to be recovered, though the Perſon ſhould happen to grow rich. As his Buſineſs was to keep his Province quiet, and to purge it from evil Men [r]; ſo it was alſo incumbent on him to impriſon and take care of Madmen, that they did not hurt others. He was to be eaſy of Acceſs in all Matters of Right, without receiving any Preſents: And as he was not to be acquainted with Anger and Cruelty; ſo he was not to ſhow himſelf profuſe of Mercy [s]. And though he had Juriſdiction over all ſuch Cauſes, wherein the Magiſtrates of the City of *Rome* had Cognizance; yet he was not to borrow Precedents from them, but to follow Truth [t]. He had the care of Trade committed to him, to allow of what was lawful, and to prevent ſuch as was detrimental [u]. He was not to go out of the Province, leſt the People ſhould want a Governor; nor could he contract Matrimony or Eſpouſals with any young Woman in his Province, leſt ſhe ſhould ſeem to be awed into a Conſent [x]. He had the Inſpection of all Buildings, and might compel the Owners to repair the ſame. He had the Power of the Sword, but only in a qualify'd manner, not to put Perſons to death, but only to fine them, and to ſend them to the Mines. And in this the Power of Preſidents was leſs than that of Proconſuls, as may appear, in that a Preſident had not the Right and Power of Deportation [y], as a Proconſul had. Becauſe Deportation was a ſpecial Puniſhment introduced by Princes, who, ſo far reſerv'd this Puniſhment to themſelves, that it was neceſſary for the Præfect of the City to have a Law, or ſome ſpecial Grant of the Prince, before he could execute the Power of Deportation. Again, a Proconſul could give his Lieutenant ſpecial Cognizance touching ſuſpected Tutors or Guardians: But a Preſident could not delegate this Power; nor could he any more delegate a Judge, than he could aſſign a Guardian [w]. But ſome held this laſt to be an Error, becauſe only inferior Judges were barr'd this power.

[p] Nov. 8. in fin.
[q] D.1.18.6.2.
[r] D.1.18.3. & 13.
[s] D.1.18.19.
[t] D.1.18.12.
[u] D.1.18.6.4.
[x] C.1.53.l.un.
[y] D.1.18.2.
[w] D.1.18.5.

TIT. XXIX.

Of the Prætorian Prefect, his Power and Office.

AS heretofore the Dictators, who were choſen on ſome emergent Occaſions of State, created unto themſelves Perſons ſtiled *Maſters* or *Generals of the Horſe*, who, next to the Dictators, had the chief Authority in the Commonwealth: ſo in proceſs of time, after the Government of the State was transferr'd on the *Roman* Emperors or Princes, they aſſum'd unto themſelves Perſons ſtiled by the Name of *Prætorian Præfects*, who had a larger power given them of correcting Abuſes, and reforming publick Diſcipline [z], than other Magiſtrates were veſted with: And from theſe Perſons

[z] D.1.11.l.un.

Perſons it was not lawful to appeal. For the Prince or Emperor believ'd them to be Perſons of ſo much Prudence and Integrity, that they would not judge otherwiſe than he himſelf would determine by a Sentence[y]. Nor could even Minors be reſtored in oppoſition to their Sentences by any other Magiſtrate, than by them, or the Prince himſelf: But a Supplication might, at any time within two Years, be made to the Emperor againſt their Sentences[z]. This Officer or Magiſtrate was firſt created by *Auguſtus* to command the *Prætorian Cohorts*, or his Life-guard, who borrowed his Name from the *Prætorium*, or General's Tent; all Commanders in chief being anciently ſtiled *Prætors*. He had a great Influence on the Army: and, therefore, when the Soldiers once came to make their own Emperors, the common Man they pitch'd upon was the *Prætorian Præfect*. *Baldus* on the *Code*[a], touching theſe Officers, obſerves, That it did not ſuit with the Genius of the State to continue theſe high Magiſtrates in their Offices for any length of time; and herein he commends the *Germans*, who change their Magiſtrates every Year, and blames the *Italians* for acting contrary hereunto: ſubjoining, that the *Italians* are hereby accuſtom'd to Diſſenſions among themſelves; whereas, on the contrary, the *Germans* are wont to ſpend their Money on Banquets, and other friendly Entertainment, wholly unacquainted with Avarice. According to *Guil. de Cuna*, the King of the *Romans* in *Germany* ſucceeded in the room of the *Prætorian Præfects*, from whom no Appeal lies; meaning, from ſuch Kings as are ſubject to the Empire: But, I think, he is miſtaken in his Account, for the King of the *Romans* was deriv'd from the next in Succeſſion to the Empire.

[y] D. 1. 11. 1. un.

[z] C. 7. 42. 1. un.

[a] C. ut ſup.

TIT. XXX.

The Office of the Proconſuls, and their Lieutenants over the Provinces.

AMONG the *Roman* Magiſtrates, there were ſome that were intitled *illuſtrious*, and others that were only *ſpectabiles*. Among theſe laſt we may reckon the *Proconſuls*, who were ſuch Perſons as had the Government of ſome Province at a diſtance from *Rome*, committed to them; being choſen out of ſuch as were, or had been, Conſuls. Proconſul *quaſi Conſul procul miſſus*, as appears from the Signification of the Word: For the *Romans*, when they made a Conqueſt of any neighbouring Kingdoms out of the Borders of *Italy*, were wont to govern the ſame by Magiſtrates ſent out of the City; and ſuch Perſons as were Conſuls or Prætors one Year, were ſent abroad the Year following into their Provinces to govern; and hence we have the Names of *Proconſuls* and *Proprætors* of ſuch and ſuch Provinces. Afterwards, when *Auguſtus* came to the Empire, he reſerved unto himſelf the Government of the more fierce and powerful Provinces on the Borders, and ruled them with an Army; but thoſe of leſs ſtrength he left to the *Roman* People to be governed *more majorum*. And hence ſome of the Provinces were diſtinguiſh'd into ſuch as belonged to the Senate, and ſuch as were *Cæſar*'s. Thoſe, who had the Adminiſtration of the Provinces belonging to the Senate, were not ſtiled *Proconſuls* or *Proprætors*,

as formerly, but only Proconſuls; and thoſe, who had the Government of [b] Dion.lib.33. *Cæſar*'s Provinces, were ſtiled *Prætors* [b]. *Juſtinian*, after this made thoſe conſular Provinces, which were before governed by Preſidents, to be *Proconſular* and *Prætorian* Provinces. This he did, becauſe he had enlarged ſome of theſe Provinces. And in theſe he thought fit to join the military and civil Power together, and to lodge them in the hands of one and the ſame Magiſtrate; not only to preſerve Reverence and Authority unto the governing Power, but likewiſe to prevent all dangerous Diſputes, which commonly ariſe between different Perſons of the ſame degree of Power in [c] Nov.25.26. 27. 28. &c. the ſame Province [c]. Hence it appears, that the Dignity and Authority of the Proconſuls in *Juſtinian*'s Time was very great. But after his Reign, they return'd to their antient Right, and the Proconſuls were only Vicars unto the Conſuls in the Provinces committed to them. For the Juriſdiction reſided with the Conſuls, but the Proconſuls had the Adminiſtration and Execution thereof. So that whenever a Conſul came into the Province, [d] C. 1. 35. 1. where a Proconſul preſided, the Proconſul laid down his Adminiſtration [d]. Yet Proconſuls, who had a conſular Dignity given them by the Senate, had ſometimes the ſame Honour as the Conſuls themſelves: For they might make uſe of the Faſces, and the twelve Lictors, as well as the Conſuls themſelves. But thoſe, who were ſent into the Provinces with Proconſular Dignity, were of leſſer Dignity, and had the Axes and ſix *Faſces* allotted them: and thus we may reconcile ſeveral Authors, who ſpeak of Proconſuls with twelve *Faſces*, and ſome with ſix only [e]. But though the Pro- [e] D. 1.16.14. conſuls had their Guards, and other Enſigns of their Office, on their departure out of *Rome*, even before they entred the Province, deputed to them, and out of the Province might exerciſe a voluntary, but not a contentious Juriſdiction: Yet the Proconſul's Lieutenant (for every Proconſul had a Lieutenant aſſigned him) could exerciſe no Juriſdiction at all. Nor could the Proconſul himſelf exerciſe a contentious Juriſdiction in any other Place but in the [f] D. 1.16.1. & 2. Province to which he was ſent, though he might exerciſe a voluntary one [f], as aforeſaid. He might manumiſe Bondmen, and grant Adoption, *&c.* which are Acts of voluntary Juriſdiction; but his Lieutenant could not do this, becauſe he had no ſuch Juriſdiction. The Proconſul after he entred on his Province, might make a Lieutenant, but before this his Lieutenant had no Juriſdiction: And though the Proconſul himſelf ſhould attempt to confirm what his Lieutenant did before ſuch time; yet ſuch Confirmation had no Validity in Law. But if a Proconſul was hindered from arriving at his Province on ſome neceſſary Cauſe, he might, before ſuch Arrival, [g] D. 1. 16. 5. ſend a Lieutenant thereunto [g]. The Proconſul ought to reſide in a Houſe of his own, and not burden the Inhabitants with any Charges for Diet, *&c.* nor ought he to have his *Stratores* or Purveyors, *&c.* but in lieu of them he was to furniſh himſelf with good Soldiers in his Province. Though the Proconſul might take his Wife along with him; yet it was thought more adviſable to go thither without, ſince he was liable for the Offences of his Wife. He had the Power of the Sword, and might exerciſe the ſame [h] D. 1. 16.6. himſelf [h], and might likewiſe in reſpect of Cauſes *meri imperii*, delegate the Cognizance thereof unto his Lieutenant: but he could not do this in reſpect to the Deciſion of ſuch Cauſes; for he was to adjudge and determine them himſelf. Thus he might delegate unto his Lieutenant the Cauſes of ſuch Perſons as are impriſoned, to the end that he ſhould hear the Cauſes of ſuch Impriſonment, and make a Report thereof to him, that he might diſcharge and releaſe an innocent Perſon. But this kind of Delegation was ſpecial and extraordinary. For no one could transfer unto another this *merum imperium*, or power of the Sword, which is given to him, of *common Right*. A Proconſul could not transfer the Power of diſcharging criminous Perſons, ſince they could not be accuſed or impeached before

him. And as it was in his diſcretionary Power either to delegate or not to delegate a Juriſdiction; ſo he might ſuperſede ſuch Delegation whenever he pleas'd, upon conſulting the Prince, and not otherwiſe. A Proconſul was to obſerve all Matters ſet down in the Law here quoted[i]; and had fuller Power in the Province than all other Perſons, the Prince excepted[k]: yet he could not take Cognizance of a Cauſe, which was between the Exchequer and a private Man, though the Prince might do it. The Prince was not to conſult the Proconſul's Lieutenant, but the Proconſul himſelf in Matters relating to his Province. Though his Lieutenant had not *propriam Juriſdictionem*, yet as ſoon as Juriſdiction was delegated to him, he might ſubſtitute a Judge[l]. As ſoon as the Proconſul entred the Gates of *Rome*, he was to drop all his Enſigns of Power[m].

[i] D. 1. 16. 7.
[k] D. 1. 16. 8.
[l] D. 1. 16. 11. & 13.
[m] D. 1. 16. 16.

TIT. XXXI.

Of the Cenſors, and Quæſtors, and their Offices, &c.

A General Survey of the *Roman* Citizens, and their Eſtates, much like unto our Domeſday-Book, was introduc'd by *Servius Tullius* the ſixth King of the *Romans*; who, to dazzle the People, and to know the Strength of his State, repreſented in an Aſſembly, that the number of the Inhabitants of *Rome*, and their Riches, being conſiderably increaſed by the multitude of Strangers that had ſettled in the City, he did not think it juſt that a poor Citizen ſhould contribute to the publick Expence as much as the richeſt; that thoſe Impoſitions ought to be proportioned according to every Man's Ability: And, therefore, in order to get an exact Knowledge of this Particular, all the Citizens, upon the greateſt Penalties, ſhould be obliged to give a faithful Account of what they were worth, to ſerve as a Rule to the Commiſſioners, which the Aſſembly of the People ſhould appoint, to ſettle this Proportion. The People, who ſaw in this Propoſal nothing but their own eaſe, received it with great Applauſes, and the whole Aſſembly unanimouſly impower'd the King to eſtabliſh in the Government whatever Order he ſhould think moſt agreeable to the Good of the Publick. That Prince, to effect his purpoſe, as a Spirit of Conqueſt chiefly prevail'd in this State, and in order to have a Supply of Men and Money, decreed, that every five Years a general Survey ſhould be made of all the *Roman* Citizens, containing their Age, Subſtance, Profeſſion, the Name of their *Tribe* and *Curia*, (for he divided them into *Tribes* and *Wards*) and the number of their Children and Slaves: And this Liſt or Roll of their Perſons, *&c.* was ſtiled the *Cenſus*, from the *Latin* Verb *cenſeo*, to *rate* or *value*. There was then found to be in *Rome*, and its Territory, above fourſcore thouſand Citizens able to bear Arms. Thus the Prince or Magiſtrate could immediately know how many Inhabitants in *Rome* were capable of bearing Arms, and what Contribution might be raiſed upon them. But tho' this King had thus inſtituted the *Cenſus*; yet it was without the Aſſignment of any particular Officer to manage it: And, therefore, he took the Trouble on himſelf, and made it a part of the Regal Duty. Upon the Expulſion

of the Kings, the Buſineſs fell to the Conſuls, and continued in their Care, till their Dominions grew ſo large as to give them no leiſure for its Performance. For they being frequently taken up abroad with almoſt continual Wars, not having leiſure in above ſeventeen Years to make that Enumeration, which was the *Cenſus*, it was propos'd, for the eaſe of the Conſuls, that two Magiſtrates ſhould be created of the *Patrician* Order, who, with the Title of *Cenſors*, ſhould, every five Years, take that general Review of the whole *Roman* People. The Tribunes, though always upon their guard againſt every thing offer'd by the Senate, did not oppoſe the Eſtabliſhment of this new Magiſtracy. They did not ſo much as demand, that the *Plebeians* ſhould be allow'd a ſhare in it; whether, becauſe they ſaw that the Power which went along with the Cenſorſhip was but ſmall, or becauſe they were ſatisfy'd, that by ſeparating thoſe Functions from the Conſulſhip, (for this Office was only a Portion taken out of the Conſulſhip) a Diminution was made of the Power of a Magiſtracy, which was the Object of their Hatred and Emulation. Thus the Law for the Creation of two Cenſors paſſed without Contention [n]. Whilſt the Conſuls had the Charge of this general Review, all their Buſineſs in that Article was only to take an exact Account of the Names, Eſtates, Ages, and Conditions of all the Maſters of Families, and the Name and Age of their Children and Slaves. But when this Part of the Magiſtracy was diſmembred from the Conſulſhip, and made a Dignity by it ſelf, as Men generally ſtudy nothing but how to enlarge their own Authority, the Cenſors took upon them the Reformation of Manners [o]: And tho' this new Dignity at firſt ſeemed of little moment; yet, in time, by the Power annexed to it, it became the Pinnacle of Honour, and the moſt formidable Magiſtracy in the Republick. For they enquired into the Behaviour of all the Citizens [p]; the Senators and Knights were ſubject to their cenſure, as much as the meaneſt of the People; they had power to expel out of thoſe Bodies ſuch as they thought unworthy of being in them. As to ſuch *Plebeians*, as through their Debauchery or Lazineſs were fallen to want, they removed them down into an inferior Claſs, nay oftentimes deprived them of their Right of voting, and they were no longer reputed Citizens, but yet they were ſtill liable to pay their part of the Taxes. When the Cenſors made their general Review of the whole Nation, there was not a Citizen but what trembled at the ſight of their Tribunal; the Senator through fear of being driven out of the Senate; the Knight with an apprehenſion of being broke and deprived of the Horſe which the State kept for him; and the private Citizen with a dread of being out of his Tribe, and tumbled down to the loweſt Degree, or (at leaſt) into a Century leſs honourable than his own. So that this wholeſome Terror was the Support of the ſumptuary Laws, the Bond of Concord, and, as it were, the Guardian of Modeſty and Virtue, which preſerved the Commonwealth for a time. Their Office at firſt was to continue for five Years, becauſe every fifth Year the general Survey of the People uſed to be performed, as aforeſaid: But when they grew to be the moſt conſiderable Perſons in the State, for fear they ſhould abuſe their Authority, a Law was paſſed [q], by which their Office was reſtrained to a Year and a half: And, therefore, for the future, though they were elected every five Years, yet they continued to hold the Honour no longer than the Time prefix'd by that Law. After the ſecond *Punick* War, they were always created out of ſuch Perſons, tho' it ſometimes happened otherwiſe before. Their Station was reckoned more honourable than the Conſulſhip, though their Authority, in Matters of State, was not ſo conſiderable. And the Badges of the two Offices were the ſame, only that the Cenſors were not allowed the *Lictors* to walk before them, as the Conſuls had. This Office continued no longer than till the Time of the Emperors, who performed the ſame Duty

[n] A.U.C.310.

[o] Lipſ.

[p] Val. Max. lib. 2. c. 9.

[q] A.U.C.420.

Duty at their pleaſure: And the *Flavian* Family, that is to ſay, *Veſpaſian* and his Sons, took a Pride in being called *Cenſors*, and put this among their other Titles on their Coins. *Decius* entred on a Deſign to reſtore the Honour to a particular Magiſtrate, as heretofore, but without any ſucceſs.

A *Quæſtor*, in the general Senſe of the Word, among the *Romans*, was ſuch as got in the publick Taxes and Revenues of the *Roman* Empire throughout the whole World, and had the Cuſtody and Management thereof for the beſt advantage of the State, as our Lord-Treaſurers have, or ought to have with us. And, therefore, *Varro* ſays [r], they were called Quæſtors, *à Quærendo*, becauſe their Office was diligently to enquire and ſearch after the publick Money; and at firſt their Buſineſs alſo was to enquire into all publick Crimes and Offences, which the *Triumviri Capitales* afterwards had the Inquiſition of: And thus from theſe Enquiries they were called *Quæſtors*. The Original of creating a Quæſtor in *Rome* was very ancient, and almoſt before all other Magiſtrates. For *Junius Gracchanus* in his ſeventh Book *de Poteſtatibus*, reports, That even *Romulus* himſelf, and *Numa Pompilius*, had two Quæſtors or Treaſurers, whom they did not create by their own Voice, but by the general Suffrage and Conſent of the People, as being the publick Money they were to take care of. But tho' ſome have doubted touching this matter; yet it is certain, that Quæſtors were in the Reign of *Tullus Hoſtilius*; and this (I think) admits of no diſpute.

[r] Lib. 4. de Ling. Lat.

There were three diſtinct kinds of *Quæſtors*. For ſome were called *Quæſtores Urbani* or *Ærarii*, who had the Care of the City-Treaſury. Touching the firſt Inſtitution of theſe, it remains ſtill a doubt [s]. *Tacitus* in his Annals refers the beginning of theſe to *Pub. Valerius Poplicola*, when he appointed the Temple of *Saturn* to be the Place of the publick Treaſury: granting Power to the People to create two *Quæſtors* or Treaſurers, who were to be accountable to the People for all publick Money, under heavy Puniſhments. The two firſt of theſe City-Quæſtors were *Pub Veturius* and *Mar. Minucius:* Afterwards there were two others added unto the former, who were to attend the Conſuls in their warlike Expeditions; and were to be ready at hand to aſſiſt them with Money in the Miniſtry of the War. The Commons obtained, that part of them ſhould be choſen out of the Nobility, and the other part of them out of the Commonalty, at the *Comitia Tributa*.

[s] D. 1. 13.

The Offices of the City-Quæſtors were various: For they were not only to take care of the publick Treaſury, and to demand Taxes and Cuſtoms from the *Roman* People, and to make publick Entries of all Receipts and Diſburſements; but they were alſo to deliver out the military Enſigns from the Exchequer to the Conſuls, when they marched their Legions into the Field, and to take care of the publick Entertainment of Ambaſſadors that came to *Rome* from remote Parts of the World; to take care of foreign Ambaſſadors in their Sickneſs, and to furniſh them and their Retinue with all Neceſſaries on the publick Account; and to bury them at the publick Charge. When the General of the Army returned from an Expedition, and deſired a Triumph, he was to make Oath before them touching the Number of the Enemy ſlain, and the Number of the Citizens loſt.

Among the Quæſtors that acted out of the City, ſome were wont to have the Government of Provinces allotted, according to a Decree of the Senate, made at the Recommendation of *Porcina* and *Decimus Druſus*, when they were Conſuls; and they had the Care and Management of the publick Money in ſome Province or other. The word *Quæſtor* was alſo uſed for him, who was otherwiſe ſtiled *Candidatus Principis*, or the Prince's Chancellor, whoſe Buſineſs it was to read and form the Prince's Decrees, and his

his Letters to the Senate. Touching theſe, ſee *Briſſonius* in his Antiquities. There was alſo another ſort of Quæſtor, who preſided over capital Cauſes. But the great Quæſtor here referr'd to was the City-Quæſtor, who had no Juriſdiction, nor a *Curule* Chair, as moſt other Magiſtrates had, nor Lictors, Beadles, *&c.* to attend him. He was to be twenty-ſeven Years of Age at leaſt, before he was qualified for the Office; and was to be a Perſon of clean Hands, and uncorrupted Fidelity. He might be ſummoned before the Prætor by a private Perſon, if he was found guilty of robbing the Publick. The Provincial Quæſtors acted under the Proconſuls and Proprætors in the Provinces, and were in Subordination to them, furniſhing them with Money, *&c.* There was a Quæſtor ſent into each Province, unleſs it was into *Sicily*, which had two Quæſtors; becauſe it was divided into the new and old *Sicily*. But let this ſuffice touching Quæſtors. I paſs next to ſpeak of the *Roman* Senate, a great and powerful Body, whilſt the Commonwealth laſted.

TIT. XXXII.

Of the Roman *Senate and Senators; their Number, of whom they conſiſted, and in what manner elected.*

EVERY one, that pretends to any part of Learning, very well knows, That the Words *Senate* and *Senators*, are derived from the *Latin* word *Senectus*[s], which ſignifies old Age: For *Romulus*, the firſt King of the *Romans*, after he had built the City, and founded that antient State, did, by the Suffrages of the Wards and Tribes of *Rome*, chuſe one hundred Perſons out of theſe Bodies for his Council to govern the State, and they were to be Fathers and old Men, that they might, by their Experience in Buſineſs, be the better qualified to conduct themſelves in State-Affairs: For the Care of the Republick was only committed to Men of Years[t]; that is to ſay, to ſuch Perſons as were above twenty-five Years of Age. Thus *Cicero* obſerves, that, among the *Lacedemonians*, thoſe Perſons were ſtiled *Senes*, that were admitted to the higheſt Offices of Magiſtracy among them, though the word *Senectus* in the *Latin* Tongue denotes a more advanced Age than that of twenty-five Years, as I have already ſhewn. Theſe Senators were afterwards called *Patres* or Fathers, by reaſon of the Honour that was due to them for their great Wiſdom; for they were the Patrons and Defenders of the People. And the Writers of the *Roman* Hiſtory inform us, that ſuch as were ſtiled *Patricians*, were the Deſcendants of theſe Senators. Theſe Senators were alſo termed *Patres Conſcripti*, becauſe they were regiſtred and enrolled in the Senate; and that other Reaſon given of their being ſo called, *viz.* becauſe their Names were written on their Turbants, is falſe and idle.

[s] Liv. lib. 1.

[t] D. 50. 6. 5. D. 50. 4. 8.

But though, in the beginning, the Number of theſe Senators was only a hundred; yet, in proceſs of time, this Number was increaſed even to three hundred: For *Tarquinius Priſcus* afterwards increaſed the Majeſty of the Senate, by adding a hundred Men. But then came *Tarquinius Superbus*, who by Death and Baniſhment deſtroy'd the moſt eminent Part of the

Senate. But ſoon after, on the Expulſion of their Kings, the *Roman* Senate, which had been thus diminiſh'd by the cruel Slaughter and Treatment of *Tarquin* the *Proud*, was again reſtored to its antient Number by *Brutus* the firſt Conſul, who augmented it to the number of three hundred, by chuſing the Chief of the *Equeſtrian* Order into this Body. And thus the Perſons that were ſo choſen by him, and regiſtred as Senators, or (as the *Latin* has it) *Senatui aſcripti*, were called *Patres conſcripti*, as being diſtinguiſh'd from the other Senators, though at length they all came under this Appellation. Some time after this, *Cæſar* increaſed the Body of the Senate, rather thro' Favour to particular Perſons, than by a regular Choice, and brought many Citizens and Foreigners thereinto, (according to *Rivallius*,) as it ſerved his own Intereſt and Purpoſe. And thus, the Senate conſiſting of *Gauls* and ſeveral other foreign Nations, an humble Petition was made him not to enlarge this Council any farther with new Members, which he complied with during his time. But after *Cæſar*'s Death, there were ſo many Perſons admitted into this Body, through favour, and other corrupt Methods, that the Senators amounted to above a thouſand in number, which not only rendred the Aſſembly tumultuous, but leſſened the Dignity of the Order: Whereupon *Auguſtus* at length reduced them to their antient Standard and Splendor.

Feneſtella, in his Treatiſe of the *Roman* Magiſtrates [u], tells us, that the Senate conſiſted of three Ranks or Orders of Men: Some of them being ſtiled *Patricians*; others *conſcript Fathers*; and the third degree was that of the *Pedarii*, ſo termed, according to *Aul. Gellius*, becauſe they went to the Senate on foot, as having no Chair or Chariot allowed them; others ſay, becauſe they gave not their Suffrage *vivâ voce, ſed pedibus in ſententiam ibant* [v], viz. they voted and gave their Opinion by going on this or that ſide of the Senate-Houſe. And hence, among them a Decree of the Senate was two-fold, *viz.* that which was made by going out or retiring, when they gave their Votes: And the other was made by collecting their Votes in the Houſe, *viz.* when each Perſon was ſeverally asked to give his Opinion; and this was in Matters of great moment. The *Patricians* were chiefly thoſe that were the Deſcendants of thoſe hundred Senators, that were firſt created by *Romulus*. The *conſcript* Senators were thoſe that were brought into the Senate by the Decree of ſucceeding Kings, Conſuls, or Cenſors. Some ſay, that the *Pedarii* were thoſe that came to the Senate, but yet had no Suffrage, as having never went through the Office of a *Curule* Magiſtrate. *Feſtus* ſays, as juſt now hinted, that theſe laſt did not declare their Sentiments by Words, but went to the ſide of them, whoſe Opinion they allow'd: and, therefore, were called *Pedarii*, as aforeſaid. But this Conjecture of *Feſtus* does not pleaſe me, becauſe this might as well be ſaid of other Senators: Wherefore, I rather chuſe to follow the Opinion of *Aulus Gellius*, viz. becauſe they went to the Senate on foot: For thoſe that had not paſſed through the *Curule* Magiſtracy, could not ride in a *Curule* Chair. And though they had not properly Votes in the Senate, yet they joined the chief of the Senate in their Opinions.

[u] Cap. 1.

[v] Feſtus.

Not only Age (for none could be called to the Senate, but ſuch as were twenty-five Years of Age, at leaſt, *anno currente*,) but a proper Eſtate was alſo conſidered in the Choice of a Senator, as *Seneca* remarks in his *Declamations* [w], *Senatorum gradum Cenſus aſcendere facit*, leſt they ſhould be tempted to do amiſs by Corruption. But whether this was an antient Inſtitution of that Order, *Pliny* [x] doubts in his natural Hiſtory. For, ſays he, the Largeneſs of an Eſtate has been a Detriment to the Publick, ever ſince a Senator has been choſen on the account of his Eſtate, ſince Men can procure themſelves to be elected Senators through the means of

[w] Lib. 2.

[x] Lib. 14.

their great Wealth alone, without any other Merit. Hence *peſſùm iêre vitæ pretia*, &c. But, I think, an Eſtate is commendable in a Senator, if not neceſſary in him, leſt the Splendor of that high Order ſhould be obſcur'd by the Narrowneſs of their Fortune. And we read in ſeveral good Authors, that a Senator's Eſtate before the time of *Auguſtus*, was eight hundred thouſand Seſterces: Which he enlarged to a greater Sum, if we may believe *Suetonius* and *Dion. Caſſius*. But not only he who had no Eſtate was without a Qualificaton hereunto, but if he waſted his Eſtate, and was reduced in his Circumſtances, after he was choſen, he was expelled the Order. See *Cicero*'s Epiſtles to *Quint. Valerius*. And all manner of Gain and filthy Lucre was ſo odious in a Senator, eſpecially if he was found ſelling his Voice, that it not only turned him out of the Senate, but it rendred him infamous for ever afterwards, according to a Law of *Quint. Clodius*, a Tribune of the People [y]. See *Cicero*'s ſeventh Oration againſt *Verres*. Such as were choſen into the Senate from any other Place than the City, did not loſe or change their Dwelling, though they obtained a new Settlement: For a Dignity does not change a Man's former Condition, though it may change his Temper.

[y] Liv. Hiſt. lib. 21.

The Senators were diſtinguiſhed from the Knights by a Gown, which was called *Laticlavium*, being a Robe or Garment of Purple, wrought with Studs like unto Nails Heads. They determined their Acts, which they termed *Senatus-Conſulta*, ſometimes by departing from their Benches, and dividing themſelves into Sides, and ſometimes by going out of the Houſe, as with us, in dividing the Parliament-Houſe. Thoſe who approved what was propoſed, ſided with the Party that propoſed the Matter to the Senate, and the others went to the contrary ſide: or if they came not down at all, but ſate ſtill on the Benches, they then ſignified their Opinions by holding up their Hands. But if both Parties were almoſt equal, ſo that the major part could not eaſily be diſcerned, then they proceeded to give their Voices by Scrutiny; and that which was thus determined, was ſaid to be decreed by the Opinions of all and every of them.

In the beginning, under *Romulus*, and the ſucceeding Kings, there was a Perſon ſtiled *Prince of the Senate*, who repreſented the Sovereign Magiſtrate in the Senate, and was much like unto our Speaker of the Houſe of Lords or Commons: only he was choſen for Life, and had a much larger Power given him; which Honour was ſeldom conferr'd on any one, but who had been Conſul or Cenſor. The Power of this College or Conſiſtory, called the *Senate*, conſiſted in all Matters relating to the State, except the creating of Magiſtrates, giving Sanction to the Laws, and the Buſineſs of Peace and War [z]: For in the Buſineſs of Peace and War, and of making Laws, they had only the Power of debating the Matter, and of reporting their Opinion unto the King himſelf. In reſpect of the publick Revenue or Treaſury, their Power was unlimited [a]: All the Receipts and Disburſements of publick Money being under their Cognizance alone; and a very watchful Eye they kept on their Treaſurers or *Quæſtors*, to ſee they did not embezzle, miſapply, or purloin the Caſh of the Commonwealth to their own Uſes. They had alſo the Puniſhment of all flagitious Crimes, as Treaſon, Conſpiracy, and the like, which were committed within the Confines of *Italy* [b]. And, laſtly, whatever Embaſſy was ſent to any Place out of *Italy*, either for the ſake of contracting Alliances, or on the ſcore of Mediation, Exhortation, or denouncing of War, *&c.* the Senate was always conſulted herein, and was to take care that no Damage enſued to the State from them. The Senate was likewiſe conſulted, when Ambaſſadors came to *Rome*, how they were to be received and entertained, and what Anſwer was to be given to them [c]. See *Cicero*'s Oration *pro domo ſuâ*, and that againſt the Witneſs *Vatinius*.

[z] Dion. Hal. lib. 6.

[a] Polyb. lib. 6.

[b] Polyb. ut ſupr.

[c] Polyb. ut ſupr.

Touching

Touching the time of holding the Senate, it was two-fold, *viz. Firſt*, that fixt Time which the Law had appointed; and this was at firſt on the Calends, Nones, and Ides of every Month: But *Auguſtus* afterwards ordered, that a *legal* Senate ſhould not be held oftener than twice a Month [d], on the Calends and Ides, and that none ſhould be held in *September* or *October*, unleſs occaſionally. If the Senate was called or held at any other time, it was aſſembled by the Prince's Authority. The Royal Authority, by the Death of *Romulus*, was loſt in that of the Senate: For they, being not able to bear that the Government ſhould be turned into a direct Monarchy, began to rid themſelves of a Prince that grew too abſolute. Whereupon the Senators agreed to divide this Power among themſelves, and each with the Title of *Inter-Rex* governed in his Turn five Days, and enjoy'd all the Honours of Sovereignty. This new Form of Government laſted a whole Year, and the Senate never thought of giving themſelves a new Maſter. But the People, who found that this *Inter-Regnum* only increas'd the number of Lords, loudly demanded to have it at an end; and the Senate were at laſt obliged to yield up an Authority, which they could hold no longer. They put it to the People, whether they would proceed to the Election of a new King, or only chuſe annual Magiſtrates, that ſhould have the Government of the State. The People, out of Reſpect and Deference to the Senate, left them the Choice of thoſe two ſorts of Government. Several Senators that reliſhed the pleaſure of ſeeing no Dignity in *Rome* ſuperior to their own, inclined to the Republican State; but the chief of the Body, who ſecretly aſpired to the Crown, got it determin'd by a Plurality of Voices, that no Alteration ſhould be made in the Form of Government. And thus it was reſolved to proceed to the Choice of a new King; and if the People choſe a Succeſſor worthy of *Romulus*, the Senate would confirm him in that ſupreme Dignity: and the Choice fell upon *Numa Pompilius*, a Man of Virtue, Wiſdom, Equity, and Moderation, but no great Soldier; ſo that not being able to get any Reputation by his Courage, he ſought to diſtinguiſh himſelf by the Virtues of Peace. See his Character by *Livy*, *Plutarch*, &c.

[d] Suet. de Vit. Aug. c. 35.

TIT. XXXIII.

Of Nobility in general; *and of the* Roman *Nobility in particular*: *and of Dignities*, &c.

NOBILITY, according to *Spigelius*, is a Quality or Dignity of Diſtinction, whereby one Perſon excels another, not only in the Eminency of Name and Lineage, but alſo in the Fame and Reputation of vertuous Actions: ſo that, according to him, Nobility may be ſaid to be three-fold. The firſt kind of Nobility is that which a Perſon derives by Deſcent from his Anceſtors: The ſecond is that which he aſſumes from the Honour of his own vertuous Actions. And this is true Nobility: For he who values himſelf on the account of his Deſcent from great Men, boaſts of that which belongs to his Anceſtors. The third kind of Nobility is that which depends on

on the Stock of our Anceſtors, and on our own Merit: So that there is one kind of Nobility which conſiſts in being born a Nobleman; another which is ſeen in brave and vertuous Actions; and a third which appears from high Deſcent and vertuous Actions joined together. Thus *Bartolus* on the [e] C. 12. 1. 1. *Code* [e] obſerves, that there are three kinds of Nobility: The *firſt* being that which ariſes from great and laudable Actions: The *ſecond* being that which is derived from the Knowledge of uſeful Learning: And the *third* being that which deſcends from the Wealth and Pedigree of our Anceſtors; which laſt kind was of little or no eſteem among the old *Romans*, unleſs it flow'd from their vertuous Actions. And this was the principal Riſe of the Nobility among the antient *Romans*, in the Purity of their State.

From what has been ſaid, it appears, that a Perſon may be ſtiled *Nobilis*, either in reſpect of Family, or in reſpect of Manners, or elſe in reſpect of his Mind and Underſtanding: And, according to *Cynus*, a Nobleman in reſpect of Manners, is to be preferr'd to a Nobleman in point of Family only; becauſe he acquires Nobility from himſelf, whereas the other ſhines with the Luſtre and Nobility of his Anceſtors. But if any one be a Nobleman in reſpect of good Manners and good Family both, he ſhall then be preferr'd to him, who is ennobled only in point of Manners, becauſe *duplex decus in eo fulget*, viz. his own proper Luſtre, and that of his Family. Thoſe Perſons that are deſcended of noble Parentage, are, in reſpect of Blood, by the *Civil* Law ſtiled *Perſonæ Sublimes*; and ſuch a kind of Nobility is preferr'd unto Literature and good Learning. A Perſon of Liberality may in a large Senſe be ſtiled *Nobilis*, becauſe he exerciſes an Act of Nobility: For it is the Property of a Nobleman to extend his Liberality. It is to be noted, that among the antient *Romans* every one that was not a *Plebeian*, was reckoned a Nobleman, whether they were *Knights* or *Patricians:* But of this by and by.

Nobility, as it is a kind of an Accident, and an adventitious Thing, is [f] In l. 9. c. 9. 1. not preſumed, but ought to be proved: For, according to *Baldus* [f], every one is preſumed to be a Plebeian or a Commoner, unleſs the contrary appears. And, therefore, he who avers himſelf to be a Nobleman, ought to prove the ſame; becauſe this Quality is in but few, and conſequently not preſumed. Nor is it a firſt Quality that proceeds from Nature, but it has its Riſe from our Progenitors, and from Things happening unto them, generally ſpeaking: And, therefore, he who alledges it, ought to prove it, when Nobility is deduced in Judgment by way of Incident; and thus when the principal Queſtion is not about it, lighter Proofs are held ſufficient. There is a great Preſumption in Law lies in favour of a Nobleman, *viz.* That he is a Perſon that has the higheſt Regard and Honour for his Word, and a ſtrict Obſerver of his Promiſe after he has given the ſame; inſomuch, that if the Judge has enlarged a Nobleman from Impriſonment, and would have the Hall of Juſtice itſelf to be in the Place of a Priſon, and ſuch a Nobleman runs away, he is deemed to have forfeited his Nobility, and ought to be degraded.

The State and Condition of Noblemen is conſidered in many reſpects: *Firſt*, in reſpect of obtaining any Licence or Diſpenſation. *Secondly*, in reſpect of Puniſhments: For in inflicting Puniſhments, greater regard ought to be had to a Nobleman than to a Perſon under that Degree and Character: And it is the ſame thing likewiſe in the conferring of Benefices. *Thirdly*, in reſpect of exhibiting and paying them Honours, as by ſaluting them, giving them a Seat among the Judges, and the like. *Fourthly*, they may enjoy a Plurality of Offices or Benefices. *Fifthly*, they ought to be preferr'd before others in all Elections, *cæteris paribus*. And *ſixthly*, they are conſidered in making an equal Diſtribution of Benefices, and in the Adminiſtration of other Mens Goods.

Nobility

Nobility is a Quality conferr'd and given by the Prince, or him that has the ſovereign Power veſted in him, and it raiſes and advances a Perſon above the Commonalty. *Bartolus* gives this Deſcription of it in his Treatiſe thereof; wherein he lays down theſe four Opinions about a Nobleman, ſaying, *firſt*, That Soldiers and the ſuperior Commanders of Armies ought to be called Noblemen. And hence *Cujacius* infers, that we have the Origine of the preſent Nobility, which are all military Titles: For antiently none were Nobles, but ſuch as were inveſted with the Title by the Prince or Leader of an Army. A *Duke*, otherwiſe in *Latin* called *Dux Belli*, was he, unto whom the whole Care of the War was committed. And this Dignity of a Dukedom at firſt was not illuſtrious, as at preſent, but was the moſt perfect; and therefore ſtiled *Dignitas Clariſſima.* A Marquiſs was the commanding Officer that defended the Marches or Borders from the Attack of the Enemy. A *Comes* or Count was an Aſſociate unto the General of the Army in the beginning; then the Name was given to all Magiſtrates that followed the Prince's Retinue or Court, and at length to all Perſons that were ſet over Affairs of any great Conſequence in the Prince's Houſhold, *&c.* as the *Comes ſacrarum Largitionum*, whom ſome will have to be the Treaſurer of the Houſhold, but I rather chuſe to call him the Prince's Almoner. In the latter time of the *Roman* Empire, about the Days of *Juſtinian*, there were ſeveral ſorts of theſe Counts or *Comites, viz.* of the firſt, ſecond, and third Order. There were Counts of the Prince's Conſiſtory, and theſe were as the Prince's Cabinet or Privy-Council; and being equal unto Proconſuls, were exempt from all mean and ſordid Offices. There were others ſtiled *military* Counts; and of theſe there were two that were employ'd in War-Affairs in the Tranſmarine Provinces: But the Proconſuls were preferr'd unto theſe *military* Counts. There are ſome *military* Counts, that are ſtiled *Comites Majores*, others termed *Comites Mediocres*, and others that are called *inferior* Counts. The *ſuperior* Counts almoſt ever follow'd the Prince, and, as a Retinue, were Officers in his Court: But the others were ſent as Governors of Provinces. And hence it is, that antiently among us we had a Count or Earl ſet over every Province or County in *England.*

The *Roman* Nobility were called *Patricii*, as being ſuch Perſons as were deſcended from the firſt Senators of *Rome*, termed *Patres* from their Age and Wiſdom; and from hence the word *Patrician* had its Riſe and Origine. Thus *Livy* obſerves, that *Romulus* firſt created theſe Senators, who, by way of Honour, were ſtiled *Patres* or Fathers; and their Offſpring or Progeny were afterwards called *Patricii.* But *Cincius*, according to *Feſtus Pompeius*, ſays, that they were wont to be called *Patricii*, who are now called *Ingenui*; but this (I think) is a wrong Account. The Diviſion of the Nobility among the *Roman* Citizens, was taken from their Images and Coats of Arms: For thoſe were ſtiled *Noblemen* who had the Images of their Anceſtors in their Families, as all the *Patricians* had: But ſuch as had only their own Images, and not thoſe of their Anceſtors, were called Novices or Upſtarts, *viz. novi homines.* And laſtly, thoſe who had neither their own Images, nor thoſe of their Anceſtors, were termed *Ignobiles* or Plebeians: So that the Right of Images among the *Romans*, was nothing elſe but the Right of Nobility. This Image, according to *Polybius*, was the Sculpture of ſome eminent Perſon engraven in Wood, and repreſenting the likeneſs of him for whom it was deſigned; and it was placed in the moſt conſpicuous and remarkable Part of the Houſe, as the Arms of the Family. And though at firſt none but Patricians and Soldiers of ſuper-eminent Merit could have theſe Armorial Enſigns; yet in After-Ages, they were granted to any Office or Adminiſtration, unto which any Nobility or Dignity was annexed. For among the *Romans* it muſt be acknow-

ledged, that he was eſteemed a Nobleman in a large Senſe of the Word, that was ſuperior to the Populacy in Honour and Dignity; ſo that Gentlemen among us might be ſo ſtiled.

In Elections, and the giving of Evidence, where the number of Voices is equal, a Nobleman is preferr'd unto a Plebeian or Commoner, according to the *Civil* Law: But it is otherwiſe by the Law of *England*. In Fines or pecuniary Puniſhments, if a Nobleman be a Delinquent, he is puniſh'd
[b] C. 12. 1. 1. with more Severity than a Plebeian of *common* Right [b]: But in corporal Puniſhments, a Plebeian is puniſh'd more grievouſly than a Nobleman, by reaſon of his Character and high Dignity in the World; for a Nobleman has a Dignity. Though a Nobleman be deprived of his Nobility and Dignity in reſpect of all Advantages accruing from thence, on account of ſome Offence committed by him: yet he ſhall not be deprived of his Nobility in reſpect of Incumbrances, which he ſhall ſtill retain; for if he were, his Crimes might prove an advantage to him.

By the *Civil* Law, there are ſome certain Perſons that cannot aſcend or be promoted to any Dignities in the State: As Perſons branded with any Infamy of *Law* or *Fact*, nor Perſons ſtained with any vicious or wicked Courſe of Life, nor ſuch as are guilty of any Action which carries Turpi-
[c] C. 12. 1. 2. tude with it [c]; as Theft, Abuſe of Guardianſhip, *&c.* Perſons are here ſaid to be branded with an Infamy of Fact that are declared infamous by the definitive or interlocutory Sentence of the Judge. Perſons that exerciſe mean or low Arts or Trades, ought not to aſpire to any Dignity; and if
[d] C. 12. 1. 6. they obtain the ſame, they ſhall be degraded [d]. A higher Dignity ought not to prejudice a Perſon in reſpect of thoſe Privileges which he has ac-
[e] C. 12. 1. 3. quir'd by virtue of a former Diginty [e]. A Perſon born from him, who has obtained any Dignity after the Birth of his Son, does not receive ſuch Dignity by Deſcent from his Father: But if he be born during the Time that his Father enjoys ſuch Dignity, though he was conceived before, yet he
[f] C. 12. 1. 11. ſhall obtain the ſaid Dignity [f]. A Dignity is an Honour given unto ſome particular Perſon, either by the ſpecial Grant of the Prince, or elſe by ſpe-
[g] Inl. 1. C. 12. 1. cial Grant of Law, upon the account of his great Merit. See *Bartolus* [g]. In the Times of the latter Emperors, we meet with four kinds of Dignities.

The firſt were ſtiled *Clariſſimi*; and theſe were the Senators, the Preſidents and Rectors of Provinces, the Prætors, the Prefects of Proviſions, and the Watch, whom the *Novels* ſometimes ſtile *Spectabiles*. They had Juriſdiction, and might pronounce Sentence; but an Appeal lay from their
[h] C. 7. 63. 2. Sentences [h]. There were ſome ſtiled *Illuſtres*; and among theſe there were ſome termed *Super-illuſtres*, being ſuch as were the Prince's Aſſeſſors, and of his Privy-Council, and who acknowledged no other Superior but the Prince; as the Conſuls, Senators, Patricians, who were called by no other Title, and preſided over Counſels rather for Deciſion of Cauſes. The *Spectabiles* were of the inferior Rank, and were ſuch as looked after the Prince's Treaſury, and the like. After the *Goths* and *Vandals* had poſſeſſed themſelves of *Italy*, we read of a fourth kind of Nobility or Dignity ſtiled *Illuſtriſſimi*; and theſe were Dukes, Marquiſſes, Counts, *&c.* being the modern Nobility. I ſhall diſcourſe of theſe in my ſecond Volume of this Work.

TIT.

TIT. *XXXIV.

Of Biſhops, Prieſts, and other Miniſters of the Church; their Offices, Orders, and how the ſame are to be come at, without Bribes, Simony, and the like.

THERE being no ſpecial Title in the *Digeſts*, which concerns the Buſineſs and Privileges of *Eccleſiaſticks*, ſaving that the *Pandects* divide the publick Law into that which concerns the Church and Churchmen in general; I will here diſcourſe of Churchmen in a particular manner, from the *Code*, which has given us a Title or two to this purpoſe [h]. And *firſt*, I ſhall ſpeak of Biſhops as the ſpiritual Fathers and Governors of the Clergy, who have the firſt Place among them, and are, as it were, the Overſeers and Super-Intendants of the reſt: in *Greek* called ἐπίσκοποι, from their Care, Watchfulneſs, and Fidelity in teaching the People, and doing other Duties, which they owe unto the Church. In the early Ages of the Church, indeed, the Power of Biſhops and Prieſts was for ſome time in common, the Apoſtles having granted this Right unto all the Elders, for the common Welfare of the whole Church, without the diſtinction of Biſhops and Prieſts, as now uſed [i]. But when Schiſms and Contentions aroſe among them in the Church of God, for that each miniſterial Perſon thought he had the ſole Care of ſuch as he had baptized, and that theſe were ſubject to his Power and Juriſdiction alone; there hence came this diſtinction of *Biſhop* and *Prieſt* among God's Miniſters: So early were Men wont to wrangle about Power in Church Matters. And then we read, that this common Power of Presbyters was, by a general Decree, abrogated and taken away from them, and a Biſhop was placed over them for Government, and other ſacred Offices. I will not here enter into the Diſpute, whether Biſhops are of divine or apoſtolical Right, or whether they came into the Church ſince the Time of the Apoſtles; but ſurely it is a wholeſome Inſtitution of Order and Government, if the Men perform their Duty in their Vocation. The Gloſs [k] tells us, that Presbyters had the higheſt Place among the Clergy, and in reſpect of Ordinations, were in the Place of the Apoſtles; but the Direction and Government of the Church was in the hands of the Biſhop, with the Advice of his Presbyters. St. *Peter*, though an Apoſtle, calls himſelf a Fellow-Presbyter [l], and makes no diſtinction between Biſhop and Presbyter. See alſo St. *Paul* to the Presbyters of *Epheſius* [m]. It was incumbent on Presbyters, as well as Biſhops, to preach the Word of God; and they are frequently ſtiled σύμβουλοι τοῦ ἐπισκόπου, and τῆς ἐκκλησίας στεφανὸς. The *Greek* Church early diſtinguiſh'd between Biſhops, Presbyters, Deacons, and Sub-Deacons; but this Diſtinction did not ſo ſoon come into the *Latin* Church.

Now, by the *Civil* Law, no one ought to be made a Biſhop, but ſuch as is of an orthodox Faith, ſober and regular in his Manners, of conſummate Knowledge in the underſtanding of the Holy Scriptures, a Perſon of mature Age, chaſte in his Life, and of great Humility in his Converſation, without any Blemiſh in reſpect to his Birth, and not deformed in his Body [n], *&c.*

[h] C. 1. Tit. 3 & 4.

[i] C. 1. 3. 14.

[k] In l. 8. C. 1. 3.

[l] 2 Pet. c. 5. v. 1.

[m] Act. c. 20. v. 17, & 18.

[n] C. 1. 3. 31. & 42.

&c. By the ſame Law, Biſhops ought not to cohabit with any other Women than their own Relations, to avoid a Suſpicion of Leudneſs, and in the place of Wives, they ought to have the Church for their Spouſe, and adhere thereunto [o]: And (in Prudence) they ought not only to be exempt from Wives, but likewiſe from Children, that they be not tempted to ſpend the Goods and Revenues of the Church on their own Iſſue begotten, which they ſhould lay out on feeding the Poor and Needy [p]. But, by a Novel of *Leo* the Emperor, the Law in the *Code* touching the Celibacy of Biſhops, *&c.* was afterwards repealed, and Biſhops may now marry in all Proteſtant Countries; and may likewiſe keep extraneous Women, whether they be Virgins or Widows, that live an honeſt Life, as their Houſe-keepers, unleſs (perchance) they give Scandal and Offence hereby unto the World; and then they may be interdicted by the higher Power [q]. Great care is alſo taken by the *Civil* Law, that Perſons be not promoted to this Dignity by evil Arts, as by their own Prayers and Sollicitations: For Perſons ought to be ſo far from canvaſſing for this Employment, that they ought to be intreated, and, as it were, compelled hereunto, *rogati recedant, invitati effugiant*, ſays the Novel [r]. Therefore, if any Perſon ſhall come to a Biſhoprick by the corrupt means of Preſents, and the like, he ſhall not only be deprived of his Epiſcopal Dignity, but be likewiſe depoſed of the Prieſthood, and branded with perpetual Infamy [s]: And he who has been once ejected, cannot afterwards be admitted to the Honour and Degree, which he has thus loſt and forfeited [t]. And, moreover, that which he has given for his Degree, ſhall go to the Church, which has ſuffered this Injury; and he who has received it ſhall be fined in two-fold [u]. The *Canon* Law alſo condemns and puniſhes this Crime of Canvaſſing and Sollicitation, which the *Canoniſts* ſtile by the Name of *Simony*. But at this day the Crime of Simony is not regarded in *France*, nor in the Court of *Rome*, but tolerated there by the Pope's preſence. See *Bugnion de ll. Abrogatis* [v]. In *Holland* it is puniſhed, if ſuch a Caſe happens, with an Eccleſiaſtical Cenſure, according to the Diſcretion of the Conſiſtory, which is grounded on a Decree of the Synod of *Middelburg* [w].

The Emperor *Juſtinian* has preſcribed a Form to be obſerved in the Election of a Biſhop [x]; which Form Pope *Innocent* the Third has altered in ſome meaſure [y]. But in theſe Times moſt Princes in Chriſtendom are wont to have the Nomination of fit and proper Perſons to be Biſhops or Abbots; and then in Popiſh Countries they are confirmed by the Pope: Becauſe, ſays *Covarruvias* [z], it is the Intereſt of the King to know who are fit Perſons to have the Adminiſtration of Churches within his Dominions. Biſhops were heretofore often wont to be choſen out of the Number of the Monks, as well as out of that of the Secular Clergy [a]. No one may be elected a Biſhop, whilſt there is an Accuſation depending againſt him in any Court of Law [b]. In *Holland*, the Paſtors are choſen by the Conſiſtory or Church-Aſſembly; and being thus elected, are approved of by the Magiſtrate and the Eccleſiaſtical Claſs; that is to ſay, by the Miniſters of the neighbouring Churches which are in the Villages; and then the Name of the Perſon elected is publickly propoſed in the Church for the tacit Conſent of the People [c].

Every City has its own proper Biſhop; and he who ſhall endeavour to deprive a City of its Biſhop, even by the Prince's Reſcript, is liable to a Confiſcation of all his Eſtate, and is noted with Infamy [d]. After Biſhops have received Conſecration, they are to obſerve a perſonal Reſidence in the Church, unto which they are choſen, and not to travel or abſent themſelves for a whole Year together, under the Pain of Depoſition, if they ſhall not return on the Summons of their Superior in the Church [e], unleſs they are retain'd in the Prince's Service above a Year: For the Prince or Emperor

[o] C. 1. 3. 48.
[p] C. 1. 3. 42. 1. Nov. 123. c. 1. Nov. 137. c. 2.
[q] Ritterhuſ. de diff. jur. Civ. l. 2. c. 20.
[r] Nov. 137. c. 2.
[s] C. 1. 3. 31.
[t] C. 1. 3. 14.
[u] Nov. 123. c. 2.
[v] L. 1. Sat. 137.
[w] Ad. 1578.
[x] C. 1. 3. 42.
[y] X. 1. 6. 42.
[z] C. Poſſeſſor. p. 2. §. 10.
[a] Nov. 6. c. 1
[b] Nov. 23. c. 2.
[c] Groenv. de ll. Abr. C. 1. 3. 42.
[d] C. 1. 3. 36.
[e] C. 1. 3 43. Nov. 6. c. 3.

Emperor may diſpenſe with the Biſhop's Reſidence at his Cathedral Church [d]; and by the Prince's Command may exerciſe the Adminiſtration of Civil Affairs [e]. The *Canon* Law requires the conſtant Reſidence of Biſhops and others, having the Cure of Souls: And tho' the Council of *Trent* [f] avers Reſidence to be a Matter of *divine Right*; yet the Church of *Rome* infamouſly diſpenſes with the ſame for frivolous Reaſons. Touching a further account of theſe Matters relating to Reſidence, and the Election of Biſhops, the Reader may ſee my *Parergon Juris Canonici*, wherein I have largely handled theſe Subjects.

[d] Nov. 73. c. 3. Nov. 123. c. 9.
[e] Nov. 6. c. 2.
[f] Seſſ. 23. c. 1.

By the *Civil* Law, a Biſhop is the Executor of a Laſt Will and Teſtament made to charitable Uſes, even whether the Teſtator will have it ſo or not [g]; becauſe in the Primitive Church, the chief Care of Captives and *Paupers* was lodged with the Biſhop [h]; which yet he did not execute in his own Perſon, but by his Deacons [i]: But now with us, and other Nations, this Office, I think, is left to be diſcharged by Heirs and Executors, who, if they ſhall neglect to do it, may be compelled hereunto by the Office and Authority of the Judge [k]. If the Heir be ordered by the Teſtator's Will to redeem a Captive, and he ſhall neglect to do it, he ſhall be deprived of the Succeſſion or Inheritance [l].

[g] C. 1. 3. 28. 1.
[h] Diſt. 82. c. 1.
[i] Diſt. 88. c. 7.
[k] C. 1. 3. 46. 2.
[l] Nov. 115. c. 3.

As a Biſhop had great Privileges granted to him by the Conſtitutions of ſuch of the Emperors as ſucceeded *Conſtantine* the Great; ſo he had this among the reſt, That he ſhould not be ſummoned to appear before a civil or military Judge in any Cauſe whatſoever, unleſs it were by the Prince's Reſcript or Commiſſion [m]. If a Perſon in the Father's power was advanced to a Biſhoprick, his Epiſcopal Dignity immediately diſſolved the Power of the Father, and ſet the Biſhop at liberty [n]. But the ancient Power of the Father being now aboliſh'd, this Novel is gone with it: and ſo likewiſe is that other, which exempts a Biſhop from appearing before a ſecular Judge, by the Uſage of modern Times. And thus much touching Biſhops for the preſent.

[m] Nov. 123. c. 8.
[n] Nov. 81.

I come next to ſpeak of Clerks, which are in Subordination to Biſhops, and are called in our Books the Miniſters of Churches, and of an orthodox Faith [o], as ſerving at divine Offices in ſome Church or other. The *Canon* Law reckons up ſeven Orders or Degrees of them, and ſo does the Law in the *Code* here quoted [p]: But this Law is only regarded in Popiſh Countries, ſince Proteſtants only allow of Prieſts and Deacons among the inferior Clergy. *Juſtinian* has appointed certain Ages for taking Orders. A Preſbyter by one Novel [q] ought not to be under thirty-five Years of Age; and another reſtrains it to thirty Years [r]. A Deacon and Sub-Deacon was to be twenty-five Years of Age; and a Lecturer eighteen. But touching this Matter, there is a more modern Conſtitution in the *Clementines*, requiring a Sub-deacon to be eighteen, a Deacon twenty, and a Prieſt twenty Years of Age at the time of Ordination: But this, according to the Council of *Trent* [s] is alter'd; and now a Sub-deacon muſt be two and twenty, a Deacon three and twenty, and a Prieſt five and twenty *anno currente*. A Perſon who is promoted to Holy Orders, ought to be a Freeman, and not a Servant, without the tacit or expreſs Conſent of his Maſter. The Office and Duty of a Clergyman the Emperor has deſcribed at length [t], requiring him to be always attendant at divine Offices in his Perſon, and not by Subſtitutes or Hirelings. Clergymen ought to abſtain from all unlawful Conventicles, even out of the Church [u], and not to have to do with Law-Suits and Pleadings at the Bar [w]. They ought likewiſe to refrain from all gaming and playing at Dice, and from theatrical Shews, and other Paſtimes, or having any Converſation with ſuch Perſons, under pain of Suſpenſion from their miniſterial Office, and three Years Impriſonment in a Monaſtery [x]. Beſides this Puniſhment, the Biſhop ought to inflict that of Excommunication, on pain of being excommunicated

[o] C. 1. 3. 10. & 27.
[p] C. 1. 3. 6.
[q] Nov. 123. c. 13.
[r] Nov. 37. c. 2.
[s] Seſſ. 23. c. 12.
[t] C. 1. 3. 42.
[u] C. 1. 3. 15.
[w] C. 1. 3. 17.
[x] Nov. 123. c. 10.

[w] C. 1. 3. 30. excommunicated himſelf [w]. But above all, Clergymen ought to forbear, company-keeping with ſtrange Women, whereby they give Offence unto the Church: For by this Law they might only converſe with their Mothers, [x] C. 1. 3. 19. Siſters, and the like [x]. It was this Novel, that introduced the Celibacy of Nov. 123. c. 29. the Clergy, and brought on the ſecret Sin of Fornication and Adultery with many of them in the *Romiſh* Church. But Readers, Songſters, and others [y] C. 1. 3. 45. in the lower Orders of the Church, may have their Wives [y].

The Clergy have many eminent Privileges granted them by the *Civil* [z] C. 1. 3. 2. & 6. Law: As firſt, they are exempt from all ſordid and extraordinary Offices [z], but not from real and patrimonial Services: For their Eſtates are liable to all Payments made unto the Government, as being ſubject unto profane Uſes, and not ſet aſide for divine Worſhip. They are free from all per- [a] C. 1. 3. 52. ſonal Offices, as Guardianſhip, and the like [a], unleſs Guardianſhips come to them by Right of Kindred, which they may undertake at this day, if they [b] Nov. 123. c. 5. pleaſe, except they are Biſhops or Hermits [b]. Again, they have this Privilege, that if an Injury be done unto their Perſons, or to any ſacred [c] C. 1. 3. 10. Place, it is puniſh'd capitally, as a publick Crime [c]. But this Puniſhment is not obſerved at this time, but Offenders are dealt with in a more gentle manner, according to the modern Cuſtoms of various Nations. But yet by the *Canon* Law, if a Perſon ſhall lay violent hands on a Clergyman, he [d] 17 Q. 4. is ſtill ſubject to the pain of an Excommunication *ipſo Jure* [d]; and our Law in *England*, I think, does not abſoil the Offender. But as to that Law which inflicts a Penalty of thirty Pounds of Gold on him who falſely ac- [e] C. 1. 3. 22. cuſes a Biſhop [e], it is now out of uſe. The Clergy had alſo another ſpecial Privilege of not being ſummoned before a ſecular Judge in civil and criminal Cauſes: But this Privilege is taken from them by the municipal Laws of moſt Countries, where the *Canon* Laws does not entirely lord it; becauſe this Privilege gave them too great a handle of becoming factious, and of ſeparating from the State. 'Tis the Office and Buſineſs of the civil Magiſtrate to rebuke ſeditious Miniſters of the Goſpel. Thus we read, that *Conſtantine* the Great did not ſcruple to rebuke and chaſtiſe the whole Synod of *Tyre*, by forbidding an injurious Behaviour offered unto *Atha-* [f] Lib. 1. *naſius*. And *Socrates* in his Eccleſiaſtical Hiſtory aſſures us [f], that the ſaid *Conſtantine* ſharply rebuked the whole Clergy of *Nicomedia*, and threatned to puniſh them in a grievous manner, if they diſturbed the Peace and Quiet [g] C. 1. 3. 14. of the State. And to this purpoſe we have a Law in the *Code* [g], which baniſhes a Perſon a hundred Miles from the City, which he ſhall thus diſturb by his ſeditious Behaviour, after he has been deprived or depoſed from his Epiſcopal See for moleſting the publick Tranquillity of the State, [h] Nov. 123. c. 11. in ſuing to recover the Prieſthood, from which he has been exauctorated [h]. Indeed, by the *Canon*, it is not lawful for any King or Emperor to ſit in [i] 11 Q. 1. 41. Judgment on Clergymen [i]: But by the *Civil* Law it is otherwiſe, as ap- [k] C. 1. 3. per tot. pears by a whole Title in the *Code* [k], where we meet with ſeveral imperial Conſtitutions relating to and binding the Clergy: And thus it ſeems, that the Clergy are ſubject to a ſecular Juriſdiction, notwithſtanding the Claim of the *Popelins*, and the weak Conſtitution of *Frederick* the Emperor. But the bigotted *Canoniſts* ſay, that none of theſe Laws would have force, if they had not been approved of by the Pope, and that it was his Authority which gave them the Eſtabliſhment of Law.

They were called the Clergy from the *Greek* word κλῆρος, elected; not that they were God's choſen Inheritance any more than the Laity, tho' they would have themſelves to be thought ſo, nor becauſe they are ſet apart for God's Service, but becauſe they were in ancient Times elected hereunto by the People or Congregation, and then preſented unto the Biſhop [l] Nov. 131. c. 14. for his Approbation or Ordination. By the *Novels* [l], if Eccleſiaſtical Perſons die without Wills or lawful Heirs, the Church ſucceeds them to their

Eſtates, as the Exchequer did heretofore [m]. And by a Law in the *Code* [n], it is ſaid, that after a Perſon has got himſelf poſſeſſed of a Biſhoprick, he cannot make a Donation of his Eſtate by Will; for as much as what he afterwards acquires, he is preſumed to have gotten the ſame out of the Goods of the Church, and through means thereof: But he might in his Life-time give the ſame to charitable Uſes.

[m] C. 1. 3. 20.
[n] C. 1. 3. 42. 2.

Touching Eccleſiaſtical Revenues, they ought, in the firſt place, to go towards the Maintenance of the Clergy or Rectors of Churches, and likewiſe towards Hoſpitality. Then, *ſecondly*, they ought to go towards Building and Repairing of Houſes. And after this, they may be converted towards Purchaſing of Eſtates [o], which were much wanted in the Church when this Law was made. St. *Ambroſe*, in his Book or Treatiſe of Offices obſerves, That the Church has Wealth beſtowed on it, not to hoard up, but to diſtribute and lay out the ſame for ſupplying the Neceſſities of the Poor. For, ſays he, "what occaſion is there to keep that which can "be of no advantage unto us in Life? Is it not much better to diſpenſe "that Wealth in the Maintenance of the Poor, if they want the proper "Aids and Aſſiſtance of Life, than for a ſacrilegious Perſon to contami-"nate the ſame, or for an Enemy to carry it away?" By the *Novels* [p], Eccleſiaſtical Eſtates have an Exemption or Immunity from all ſordid Offices and Incumbrances of what kind ſoever they be: But the Repairs of Highways and Bridges are not reckoned among ſordid Offices [q]. The Lands of Churches pay Tribute: For Churches are liable to all ordinary Payments and Duties [r]. St. *Ambroſe*, ſpeaking of the Emperor, ſays, *if he deſires Tribute, we deny him not.* But of this matter, *Gregory* in his ſeventh Epiſtle complains to *Theodore* and *Theodoret*, Kings of the *Franks*; for then the Clergy had began to exalt themſelves above their pitch, and to wreſtle with Kings and Emperors.

[o] C. 1. 3. 46. 7.
[p] Nov. 131. c. 5.
[q] C. 1. 2. 7.
[r] C. 1. 2. 5.

For the Encouragement of Learning in the Times of groſs Ignorance, when even many of the Clergy themſelves could hardly read, which was about the ninth Century, the Benefit of Clergy was introduced to unveil this Cloud, and diſperſe the Miſt of Darkneſs then hovering over the Land. And *Coke* upon *Littleton* [s] defines it to be an ancient Liberty of the Church, confirmed in divers Parliaments. It is when a Man is arraigned of Felony, or the like Offence, before a temporal Judge, and the Priſoner praying his Clergy, that is, to have his Book; the Judge then ſhall command the Ordinary to try if he can read as a Clerk in ſuch a Book and Place, as the Judge ſhall appoint; and if the Ordinary certifies the Judge that he can, then the Priſoner ſhall not have Judgment to loſe his Life. It was allowed in ancient Times for all Offences whatſoever, except Treaſon and robbing of Churches of their Goods and Ornaments. But by many Statutes made ſince, the Benefit of Clergy is taken away for Murder, Burglary, Robbery, cutting of Purſes, Horſe or Mare ſtealing, becauſe Horſes are for publick Service and Commerce. Though a Perſon has been taught and inſtructed in the Goal to know his Letters, yet this ſhall ſerve him for his Life, but the Goaler ſhall be puniſhed for it. *Forteſcue* ſays, that tho' a Felon fails to read, for which he is judged to be hanged; yet in favour of Life, if he demands a Book afterwards under the Gallows, and reads, he ſhall have the Benefit of his Clergy. And yet it is to be ſuppos'd that he had no Ordinary at that time to certify, whether he could read: But this Caſe ought to be ſpecially taken, *viz.* where the Felon is judged before the Juſtices of the King's-Bench; for if he be judged before the Juſtices of the Goal-Delivery, it is otherwiſe, becauſe their Commiſſion ends with their Seſſion. Clergy was allowed to an Acceſſory for ſtealing of Horſes and Mares, becauſe the Statute ſhall be taken moſt ſtrictly, which only ſpeaks expreſſly of the Principal [t]. Clergy is grantable but once to one

[s] Lib. 2. c. 11. §. 109.
[t] Dyer. Rep. pag. 99

one Perſon, except he be within Holy Order; for ſuch a Man may have it
[t] 4 H. 7. c. 13. often [t]. If the Indictment be only *Murdravit*, without adding *ex malitiâ præcogitatâ*, the Offender ſhall have his Clergy. If he will read as a Clerk he ought to read all the Verſe; but though he does not read it at the beginning, but firſt ſpells, and afterwards reads, yet he ſhall have allowance
[u] Lib. 2. c. 43. as a Clerk, in favour of Life. See *Stamford*'s Pleas of the Crown [u].

The *Romiſh* Church from the *Novels* of ſome of the latter Emperors, diſtinguiſhes Eccleſiaſticks into the *higher* and *lower* Orders of the Church; and ſhe reckons *Sub-deacons*, *Deacons*, and *Prieſts* among the firſt: ſo ſhe reckons the *Oſtiarius*, *Exorciſt*, *Acolythiſt*, and *Reader* among the latter. The firſt, the *Canon* Law (by way of diſtinction) ſtiles *ſacred* Orders; and the latter, by the Name of the *leſſer* Orders, which ſerve only as a Gate or Initiation unto the others. And no one ought to be promoted to any of
[v] X. 5. 29. 1. the ſeven Orders *per ſaltum* [v]; nor ought any one to be initiated into the inferior or leſſer Orders, unleſs he be recommended as duly qualify'd by his Studies, and by a Proſpect of future Knowledge, for the higher Orders in the Church: And it is for this reaſon, that the *Civil* and *Canon* Law have appointed certain Ages for the proper Aſſumption of theſe ſeveral Orders. By the *Civil* Law, no one was to be ordained a Presbyter till he was thirty-
[w] Nov. 123. c. 13. five Years of Age [w]: Though by a later *Novel* it was ſufficient, if he was above thirty. And no one by this Law could be ordained a Deacon or
[x] Nov. 37. c. 2. Sub-deacon under the Age of twenty-five Years [x]; nor a Lecturer or Reader under eighteen Years of Age. What were the Ages preſcribed by the
[y] 28 & 27 Diſt. ancient Canons, *Gratian* ſhews in his *Decretum* [y]. But touching this matter,
[z] Cl. 1. 6. 3. we have a freſher Canon in the *Clementines* [z], which requires a Sub-deacon to be only eighteen Years of Age, a Deacon twenty, and a Preſbyter twenty-five Years of Age. The Council of *Trent* has added ſomewhat hereunto, requiring a Sub-deacon to be twenty-two, a Deacon twenty-three Years of Age, and leaves a Presbyter to the *Clementine* Conſtitution aforeſaid. And 'tis enough for them to have arriv'd at theſe reſpective Years, though they have not compleated the ſame.

A Clergyman that is abſent from his Church, in the Affairs of his Church, or his Superior, is ſaid to be preſent; and, conſequently, he ſhall of Right have the Fruits and Profits of his Prebend. Clergymen are forbidden to exerciſe the Office of a Notary: But yet if they make Inſtruments, ſuch Inſtruments are valid. The antient *Canon* Law, whilſt it was pure and uncorrupted, took great care that no more Clergymen were ordained than the Cure of Souls required, leſt the Clergy ſhould become Beggars, and be tempted to do unwarrantable Offices for a livelihood: But this wholeſome Care of the Church has been long ſince laid aſide, and the Clergy may increaſe as they think fit, to be a Plague and Burden to the State.

TIT.

TIT. XXXIV.

Of Soldiers, *and the Rights of War; and what Diſcipline is to be obſerv'd in an Army; and how to be enforced by Martial Law; and of Crimes and Puniſhments peculiar to them*, &c.

AS there are Laws relating to the Affairs of a State in the Time of Peace, ſo there are alſo very wholeſom Rules and Inſtitutions concerning the Buſineſs of War, and they are accommodated to the very Nature and Exigencies of it: Some of which I ſhall here mention, ſo far as they reſpect Soldiers, and the Diſcipline of an Army; as that the Valiant ought to be advanced to Honours, and admitted to partake in the Spoil which he did help to get; the Cowardly diſgraced; the Diſobedient rigorouſly chaſtiſed; the Incorrigible caſhier'd; and the Aged or Worn-out Soldier diſmiſſed to Eaſe with Reward and Honour. That a Difference of Degrees be obſerv'd, and a Subordination made, as the Places of Command differ; that, for Military Offences, or Contracts and Promiſes made between Soldier and Soldier, the Cognizance thereof be in the Court-Marſhal, and to be tried by the Law of Arms only *: That Hoſtages be taken and kept, and may be put to Death, if the Enemy prove perfidious, *&c.* There are many other Things, which relate to War, *viz.* That there be a ſolemn Denouncing of War intended, to the End that all Diſſenters may withdraw themſelves in Time, and divert themſelves to other Nations: That it be proſecuted by juſt and honourable Ways, without Treachery, Corruption, breach of Faith, Poiſon, or ſecret Aſſaſſination, (which Part the gallant *Romans* diſdain'd to act, tho' for never ſo great a Victory:) That all Articles and Capitulations made, be ſtrictly kept and obſerv'd, even towards Turks, Pagans, Jews, or Infidels; that they be interpreted in the plaineſt and moſt equitable Senſe, without any Art or Subtlety at all: That an Enemy, after he has yielded himſelf, be not killed, but kept alive for Exchange or Ranſom: That what is gotten from the Enemy, is good and lawful Purchaſe, tho' it was newly taken from ſome of our own People or Confederates, provided it were once brought into the Enemies Quarters: That the Enemies Country, when it offers to yield, be not laid waſte, burnt, or deſtroy'd: That when a Town is to be ſtormed, Women, Children, Aged and Eccleſiaſtical Perſons, ſo far as is poſſible, may be ſpared: That it be free to Friends or Confederates to trade with the Enemy, provided they carry neither Victuals, Money, Arms or Ammunition: That the Country, through which the Army paſſes, no Offence being given, be not injur'd, but kept from Spoil and Rapine: That Heralds, or Meſſengers, ſent from the Enemy, be receiv'd, and diſmiſs'd with Safety: And laſtly, That when a Victory is gotten, the Enemy ſubdued be uſed with all Clemency and Moderation. But theſe, and many other Points concerning War, I ſhall reſerve for a particular Title touching War, to be handled in the Second Volume of this Work by themſelves.

* C. 9. 3. 1.

A Soldier, in *Latin* called *Miles*, is ſo term'd (as ſome think) from the Word *Malum*, an Evil; not that a Soldier brings an Evil on us, but becauſe he defends us from an Evil [a]: Or elſe from the Word *Mille*, denoting the Number of a Thouſand Men; for the *Greeks* called a

[a] D. 29. 1. 1. 1.

Thouſand Men by the Name of Τάγμα, or a Regiment of Soldiers, which conſiſted of that Number, and over which a Commanding Officer was placed, ſtiled Χιλιαρχὸς, or the Commander of a Thouſand Men [b]. But, according to *Ulpian* and *Pompeius Feſtus*, Soldiers are in *Latin* ſtiled *Milites*, from the Word *Mollitia*, by an *Antiphraſis*; becauſe it is the Part and Buſineſs of Soldiers, among other Things, to undergo many Hardſhips and Fatigues in War: And ſo ſays the Emperor *Severus* in *Herodian*'s Hiſtory of the *Cæſars*. Therefore, there have been ſeveral Laws made and conſtituted for this Part of Military Diſcipline, as I ſhall remark by and by.

[b] D. ut ſup.

Soldiers were ſuch as were enliſted into the Service of the Army by the Means of an Oath given them to obey their Leader, and to be faithful to their Country [c]; and, by the *Roman* Law, they were not to be preſſed into the Service, but only to be perſwaded and intreated thereunto [d]: For War was thought to be an honourable Employment, and thoſe that were not induced to it of their own Accord, and upon juſt Motives, were not regarded as Soldiers. Some of theſe were ſtiled *Tyrones* [e], or Freſhmen, being ſuch as had not yet gone through with, or perfected their full Exerciſe, or had not been in any Battle: And others were termed *Veterans*, as being by their long Service compleat Maſters and Proficients in the Art of War. Some of theſe were call'd common Soldiers, others ſtiled Centurions [f], and others Tribunes [g], or Colonels, and a fourth Rank or Order were term'd *Prepoſiti* [h], or General Officers. But the *Juſtinian* Code ſtiles thoſe by the Name of *Veterans*, who had ſerv'd in the Wars for twenty Years, and receiv'd a Soldier's Stipend [i]; or ſuch as had obtain'd an honourable Diſcharge [k]. There were ſome Perſons that the Laws would not admit to be Soldiers, (ſo honourable was this Employment among the ancient *Romans!*) as Bondmen, infamous Perſons, and ſuch as were guilty of any Crime: Nor could ſuch Men become Soldiers, as had hatch'd or attempted any malicious Deſign againſt their Adverſaries, under the Umbrage or Pretext of going into the Wars, as Debtors, and ſuch like Perſons [l]. And there were alſo ſome that were excus'd and exempted from being Soldiers, by reaſon of their Age, and the like Privilege [m]. Otherwiſe, all Perſons that were entirely *Roman* Citizens, or Subjects, went into the Service, and were forced to ſerve, tho' no other Perſons could be compelled hereunto. The Duty of Soldiers is to obey their Commanders in all Things lawful and reaſonable, and with great Alacrity to undertake the Dangers and Fatigues of the War, and the like. And the Office of a General conſiſts not only in preſcribing Orders and Diſcipline to be obſerv'd in the Army, but alſo in obſerving the ſame himſelf [n]. He ought to remember, that he preſides over the Army for the Good of the State: And, therefore, he ought not to be laviſh in granting Furloes, or Leave of Abſence, for the ſake of Money, and private Gain to himſelf, but ought to be very ſparing therein. In the *Roman* Army, according to *Iſidore* [o], 500 Men made a Cohort, and a Legion conſiſted of ten Cohorts, or 5000 Men, as *Aulus Gellius* remarks. In a Legion there were ſixty Centuries, or thirty *Manipuli*: And hence, ſome ſay, there were 6000 Soldiers in a Legion, which made ten Cohorts. A Centurion was a Perſon, who was ſet over one hundred Men, as a *Chiliarcha* was he who preſided over a Thouſand.

[c] D. 29. 1. 42.
[d] D. 29. 1. 11.
[e] D. 49. 16. 3.
[f] D. 49. 16. 13.
[g] D. 49. 16. 12. 2.
[h] D. 49. 16. 6. 1.
[i] C. 10. 54.
[k] D. 49. 18. 2.
[l] D. 49. 16. 4.
[m] D. 50. 5. 7. 8 & 11.
[n] D. 46. 16. 12. pr.
[o] Lib. 3.

Among the *Romans*, a Soldier taken Priſoner by the Enemy, could not receive his Stipend or *Donarium*, whilſt he was in the Hands of the Enemy [p]: But, by the Cuſtom of our Times, a Soldier is not forbidden to demand his Stipend during ſuch Time. Indeed, at firſt, the *Roman* Soldiery went into the Wars at their own Coſts and Charges for above three hundred Years after the building of the City: But afterwards they had a Stipend allow'd

[p] C. 12. 36. 1.

allow'd them out of the publick Treaſury; yet the Learned are not well agreed among themſelves, what and how much this Stipend was. But 'tis certain, that this Stipend conſiſted either in Money, Corn, or Cloaths. The *Romans* took great Care, that Soldiers ſhould have not only their Stipends paid them, but alſo a full Supply of all neceſſary Proviſions: And this was look'd upon, amongſt that brave and warlike People, as it were a fundamental Law of their State, and was very early introduced among them. For as it is a very diſhoneſt Thing for the Father of a Family to ſuffer his Wife, Children, and Servants to be pinched with Hunger; ſo it is the very ſame Thing, in reſpect of a Prince or State, if the Army be not ſupply'd with neceſſary Proviſions, in regard to Food and Raiment: And therefore, this was the firſt Care of that State, which ſupported it by Arms, and made ſo many noble Conqueſts over thoſe that oppoſed their Power and Greatneſs. For there is nothing, but what a hungry Soldier will think of: He will meditate Conſpiracies, become a Deſerter of the Army and State, and ſhake off that Reverence which is due to his Leader. The *Roman* Allowance, in Point of Victuals, conſiſted in Bread, Fleſh, Wine, Oil, Salt, and Vinegar [q]. The Emperor *Conſtantine* allow'd his Soldiers Bisket for two Days, and Bread every third Day; one Day Wine, and another Day Vinegar; one Day Lard, and another Day Mutton or Fleſh. In an Expedition, the Soldiers were forbidden to drink Wine, but they were to content themſelves with Bisket and Vinegar, as *Spartianus* relates in the Life of *Nigrinus*. The *Poſca* or *Poſcet* was a Drink temper'd with a Mixture of Water and Vinegar. Theſe were the Banquets and Dainties not only of the common Soldiers, but likewiſe of their Commanders too, in the Time of an Expedition; which was the Cauſe, that they ſeldom or never labour'd under the Inconveniencies of Hunger and Thirſt. So that Parſimony is very neceſſary in a Camp, leſt too great Plenty and High-feeding ſhould render Soldiers ſlothful, idle, and effeminate, the greateſt Evil that can happen to an Army. Wherefore, this provident Emperor commanded Frugality to be obſerv'd in the Time of an Expedition, and Proviſions were deliver'd out unto each Soldier, according to his Allowance, every Day [r]. Tho' ſometimes each Soldier carry'd with him ſeven or ten Days Proviſions, as we may read in *Spartianus*, touching the Life of *Alexander*, who, in the Time of an Expedition, furniſh'd his Soldiers with Proviſions in this manner. Yet they were not allow'd much Wine; and ſuch as they drank from the Month of *September* was only new Wine, by reaſon of the great Expence of old Wine [s]; for at that Time the Muſt ceaſed to be flatulent, and was eaſy of Digeſtion. Such was the Care of the Soldiers Health among the *Romans*; and ſuch was their Frugality in their Expeditions. If there was any Deficiency in the Publick Treaſury, ſo that the Army could not be paid their Stipends and Allowances, the Soldiers were to be maintain'd by a Contribution of thoſe Perſons whoſe Lands they protected and defended: But it was a capital Crime for Soldiers, by Force, to enter into the Houſes of the Provincials, and, by robbing them, to live at Diſcretion. But whatever the Poſſeſſors of Lands contributed towards the Maintenance of the Army, was to be charged to the Prince's Account, and repaid when Money came into the Exchequer.

[q] C. 12 38. 1.

[r] C. 12. 38. 6.

[s] C. 12. 38. 10

There are Six Things neceſſary in a Soldier, to the End he ſhould have the Privileges granted unto Soldiers. 1*ſt*, He ought to be girt with a Sword, and to wear the ſame [t]. 2*dly*, He ought to be enliſted, and his Name wrote in the Muſter-roll [u]. 3*dly*, He ought to take the Soldier's Oath, Not to fly from Death, in the Service of the State, nor run away from his Colours [x]: And *Vigetius*, in his Second Book of *Military Affairs and Teſtaments*, has given us the Form of this Oath. 4*thly*, Some

[t] D. 29. 1. 38. 1.

[u] D. 29. 1. 42.

[x] D. 4. 6. 45.

D. 29. 1. 11. pr.

Stygma,

[y] D. 3. 2. 2. 3. *Stygma*, or publick Mark, ought to be inſcribed on his Arms [y]. *5thly*, [z] C. 11. 9. 3. He ought to be Muſtered, and to undergo the Examination of a Soldier [z]. And, *6thly*, He ought not to follow any mean Trade or Buſineſs; becauſe [a] C. 12. 34. 1. C. 12. 35. 1. his Employment is honourable [a]. But yet theſe Things, tho' required, to entitle Men to the Privilege of a Soldier, in the main, were not ſo entirely neceſſary, as to vitiate an Act, if any one of theſe Particulars were [b] I. 2. 11. pr. omitted, as *Viglius* obſerves upon the *Inſtitutes* [b].

By the *Roman* Law, Soldiers had many Privileges granted to them, which were not common unto other Men: As, That no Civil or Municipal Office could be impoſed on Soldiers, or on ſuch Perſons as aſſiſted in the Wars, and ſpent their Lives in Camps and Garriſons after a military way; unleſs (perhaps) a Perſon had enrolled or inliſted himſelf as a Soldier, with a [c] D. 50. 4. 4. 3. C. 12. 34. 2. fraudulent Intent of avoiding Civil Offices [c]. Nay, the *Civil* Law forbids Soldiers to meddle with Civil Offices, under Pain of being ſtript of their [d] C. 12. 36. 15. Privileges, and turn'd out of the Army [d]: But this Law is not now obſerv'd, I think, in any Country. Again: Soldiers, in the Service of the Wars, or (as we ſay) *Armatæ Militiæ*, have this Privilege alſo granted them by the Prince or Emperor, *viz.* That they cannot be compell'd to anſwer in any Criminal or Civil Action, if they are convened [e] D. 2. 6. C. 9. 3. 1. before any other Judge than the *Magiſter Militum* [e]. Hence it is, that Soldiers taken and arreſted by the Preſident of a Province, ought to be [f] D. 49. 16. 3. pr. remitted to their proper Judge [f], (who is, in ſome meaſure, ſtiled an Auditor); unleſs they have renounced or waved their Privilege of Juriſ- [g] C. 2. 3. 29. diction [g], or have render'd themſelves unworthy of that Privilege, by Deſertion of the Service; or unleſs it be in the Cauſe of ſome enormous Crime, or in a Cauſe of Subſtraction of Tribute: In all which Caſes the Provincial Preſidents were impower'd to take Cognizance of, and to [h] D. 49. 16. 3. pr. pronounce Judgment againſt Soldiers [h]. But now, by the Statutes and Decrees of the Kings of *Spain*, and ſome other Nations, this Power of the Preſident is abrogated: So that, at this Day, none but Court-Martials, or Military Judges, can take Cognizance of the Crimes and Offences relating to Soldiers; as of Mutiny and Deſertion, and other Cauſes entirely Military: Nor can Soldiers renounce and wave this Privilege. See *Caballa's Criminal* [i] Cont. 3. Caſ. 194. 225. n. 25, &c. *Reſolutions*, or *Caſes Adjudged* [i]. But though, by the *Civil* Law, and the Cuſtoms of ſome Countries, Soldiers are to be impleaded before Courts-martial; yet in *England* and *Holland* they may be convened, in Civil Cauſes, before Civil Judges, without any Regard had to their Court-martial; as [k] Lib. 1. Tit. 40. cap. 3. n. 5. we may find in *Merula's Practice in Civil Cauſes* [k]. And the ſame alſo obtains in criminal Cauſes, if they are charged by the Fiſcal Proctor, or Attorney-general, with the Commiſſion of any flagrant Crime, as Murder, [l] Jan. A. D. 1640. and the like; and thus it has been adjudged in *Holland* [l], in the Cauſe of killing a certain Soldier.

By the *Roman* Law, if a Soldier committed a publick Crime in any Province, the Preſident thereof cauſed him to be apprehended, and ſent a Letter to the *Magiſter Militum*, wherein were contain'd the Merits of the Cauſe, and in what manner he had offended, and what Proof there was of it: But if the [m] C. 9. 3. 1. Crime was common and enormous, the Preſident might puniſh him himſelf [m]. A Number of Soldiers might litigate by a Syndick, if (perchance) the Cauſe [n] C. 12. 31. 18. was ſuch as appertain'd to the whole Number [n]. By the old *Roman* Law, Soldiers were heretofore, by the Indulgence of the *Roman* Emperors, enabled to make their Laſt Wills and Teſtaments, according to a Military Right or Privilege, and not according to the ſtrict Form of the *Civil* Law: But *Juſtinian* afterwards reſtrain'd this Right or Privilege, and would have this Indulgence only to extend to the Times of their being in warlike Expedi- [o] I. 2. 11. pr. tions, and Martial Affairs [o]. And the Reaſon given, why this Privilege about Laſt Wills and Teſtaments was allow'd unto Soldiers, according to

Juſtinian's

Juſtinian's Account, ſeems to be the Unskilfulneſs and Ignorance of Soldiers in the Buſineſs of Wills, and in the Law itſelf; as being rather bound to know the Buſineſs of Arms, and the Diſcipline of War, than the Laws themſelves [p]. But this, ſurely, was not the final Cauſe of this Privilege: For then it would follow, That if a Perſon skill'd in the Law, ſhould happen to go into the Wars, (as *Trebatius* did under *Cæſar*, and *Julius Frontinus* under *Trajan*) he ſhould not enjoy this Advantage or Privilege: Which is abſurd. But even Ruſticks, Women, and Minors, who never went into the Wars, had this Privilege; becauſe the Laws were wont to deal with them with more Tenderneſs and Humanity, in reſpect of their Ignorance of the Law, than with other Perſons: But of this, more hereafter, under the Title of *Wills*.

[p] I. ut ſupra.

Touching Crimes and Offences committed by Soldiers, there are ſome, which are proper to them as Soldiers; and others, which are common to them with other Men: And hence, the Way and Method of Proceeding againſt them, is either *proper* or *common*. An Offence proper to a Man as a Soldier, is that, which he commits as being a Soldier [q]. As, *Firſt*, A Soldier, who abſents himſelf from Duty without the Leave of his commanding Officer, is guilty of a Military Offence, and may be puniſh'd, tho' not with Death, unleſs he abſolutely deſerts the Service. This Leave of Abſence given to a Soldier, we commonly call a *Furlough*: But a Soldier, who acts or lives upon a *Furlough*, does not ſeem to be abſent on the Account of the State [r]; and therefore he may be recall'd, whenever his Officer pleaſes. The *Civil* Law makes a Diſtinction between a *Deſerter* and an *Emanſor*. The firſt is he, who has been abſent for a long Time, without Leave from the Army, and is brought back again by Force: But an *Emanſor*, or Truant, is he, who tho' he has been abſent for a long Time, yet returns to the Camp of his own Accord [s]. The firſt is compar'd to a fugitive Servant; but the other is like unto a Stroller or Vagrant. *Secondly*, It is an Offence in a Soldier, to transfer himſelf from one Regiment, or Muſter-roll, unto another, unleſs it be by the Prince's Conſent, for the ſake of the Publick Advantage [t]; and if he ſhall act contrary hereunto, he ſhall be liable to a Fine of fifty Pounds in Gold: But now the Penalty of this Law is grown obſolete, and out of Uſe. If a Perſon, after his Deſertion, ſhall inliſt himſelf in another Regiment or Company, he ſhall be puniſh'd by the Law of Arms as a Soldier [u]. *Thirdly*, Mutiny and Sedition moved among Soldiers, has a Reſemblance unto Contumacy or Diſobedience; and if it be atrocious, it is puniſh'd with Death [x]. *Fourthly*, It was a grievous Offence, among the *Romans*, for a Perſon to inliſt himſelf as a Soldier, who was not qualify'd to be ſuch, as being a Bond-man [y] or Trader [z] among them was not deemed to be; (for the *Romans* look'd upon Warfare as an honourable Service or Employment): And this Offence was enhanced, as other Offences are, in regard to the Dignity, Degree, and ſeveral *Species* of Military Service, which the Perſon thus offending was employ'd in [a]. And, in a word, all ſuch Crimes are proper and particular unto Soldiers, as relate to the Miltary Diſcipline and Order of an Army [b], as Alienation or Loſs of Arms by his own Fault; Contumacy or Diſobedience to his General, or his Chieftain [c]; ſtealing the Arms of his Comrade [d]; or wounding his Fellow-ſoldier, and the like: And all theſe Crimes are puniſh'd according to Martial Law, and the Rules of War, in an arbitrary manner, *viz.* either by corporal Puniſhment, Fine, Degradation, an ignominious Diſcharge [e], *&c.* But tho' a Soldier may be puniſh'd in his Body, Purſe, Honour, and the like; yet, according to the Rules of the *Civil* Law, he can never be condemned *in metallum*, or *in opus metalli*, nor can he be put to the Rack or Queſtion [f].

[q] D. 49. 16. 2. pr.

[r] D. 49. 16. 1.

[s] D. 49. 16. 3. 2, & 3.

[t] C. 12. 36. 14.

[u] D. 49. 16. 49.

[x] D. 49. 16. 3. 20.

[y] D. 49. 16. 8.

[z] D. 49. 16. 11.

[a] D. 49. 16. 2. 1.

[b] D. 49. 16. 2, 3, 4, 5, 6, &c.

[c] D. 49. 16. 4. 1.

[d] D. 49. 16. 3. 14.

[e] D. 49. 16. 3. 1.

[f] D. 49. 16. 3. 1.

There are ſome Crimes or Offences in Soldiers, which are puniſh'd capitally; it being probable, they can never be committed, without the Intervention of a groſs Fault: As when a Soldier is found to be a wilful *Renegado*, he ſhall, upon his being taken, or reclaim'd, be puniſh'd with
[g] D.49.16.3.11. Death [g]. But if he be taken by the Enemy unawares, on his March or Journey, he ſhall be pardon'd, a due Regard being had to his paſs'd Life and Behaviour in the Service: And if he ſhall return at the End of the
[h] D.49.16.3.12. War, he ſhall be reſtor'd as a *Veteran*, and receive his paſs'd Pay [h]. By a *Renegado*, we here mean, ſuch a Perſon as does in a voluntary manner deſert the Army, and go into the Service of the Enemy. A Soldier, who has loſt his Arms in the War by his own Fault, or has alienated the ſame,
[i] D.49.16.3.13. is likewiſe capitally puniſh'd [i]: But he, who only ſteals the Arms of his
[k] D.49.16.3.14. Comrade, is only degraded [k], or caſhier'd. A Soldier, who does not obſerve the Orders of his General, or Leader, and likewiſe he who does any Thing which his Leader forbids him to do, is in the ſame manner
[l] D.49.16.3.15. capitally puniſh'd [l]. A Soldier is not only capitally puniſh'd, if he runs away from his Colours, and deſerts the Army in Time of Battle, but alſo if he inliſts himſelf into ſeveral Companies at the ſame Time; or if, being taken Priſoner by the Enemy, he does not return again, when he may
[m] D.48.19.14. make his Eſcape; or be any-wiſe diſobedient to his Chieftain or General [m];
D.49.16.4.1. or if he makes uſe of any ludicrous Art. If a Perſon ſhall lay violent
D.49.16.6. Hands on his ſuperior or commanding Officer, it is a great Offence, and
[n] D.49.16.6.1. the guilty Perſon ſhall be puniſh'd with Death [n]: And the Heinouſneſs of this Crime is increaſed, according to the Quality and Dignity of ſuch commanding Officer. Contumacy and irreverent Behaviour againſt the General, or a Military Preſident, is alſo deemed a capital Offence. The ſame capital Puniſhment is alſo inflicted on him who ſhall deſert his com-
[o] D.49.16.6. manding Officer in Time of Danger, or refuſe to defend and protect him [o]. Mutiny and Deſertion, ſtirred up among Soldiers, if it be of an atrocious
[p] D.49.16.3.20. Nature, is likewiſe puniſh'd with Death [p]. If a Perſon wounded his Fellow-ſoldier with a Stone, he was only caſhier'd; but if he wounded
[q] D.49.16.6. him with a Sword, the Crime was adjudged capital [q]. The Law above-quoted, ſays, That he who goes over to the Enemy, tho' he returns again, ſhall be put to the Rack, and condemned to the Gibbet, or to fight with wild Beaſts: Tho' Soldiers now ſuffer not any of thoſe Things; for this Part of the Law, touching fighting with wild Beaſts, is now repealed
[r] Nov. Leon. 67. by a novel Conſtitution [r]. All Deſerters are not to be puniſh'd alike; for a Regard is to be had to their Degrees, and to the Courſe of their paſt
[s] D.49.16.5.pr. Life, and the like [s].

There are Three general Cauſes or Reaſons for the Diſcharging of Soldiers. The Firſt is ſtiled *Honourable*; and ſuch a Diſcharge is given to Soldiers, when the Time of the War is ended. The ſecond is ſtiled an *Occaſional* Cauſe; and is, when a Soldier is diſabled either through ſome Imperfection of Body or Mind; as, that he is a Cripple, or a Madman, *&c.* And the Third is termed an *Ignominious* Diſcharge; and is, when a Soldier is diſmiſſed, on the ſcore of ſome Offence committed; which is uſually done, by drumming him out of the Regiment, with a Halter about his Neck. A Perſon who is caſhier'd on the Account of Ignominy, ought to be remitted to his proper Judge, if he be guilty of any Crime, and never more admitted into the Service, tho' he ſhould be willing to be a Soldier
[t] D.49.16.4.6. again; yea, tho' ſuch Perſon ſhould be acquitted [t]. But a Perſon who has a Law-ſuit with another, ought not to be exauctorated, unleſs he
[u] D.49.16.4.8. enters himſelf into the Service on the Account of not paying his Debts [u], or of becoming more intractable unto the adverſe Party. Perſons condemn'd of Adultery, or of any other publick and common Crime, ought not to be among Soldiers, according to the *Roman* Law: But this is not obſerv'd

obſerv'd at this Day, to the Diſhonour of the Army. Thoſe Crimes that are in a Soldier common with other Perſons, are puniſh'd in a Civil, and not in a Military Manner, according to the Laws of the State under which they live. But even in Courts-Marſhal, and in Military Places of Judicature, ſome Matters may be tranſacted by a Civil, and other by a Criminal Proſecution of them.

By the Civil Law, Soldiers are forbidden to purchaſe Lands or Predial Eſtates in thoſe Provinces wherein they act as Soldiers, and perform their Military Duties: And the Reaſon of this is, leſt they ſhould be called from their Military Exerciſe through a Deſire of Agriculture, and the Buſineſs of Tilling their Lands [x]: But they may purchaſe Houſes in ſuch Provinces, and likewiſe landed Eſtates in other Provinces [y]. Note, This Part of the *Civil* Law is grown into diſuſe in *France*, *Holland*, and ſome other Places; wherefore Soldiers may now purchaſe where they think fit. A Soldier cannot at one and the ſame Time have two diſtinct Offices or Dignities in the Army: But it is otherwiſe, if they do not tend to the ſame End and Purpoſe, or hinder the Buſineſs of each other [z]. Yet if two Offices are given unto a Soldier, he may retain which of them he pleaſes.

[x] D. 49. 16. 9.

[y] D. 49. 16. 13.

[z] C. 12. 31. 5.

Touching Soldiers Arms, the Word *Arms* does not only denote Swords, Shields, and Helmets, but even Clubs and Stones, whereby we annoy another, which are ſtiled *Offenſive* Weapons: But theſe laſt do not belong to the Care of Soldiers, tho' ſometimes made uſe of in War. And thus not only thoſe Perſons are ſaid to be armed, who are provided with Darts, Shields, and the like, but even thoſe who may with any Weapon aſſault and hurt another, whether it be by a Sword, Dart, Pole, Lance, Gun, Club, *&c.* Hence it is, that he who drives another out of his Land, either with Stones, Clods of Earth, or with Clubs, is liable to an Interdict *de Armis*. *Arms* are divers: Some are more for Defence and Covering, and theſe are ſtiled *Defenſive* Weapons, as Shields, Helmets, and the like; and others are for Offence and Miſchief, being put into our Hands to annoy and offend our Enemies, and theſe are called *Offenſive* Weapons, as Swords, Guns, Bows, *&c.* But *Angelus* thinks the Word *Arms* only denotes thoſe Weapons, which are provided for our Defence; which is a wrong Opinion. The Word *Tela*, according to *Bartolus* *, only ſignifies thoſe Weapons which are uſed for the ſake of hurting another; and theſe were the Arms that a Soldier was to take particular Care of. The *Roman* Emperors, on Account of Seditions, Commotions, and other Broils, where Slaughters might enſue, and to prevent Conſpiracies againſt private Men and the State, prohibited private Men to keep Arms, and order'd that they ſhould not be made in any other Place than at the publick Forges and Foundaries for Arms. And tho' all Arms ought to be laid up in the publick Arſenals, and not worn in common Uſe either by Laymen or Clergymen †: Yet a Perſon might keep Arms in his Houſe, or on his Eſtate, on the Account of Hunting, Navigation, Travelling, and on the Score of Selling them in the way of Trade or Commerce, or ſuch Arms as accrued to him by way of Inheritance ‡.

* In L. 1. D. 48. 6.

† D. 48. 6. 1.

‡ D. 48. 6. 2.

TIT.

TIT. XXXV.

Of Corporations, Communities, *or* Bodies Politick; *how they are conſtituted; what Acts they may do, and what not; and how they are extinguiſhed*, &c.

A *Corporation*, or *Community*, is a Collection or an Aſſembly of ſeveral individual Perſons united and formed into one Myſtical Body, called a *Body Politick*, by the Permiſſion and Grant of the Prince, but diſtinguiſh'd from thoſe Perſons that compoſe a State; and it is eſtabliſh'd for the common Good of thoſe who are of this Body Politick. *Caſtrenſis* [a] ſtiles it a *feigned* Perſon in Law, conſiſting of many Individuals reduced into one Body. By a *feigned* Perſon, he here means the Image of a Perſon, or a Perſon repreſented: For a Corporation repreſents one Perſon, which is diſtinct from the individual Members of ſuch Corporation [b]; becauſe, tho' all the Members of ſuch Corporation ſhould be dead, yet it is the ſame Body Politick ſtill, if others are ſubſtituted in their Room [c]. So that a Corporation is diſtinguiſh'd from the particular Perſons that make the Corporation: And it may be conſider'd in a twofold Reſpect, *viz.* In the *Abſtract*, and in the *Concrete*. In the *Abſtract*, it is not a Perſon, nor an animated Body, but is only a kind of intellectual Body, or the Repreſentation of a Body animated. In the *Concrete*, it is taken for the particular Members of ſuch Corporation. The Communities, of which I am here ſpeaking, are ſtiled *perpetual* Communities, and are diſtinct from thoſe Societies or Communities which the *Civil* Law treats of under the Title of Society or Partnerſhip: For that theſe laſt are only for the Intereſts of particular Men, without any neceſſary Foundation on the Prince's Authority or Permiſſion, and are only for a certain Time, or (at leaſt) only for the Life-time of the Perſons thus aſſociated. There were ſeveral of theſe *perpetual* Corporations or Communities at *Rome*, which were either confirm'd by the Decrees of the Senate, or elſe by *Imperial* Conſtitutions [d].

[a] In L. 7. D. 3. 4. N. 1.

[b] D. 46. 1. 22.

[c] D. 3. 4. 7.

[d] D. 3. 4. 1.

Now Communities or Corporations are of two Sorts: For I ſpeak not here of a Community as it reſpects the Body of a State or Kingdom, but only of ſuch Communities as are diſtinct from that great and univerſal Body, and are ſubſervient to it. The firſt ſort of Corporations has a reſpect unto ſuch Perſons, whoſe principal Buſineſs regards Religion, as Chapters of Cathedral or Collegiate Churches, Monaſteries, and the like: And theſe are ſtiled *Eccleſiaſtical* Corporations. The ſecond Sort of Communities extends itſelf to thoſe Perſons, who have to do with Temporal Affairs only, as the Civil Government of Cities, Towns, *&c.* which are ſtiled the Corporation of ſuch a City, Town, and the like; and inferior unto theſe we may reckon the Colleges and Corporations of Merchants, Tradeſmen, and Artificers [e], uſually called *Companies*. This ſecond Sort of Corporations we term *Secular* Corporations.

[e] C. 11. 15. 16.

A *Corporation* or *Body Politick*, in *Latin* ſtiled *Univerſitas*, is a Generical Term, and is properly ſo called, whether the Perſons live together in the ſame Houſe or not [f]: But a *ſimple College* is, when the ſeveral Perſons of a Corporation do cohabit together; *quoniam plures ſimul colliguntur*, ſays *Bartolus* [g], and the *Gloſs* on the Law [h]. Every College is a Corporation, but every Corporation is not a College. *Bartolus* obſerves, That Colleges have

[f] Gloſ. in L. 3. D. 3. 4.

[g] In L. 1. D. 31. 4. v. *Collegium.*

[h] Gloſ. in Rub. D. 47. 22.

have ſeveral Names in Law. For ſome Colleges are called *Societies*; others are ſtiled *Guilds*, or *Fraternities*; and hence the Perſons of ſuch Colleges, or Communities, are term'd *Confratres* [i]: And others are named *Sodalitia*, or Fellowſhips, and the Members of ſuch Colleges are ſtiled *Sodales* [k], or Fellows. Colleges had their firſt Riſe and Original from the *Greek* Law of *Solon*; and, as ſuch, they may make Laws and Statutes among themſelves, mutually to oblige each Perſon in the Society, provided they do not thwart the Statutes of their Founders, nor contravene the Laws of the Realm. By the *Civil* Law, a College, or Community, muſt conſiſt of three Perſons at leaſt [l]: And *Baldus* gives us the Reaſon, why a College cannot conſiſt of two Perſons alone, *viz.* Becauſe a Major Part cannot be had in two Perſons, if any Diſcord ſhould happen between the Members in the Diſpatch of Buſineſs. But the *Gloſs* on the *Canon* Law will have it, that two Perſons may by that Law make a College [m]. A *ſimple* College has no Juriſdiction; nor has it a *Merum* or *Mixtum Imperium*, unleſs it be in thoſe Things which belong to the College itſelf, or reſpect the Art or Profeſſion of ſuch as are Members of ſuch College. For in theſe Things Colleges have a Juriſdiction; and, conſequently, may make Laws or Statutes to bind their own Members.

[i] D. 3. 4. 1. pr.
[k] D. 47. 22. 194.
[l] D. 50. 16. 85.
[m] Gloſ. in. c. 1. 10. Q. 1.

There are ſome Colleges, or Communities, (for I uſe the Word *College* here in a large Senſe for any Community) which are permitted by the Law of Nations: And ſome, which are permitted by the *Civil* Law. According to the Law of Nations, the People of every City, Town, or Ville, may be ſtiled a College, tho' improperly, according to the limited Senſe of the Word: For *Innocentius* ſeems to hold, that ſuch a College, or Community, ſhall not enjoy the Privileges of a City, Town, or Ville, unleſs it be approv'd of by the Sovereign Power. But, I think, that ſuch an Approbation is not neceſſary, according to the Law of Nations; ſince ſuch a College, or Community, is permitted by this Law; it being no other than a joining of Houſe to Houſe, and an aſſembling of Perſons together for the legal Convenience of the Inhabitants. Yea, ſuch a College, or Community, is not diſallow'd by the *Civil* Law; unleſs it be, when ſuch a Collection of Houſes tends to rival ſome lawful City. Theſe Cities, Towns, or Vills, are often in our Law-Books ſtiled *Communities*, in order to diſtinguiſh them from what the Law properly calls a *College*, or Body of Men aſſembled in one Houſe. The Word *Corpus* denotes any Corporation or Body Politick whatſoever, which is authorized by Charter or Preſcription, and govern'd by particular Laws given thereunto: But a *Community* is a more general Term, and may comprehend the whole State of a Country, as well as of a City, Town, or Ville.

A Corporation approv'd by Law, may have Goods and Eſtates in common, as any individual and ſingle Perſon may have an Eſtate proper to himſelf; as Woods, Paſtures, Fiſh-ponds, and a common Cheſt, or Treaſury for Money [n]. But the Goods and Eſtates of a Corporation, are not the Goods and Eſtates of the particular Members, conſider'd ſeparately, but of all the Members, as they make one Collective Body, and are allotted for their common Uſe [o]. I ſay, the Property of theſe Things belongs to the whole Body, tho' the individual Members may (perhaps) make uſe of them: But it is otherwiſe, if they are ſimply bought for the Service of the whole Corporation, without adding, That the Individuals ſhall have the Right of cutting Wood, or feeding Cattle, *&c.* But ſometimes it happens to be, that Paſtures and Woods are purchas'd by the Corporation for the uſe of the particular Members; and in this Caſe they ought each of them to uſe them with Moderation, and without Contention, according to the Extent of the Eſtate [p]. But even in this Caſe, properly ſpeaking, thoſe particular Members have not the Uſufruct of theſe publick Eſtates,

[n] D. 3. 4. 11. D. 50. 16. 17.
[o] D. 1. 8. 6.
[p] Marc. Deciſ. 223. Vol. 1.

but only the Power of uſing them, as *Caſtrenſis* [q] obſerves on the Law here quoted. It has been a doubt, indeed, among the Doctors, whether a Corporation may properly be ſaid to poſſeſs a Thing; many of them holding the Negative, *viz.* That a Corporation is only ſaid to poſſeſs a Thing by Impropriety of Speech [r]. Other ſay, that a Corporation itſelf cannot be ſaid to poſſeſs a Thing, but only thoſe Perſons are in Poſſeſſion, unto whom the Adminiſtration is granted [s]. *Firſt*, Becauſe a Corporation is a Perſon repreſented [t]; and, therefore, cannot poſſeſs a Thing. *Secondly*, Becauſe a Corporation does not ſeem to have an Ability of Conſenting; becauſe in a Corporation there are Infants, Pupils, Madmen, and many others who cannot conſent: But Poſſeſſion is not acquir'd without an Intention and Conſent; wherefore, a Corporation cannot poſſeſs a Thing. Hence it ſeems, that as thoſe Things, which are in the common and promiſcuous Uſe of Men, as a Market, and the like, cannot be poſſeſs'd, but are only promiſcuouſly made uſe of by the People of ſuch Corporation, as in the like Manner other Things are in Common to ſuch Bodies Politick and cannot be poſſeſs'd by them, according to the Opinion of theſe Men. But, I think, the contrary is the better Opinion: As that a Corporation and the Inhabitants thereof, may properly be ſaid to poſſeſs a Thing, either in their own Perſons, or elſe by their Servants and Syndicks, or by other Adminiſtrators [u]. For tho' a Corporation be only a Perſon by Fiction of Law; yet the Property and Poſſeſſion of a Thing is lodg'd in the Corporation itſelf, and not in the Individuals of a Corporation.

[q] In L. 7. D. 3. 4. N. 4.

[r] D. 41. 2. 2.

[s] D. 35. 1. 97.

[t] D. 41. 1. 22.

[u] D. 41. 2. 2.

A Corporation may, in its own Perſon, whenever it pleaſes, do any extrajudicial Act, as make Contracts, and the like, and ſhall not be compelled to conſtitute a Syndick (as in Judicial Acts) for the Diſpatch of any publick Buſineſs of this kind [x]: For a Corporation may celebrate Contracts by its own proper Decree, without conſtituting a Syndick. And as a Corporation may contract with Perſons, which are not of ſuch Corporation: So, according to *Bartolus* [y], it may make Contracts with its own Members, and they ſhall be valid. Corporations are bound by their Contracts, after the ſame Manner as individual Perſons are [z]: For tho' a Corporation cannot ſeparately and individually give their Conſent in ſuch a Manner as to oblige themſelves as a Collective Body; yet, being lawfully aſſembled, it repreſents but one Perſon, and may conſequently make Contracts, and, by their collective Conſent, oblige themſelves thereunto. And thus a Corporation may conſent, tho' not with the ſame Readineſs and Facility as particular Perſons. But the Queſtion is, Whether a Corporation may, either by itſelf, or by its Syndick, oblige the particular Members of ſuch Corporation, and their individual Eſtates, without the Conſent of ſuch particular Members? Touching this Point, the Doctors are wont to diſtinguiſh between a Corporation that has no ſuperior Authority above it, and conſequently has a Power of making Laws and Statutes, and a Corporation which recognizes a Superior, and conſequently cannot make a Law or Statute. In the firſt Caſe, a Corporation may either principally of itſelf, or elſe by a lawful Syndick, who has a Commiſſion to this End and Purpoſe, oblige the Perſons, and the particular Eſtates of ſuch Perſons belonging to the Corporation; as in the Caſe of Taxes, *&c.* For every Contract, which is made by him who has the Power of making a Law, has the Force of a Law [a]. For, as a Law or Statute made by a Corporation, that has the Power of making a Law or Statute, binds all the Members of ſuch Corporation: So likewiſe do Contracts, enter'd into by ſuch Corporation, bind the particular Goods and Perſon of ſuch Corporation; and all Pacts expreſs'd in ſuch Contracts may, according to *Bartolus* [b], be cited in Law, as Statutes, againſt the Members of ſuch Corporation. But it is otherwiſe in the ſecond Caſe, where a Corporation acknowledges a Superior.

[x] Caſtrenſ. in L. 1. D. 3. 4.

[y] In L. 1. D. 36. 1. 15.

[z] D. 12. 1. 27.

[a] D. 39. 4. 15. C. 5. 16. 26.

[b] In L. 27. D. 12. 1.

But

But to the end that ſuch a Statute ſhould be valid, it muſt be general: For if it be made againſt particular Perſons of the Corporation, it is not valid.

As a Corporation, or Body Politick, may bring an Action, and implead a Perſon; ſo it may alſo be impleaded and brought into Judgment [c]: But then ſuch Corporation ought to appear by its Syndick, or Attorney, ſince it cannot appear in its own Perſon. And when a Proceſs is ſerved upon a Corporation, it ought to be on the Perſon of the Adminiſtrator or Syndick; (for a Corporation may, in this Caſe, be compelled to make a Syndick); and an Attachment lies againſt their Goods, and a Sequeſtration on their Lands, if they do not appear by their Syndick. But the particular or individual Members of a Corporation cannot be convened for the Debt of the Corporation: For as that which is due to a Corporation at large and collectively, is not due to the particular Members of ſuch Corporation, and cannot be recovered by them in their ſeparate Capacities; ſo the particular Members thereof may not be ſued for the Debts of ſuch Corporation at large [d]. Yet when a particular Member is conſtituted as a Syndick to bind the whole Body, and all and every Member thereof, a particular Member may then be ſued for the Debt of the Corporation; becauſe ſuch Syndick repreſents the Corporation, eſpecially if all the Members were preſent at the conſtituting of ſuch Syndick.

[c] D. 3. 4. 7.

[d] D. 3. 4. 7. 1 & 2.

I have before hinted, That no one can bring an Action at Law for a Corporation without a legal Proxy, call'd a *Syndick*: And he is ſaid to have ſuch a Proxy, who has it from the greater Part of the Corporation aſſembled together. In which Aſſembly there ought to be two Parts (at leaſt) preſent of all the Perſons that have a Voice; and he who is elected *Syndick* by the Majority of theſe two Parts, is deemed to be duly choſen. By the Law of *England*, a major Part of the whole Corporation preſent is ſufficient; and a Majority of the Perſons preſent ſhall bind the reſt. A Corporation or Body Politick ought to be ſummon'd in their Common Council upon an Original Proceſs; and the Judge may compel the Rector to call a Common Council to this End and Purpoſe. Such Common Council ought to be aſſembled in ſome publick Place, where the ſame is wont to be aſſembled and meet together. And the Summons hereunto is either by the Ringing of a Bell, the Sound of a Trumpet, or the Voice of a Crier or Beadle, according to the Cuſtom of the Place [e]; and it ought to be convened and called together by the Order of the Rector of ſuch Corporation [f]. Whenever any Act is done, which may prejudice the whole Corporation, two Parts in three (at leaſt) ought to be preſent, (as aforeſaid), according to the *Civil* Law [g]: But when any Act is done, which may be to the Prejudice of any particular Members thereof, then the major Part is ſufficient, eſpecially if the Law commits this Matter to the Majority [h]. In all Acts of a publick Nature, the Conſent of the greater Part preſent is ſufficient, provided they be all legally ſummon'd; tho' in Acts of a private Nature it is ſometimes otherwiſe; becauſe, regularly ſpeaking, no one may prejudice another without his Conſent [i].

[e] C. 10. 31. 2.

[f] C. ut ſupra.

[g] D. 3. 4. 4.

[h] D. 2. 14. 7. 19.

[i] D. 27. 8. 11.

Corporations may commit an Offence, and be proceeded againſt, and puniſh'd, as well as particular Men; but then ſuch Offence ought to be committed *Communicato conſilio*, and as a Corporation, in their Politick Capacity [k], according to *Angelus* and *Ancharanus* [l]: But in Crimes and Offences, which are done by the greater part of a College, or any other Corporation, ſuch Offence is not deemed to be done by the whole or all the Corporation, if ſome of the College or Corporation proteſted againſt the ſame by their Oppoſition. Yea, the major Part only ought to be puniſh'd: For the leſſer Part, which oppoſed the ſame, ought not to be involved in the Guilt of others; nor ought ſuch minor Part to be puniſh'd. And this is

[k] Conſ. 165. & 167.

[l] Conſ. 157.

is good Law, when ſuch minor Part expreſly contradicts the ſame: But it is otherwiſe, if ſuch a Minority be ſilent therein; for then this Silence is ſtiled
[m] D. 17.1.18. *Sufferance*, which is in the Place of an Order [m], *&c.* and then they are involved in the Crime, and ſhall be puniſh'd for the Offence together with ſuch as were expreſly conſenting. Becauſe when any one is ſummon'd to a Chapter or Council, he ought either to give his Conſent, or elſe to oppoſe and contradict what is there debated or tranſacted: And hence he is obliged to ſpeak either in the Affirmative or Negative, in giving his
[n] D. 17.1.18. Opinion [n]. Though, regularly ſpeaking, a Corporation may not be
[o] C. 9.47.22. puniſh'd for the Offence of ſome of its particular Members [o]; becauſe, in ſuch Caſe, many innocent Perſons would ſuffer Puniſhments which they do not deſerve, for the Fact and Offence of ſome particular Man, which would be unjuſt: yet a Corporation may be puniſh'd for an Offence committed by the particulal Members of a Corporation in their individual Capacities, if ſuch Corporation ratifies the Offence by any ſubſequent Act. As when ſome particular Perſons of a Corporation ouſts a Man of his Caſtle, and the Corporation retains the Poſſeſſion of ſuch Caſtle to its own Uſe: For a Ratihabition, which, in Offences, is compared even unto
[p] C. 4. 28. 7. a Mandate or Order [p], is preſumed from ſucceſſive and continued Acts of this Kind. Hence, by ſuch Ratification, it becomes the Act of the Corporation, and is ſo called: For that which is done by the particular Members of a Corporation, is deemed to be the Act of the Whole, when the whole Body is apprized thereof, and ſuffers by it; provided it be not a momentaneous Act, as Murder, *&c.*

If a College or Corporation be inſolvent, the particular Members of ſuch College or Corporation ought, according to the *Civil* Law, to contribute their private Fortunes towards the diſcharging of a Fine or Obligation, and may be compelled hereunto, if ſuch Community be ſubject to a pecuniary Obligation. But it has been a Queſtion among ſome, whether this Contribution ought to be impoſed and aſſeſſed *per ſolidum & libram*, or elſe *per Capita*; that is to ſay, whether it ought to be according to the Subſtance and Ability of their Patrimonial Eſtates, or elſe according to the Number of their Perſons. And it ſeems, that it ought to be impos'd and levy'd *per Capita*; becauſe as the Offence of each Perſon is equal, ſo
[q] C. 1. 3. 31. ought the Puniſhment to be alſo [q]. But, I think, the contrary is the truer Opinion, *viz.* That ſuch Impoſition ought rather to be according to the
[r] C. 10.41.1. meaſure of each Perſon's Subſtance and Patrimony [r]. Every Corporation may impoſe a Tax on its own Members, for Diſcharging the Debts of ſuch Corporation, and for the Diſpatch of other neceſſary Buſineſs, without
[s] D. B. 4. §. ult. & Gloſ. ibid. conſulting the Prince or Sovereign [s]; tho' the Buſineſs of impoſing a Tax, is a Matter that belongs to the *Regalia*. But there are ſome Caſes, wherein a Corporation cannot impoſe a Tax, without conſulting the Prince, or Sovereign Power: As when a Corporation wou'd impoſe a Tax on Account of the publick Utility, or Neceſſity; for a Corporation cannot do this, with-
[t] Angel. in L. Un. C. 11.63. out the expreſs Leave of the Prince [t]. A Tax impoſed by a Corporation, ought to be laid equally, and levy'd by the Conſent of all Perſons that may be prejudiced or intereſted thereby, or at leaſt by the Conſent of the greater Part of them, and the Book of Rates whereby the Perſons are aſſeſſed, ought to be laid open to every one that demands a Sight thereof. And, *Laſtly*, A Tax impoſed by a Corporation, ought to be notify'd to all the Perſons that have Poſſeſſions in ſuch Corporation, that they may prepare themſelves for the Payment thereof.

It is a Matter of known Law, That a Corporation may introduce a
[u] D. 1. 3. 32. C. 8. 53. 2. DD. ibid. Cuſtom, if it pleaſes [u]: And not only the whole Corporation may do this, but even a Part of it may do the ſame in their Behalf [x]. For if a whole
[x] D. 1. 2. 2. 8. Corporation may do it in reſpect of the whole Body, a Part of ſuch Corporation

ration alſo may do it in reſpect of it [y]; becauſe a Part of the Corporation or Body Politick is in this reſpect look'd upon as a Body Politick [z]; for there may be a Corporation within a Corporation. But in reſpect to the Inducing of a Cuſtom, *Quære*, Whether the Confirmation of the Sovereign Authority be neceſſary hereunto? and, Whether the Cuſtom of a City extends itſelf unto the Lands and Vills adjoining to ſuch City, and be ſubject thereunto? The *Gloſs* [a], on the Law, holds the Affirmative: And *Bartolus* [b] is of the ſame Opinion. Yet touching this Queſtion, he diſtinguiſhes in this manner, *viz.* If ſuch Vills, or other adjacent Places, have a particular Cuſtom of their own, as the Law permits them to have, then the Cuſtom of the City does not obtain in Places ſubject and adjacent thereunto, but the Cuſtom peculiar to every Place ought to be obſerved: But if theſe Places, as the Suburbs of a City, have no ſpecial Cuſtoms of their own, then, in that Caſe, the Cuſtom of the City claims Authority in the Suburbs, and other adjacent Places being ſubject to the Juriſdiction of the City [c]. But 'tis otherwiſe, if thoſe Places are of the Diſtrict, Territory, and Juriſdiction of the City itſelf: Becauſe, when they have their own proper Bounds, and a diſtinct and ſeparate Territory, the Cuſtom of the City itſelf cannot be extended to Places of this Kind [d]. But if ſuch Vills and Places ſhall be afterwards united to the City, the Cuſtom of the City ſhall obtain in Places thus united, according to *Bartolus* [e]; eſpecially if ſuch Union be made by the Prince, or ſuch-like Sovereign Power; becauſe, *Quod juris eſt in principali, idem juris eſt in adjuncto* [f]. But it is otherwiſe, if the Place united be not ſubject to the Juriſdiction of the City, as *Bartolus* [g] aſſures us; but has its proper Bounds and Juriſdiction.

[y] Arg. D. 6. 1. 76.
[z] Arg. D. 30. 1. 94.
[a] In L. 9. D. 3. 1.
[b] In L. 7. D. 27. 1. 1.
[c] C. 1. 3. 28. 4. D. 50. 1. 30.
[d] Arg. D. 41. 1. 16.
[e] In L. 2. C. 8. 53.
[f] D. 5. 1. 9.
[g] In L. 18. D. 13. 7.

All Corporations have ſome one or more publick Perſons, unto whom they grant the Adminiſtration of their Affairs; and this either with a full and abſolute Power; or elſe with a limited Authority. Theſe Perſons are ſtiled Adminiſtrators, Actors, Syndicks, and the like; and are ſometimes truſted with a ſpecial, and ſometimes with a general Commiſſion. In a City, the Mayor and Aldermen have, generally ſpeaking, the Adminiſtration of Affairs; but ſometimes not ſimply, but with Relation had to the Common Council of the City; and ſometimes they have the full and ſole Adminiſtration thereof. The Law has entruſted the Common Council of a City, and of every other Corporation, with great Power and Authority touching the Government and Adminiſtration of its publick Affairs [h]: And as this Council repreſents the whole City or People thereof, ſo that which is done by ſuch Council, ſeems, according to *Bartolus* [i], to be done by the whole People or City. And hence ſuch Council ſeems to have the ſame Power in theſe Matters, as the whole City has. But then this Council muſt be legally ſummon'd and call'd together by the Authority of the Magiſtrate, or ſome other ſuperior Perſon: And when ſuch Council is aſſembled, ſuch ſuperior Magiſtrate ought to intervene and be preſent thereat, unleſs his own Intereſt be concern'd therein, in which Caſe the Corporation may aſſemble itſelf without his Intervention, if he refuſes to call the ſame. When a Corporation has not a Rector or ſuperior Magiſtrate, he who is the more ancient Member thereof, may convene the Council or Corporation itſelf [k]: And all the Members of the Council or Corporation ought to attend the Aſſembly; and if there are two Parts in three of the whole Order preſent, as aforeſaid, they may proceed to the Diſpatch of Buſineſs, tho' the reſt do not attend. I have before remember'd, that this Aſſembly ought to be conven'd in ſome publick Place, where it is wont to meet: But this is otherwiſe, if it cannot be aſſembled in ſuch uſual Place, by reaſon of ſome War, Peſtilence, *&c.* And when the Body or Council is thus aſſembled, that which is publickly done by the greater Part of them, ſhall oblige all the reſt [l]: And this by a Fiction of Law; becauſe it is not

[h] Gloſſ. in L. 3. D. 3. 4. V. *Ordo.*
[i] In Rub. D. 50. 2.
[k] Marc. Deciſ. 805. Vol. 1.
[l] D. 50. 17. 160.

to be ſuppoſed, that all the Perſons will ſo readily agree among themſelves. In theſe Aſſemblies the Law does not ſuffer Perſons abſent to vote by Proxies, unleſs Cuſtom has ruled it otherwiſe; becauſe of the Miſchief and Inconvenience that might attend ſuch a Practice, by having only a few of its Members aſſembled in Council, and likewiſe to reſtrain the Contumacy of others [m].

[m] Joh. Andr. in c. 30. X. 1. 6.

Syndicks and other publick Adminiſtrators, having a Commiſſion or Power *in ſolidum* to act, are bound for each other in the Management of the Buſineſs of the Corporation, and each of them muſt anſwer for the other *in ſolidum*, where there are ſeveral Perſons conſtituted. Touching theſe publick Adminiſtrators, the Law makes a twofold Difference: For there are ſome that have the Adminiſtration of Juſtice, and others that have the Adminiſtration of their Eſtates; and it is touching the laſt, that I here ſpeak. And among theſe publick Adminiſtrators, all of them are obliged to keep a Book of Accounts, and to write all Receipts and Payments therein, and at the End of their Adminiſtration to render an Account thereof, with a Reſtitution of what remains in their Hands [n]. Theſe publick Adminiſtrators are not only liable to anſwer for Deceit and Fraud, but alſo for Negligence. If they are guilty of Fraud, in detaining the publick Money in their Hands, they are obliged to refund the ſame with Intereſt. Theſe Officers are bound, at the End of their Adminiſtration, to deliver up their Books of Account unto the Corporation, or unto ſuch Perſons as are deputed by it to reviſe the Accounts; which Reviſors of the Accounts may, even in the Abſence of ſuch Officers, pronounce them to be Debtors to the Corporation: For ſince no other Cognizance is requir'd, than a bare Computation of the Account, a Sentence may rightly be pronounced againſt them [o]. No Adminiſtrator of a Corporation can Mortgage or Alienate the Goods of ſuch Corporation, unleſs he has a ſpecial Commiſſion from the whole Body, or Council repreſenting the whole Body [p]; for he is placed there for their Good, and not for their Harm or Prejudice.

[n] Bart. in L. 3. D. 48. 12.

[o] D. 50. 8. 2.

[p] Bald. in L. 27. D. 12. 1.

A *ſimple* Legacy, or a Legacy in Truſt, may be bequeath'd not only to a Whole Corporation or College, but even to a Part thereof; as to the Warden and Thirteen Senior Fellows of New-College in *Oxford*: But a Legacy left particularly to ſome certain Citizens, is not deemed to be left to the City itſelf, but to thoſe Citizens as individual Members [q]. If a Legacy be left to a College, it is neceſſary to prove ſuch to be a lawful and approv'd College, in order to render ſuch a valid Legacy: For in a doubtful Caſe, every College is preſum'd to be an unlawful Community, unleſs it be prov'd to be lawful; and conſequently is not capable of a Legacy, according to *Jaſon* [r]. Hence it is, that a Legacy cannot be bequeath'd unto a College of *Jews*. *Note*, The *Gloſs* on the Law ſeems to make a Difference between a College and a Congregation, ſaying, That Two Perſons make a Congregation, but Three a College. It has been no ſmall Controverſy among the Doctors, whether a Corporation may make Statutes and By-Laws to oblige Perſons. For *Bartolus* [s] diſtinguiſhes, and makes a Difference between a Corporation which has no Juriſdiction, and ſuch a one as has a Juriſdiction. In the firſt Caſe, when it has no Juriſdiction, it cannot make Statutes or By-Laws; becauſe this Power depends on Juriſdiction [t]: But in the ſecond Caſe, when a Corporation has a Juriſdiction, it is otherwiſe, becauſe then it has the Power of making ſuch Laws. But, dropping this Diſtinction, I think, it is the receiv'd Opinion of the Lawyers, that all Corporations and lawful Communities, even tho' they have no Juriſdiction, may make By-Laws touching ſuch Matters as relate to the Adminiſtration of their own private Affairs [u]. And not only the whole Body, but even a certain Part of it, may

[q] D. 36. 1. 1.

[r] In L. 8. C. 6. 24.

[s] In L. 9. D. 1. 1.

[t] Glof. & DD. in L. 1. D. 2. 1.

[u] C. 3. 13. 7.

may make Statutes in Relation to ſuch Matters, as are incumbent on ſuch Part of it, and which belong to their Adminiſtration [x]. But tho' a Corporation, which has no Juriſdiction, may make Statutes touching thoſe Things, which reſpect the Adminiſtration of their own Concerns; yet it cannot add a Mulct or Penalty unto ſuch Statutes, unleſs ſuch Corporation has been accuſtom'd ſo to do; becauſe the impoſing of a Penalty is a Matter of Juriſdiction [y]. But a Corporation cannot make a Statute to take away the Right of another Perſon, without his expreſs or tacit Conſent, unleſs it be upon a juſt and reaſonable Account, *viz.* ſuch as concerns the publick Utility; becauſe no Law ought to be made in Hatred and Prejudice to particular Perſons. Statutes made by a Corporation, which recognizes a ſuperior Power, ought to be confirm'd by the Authority of a Superior; unleſs they are ſuch Statutes which only reſpect the Adminiſtration of their Eſtates, and the like; becauſe, in this Caſe, Corporations may freely make Statutes, without the Confirmation of any Superior [z]. But *Baldus*, and ſeveral of the Doctors, think, that Statutes or By-Laws made by Corporations, do not ſtand in need of the Sovereign Authority for the Confirmation of them; becauſe all Corporations have this Power of making Laws for themſelves, by a Diſpenſation of the Common Law, and ſuch Statutes are confirm'd by the Common Law [a].

[x] D.D. in L. 9. D. 1. 1.

[y] Jaſ. in L. 9. D. 1. 1.

[z] Gloſ. in L. 3. C. 3. 13.

[a] Bald. in. L. 8. C. 1. 14.

Touching unlawful Colleges or Companies of Men, it belongs to the Office of a Preſident of a Province, according to the *Roman* Law, to ſee that ſuch unlawful Colleges be not erected. So that from this Law it appears, that the Inſpection of Colleges is under the Care of thoſe Secular Judges [b]. And ſuch as erect ſuch unlawful Colleges or Companies, and the Encouragers of them, are liable to the *Julian* Law of Treaſon, and alſo to the *Julian* Law touching publick Force. But tho' the Authors of ſuch Colleges are puniſh'd in this Manner; yet the Members thereof are no otherwiſe puniſh'd than by a Diſſolution of their Society [c]. And it is to be noted, that all Colleges or Companies are deem'd to be unlawful Societies, unleſs they are found to be permitted and approv'd of by Law [d].

[b] Inn. in c. 14. X. 5. 3.

[c] D. 47. 22. 3.

[d] D. 47. 22. 3. 2.

It has been ſaid before, That ſome of theſe Colleges or Corporations are permitted by the Law of Nations, and others by the Civil Law. Among the firſt it has been obſerv'd, that the People of a State or City may be reckon'd: But touching the laſt, the Law confines the Notion of a Corporation to a narrower Compaſs. Among ſuch Colleges or Corporations, as are approv'd of by the Civil Law, we may *firſt* include Colleges erected on a Religious Account [e], as Monaſteries, and the like: *Secondly*, Such as are founded on the Score of Learning [f]; and, *Thirdly*, Such as are eſtabliſh'd for the ſake of publick Charity [g], which we in other Terms call Hoſpitals. Such as are erected on the Score of Learning and publick Charity, are deem'd Secular Corporations: But ſuch as are founded on the Account of Religion, are reputed in Law to be Eccleſiaſtical, if they conſiſt of Eccleſiaſticks; and, according to the *Canon* Law, ſuch cannot be founded without the Pope's Authority [h]. There are alſo ſome other Colleges or Corporations of Tradeſmen, which the *Civil* Law permits in ſome Cities or Places of Traffick, and theſe we call *Companies*. A College may alſo be erected for poor Soldiers, on the Account of making ſome Proviſion for them: But the Effect of ſuch a College ought not to be extended to other Purpoſes [i]. Yet it is to be obſerv'd, that Soldiers cannot make theſe Societies or Colleges, or any other, without the Order of their General: But if they have his Leave or Authority, they may do it [k]. Bondmen may likewiſe be Members of a College, by their Lords Conſent, and not otherwiſe: And ſuch Colleges or Companies there were anciently at *Rome*.

[e] D. 47. 22. 1. 1.

[f] C. 4. 13. 5. Auth. *Habitat.*

[g] Bart. in L. 4. D. 47. 22.

[h] Inn. in c. 8. X. 3. 24.

[i] D. 47. 22. 4.

[k] D. 3. 2. 2.

Colleges and Corporations are under the Viſitation of ſuperior ſecular Judges, and may be convened before them, if ſuch Colleges conſiſt of ſecular

[l] D. 47. 22. 1. pr. ſecular Perſons [l]: But if they are Colleges of Clerks and Eccleſiaſticks, then they ought to be conven'd before Eccleſiaſtical Judges, as being under [m] Nov. 83. pr. their Viſitation and Correction [m]. But if it be a College conſiſting of Clerks and Laymen together, and the greater Part be Laymen, then they ſhall be call'd a College of Laymen, and be conven'd and ſubject as ſuch; [n] D. 50. 1. 19. becauſe the major part draws the Whole after it [n]: And therefore, ſuch a College may be convened before a Lay Judge, if it be impleaded on the Score of Temporal Matters; for, according to the *Canon* Law, a Lay Judge ought not to intermeddle in Spiritual Matters. But if the greater or major Part be Clerks, it ſhall, for the ſame Reaſon, be conven'd before an Eccleſiaſtical Judge. If they are equal in that Number, or their Power be equal, as, in a City, it often happens to an Hoſpital; then (I think) according to the *Canon* Law, at leaſt, they ought to be conven'd before an Eccleſiaſtical Judge; becauſe, as that Part which conſiſts of Clergymen [o] D. 6. 1. 43. Arg. D. 41. 1. 27. 2. is more dignify'd, it draws the Lay Part along with it [o]. But the Law of *England* does not make this Diſtinction between Laymen and Clerks, as aforeſaid.

A College or Company may conſiſt both of Men and Women, provided the Foundation and Inſtitution of ſuch College be not repugnant to the State and Modeſty of Women: For a Woman cannot be a Member in a [p] D. 50. 17. 2. College of Doctors and Burgomaſters [p], in *Latin* call'd *Decuriones*; for, according to the Apoſtle, the Office of Teaching and Judging is forbidden unto Women. But in Colleges, that are founded for Alms and Charity, Women may be Members as well as Men; and thus Nunneries are Colleges of religious Women. Some have doubted, whether a Perſon may be a Member of two Corporations at one and the ſame time? Now in anſwer hereunto, it is to be obſerv'd, That there are ſome Colleges, or Corporations, that are ſubaltern to each other, and are as the Whole and a Part, or as Body and Members of the ſame Body, which we call a Corporation within a Corporation. Thus, in our two Univerſities, each Univerſity is divided into Colleges, as Members of the whole Body. And in this Caſe, a Perſon may be a Member of the whole Univerſity, and a Member of a particular College, which is a Part of the Univerſity; as a Perſon may be a Member of the State, and alſo of ſome particular City under that State. And there are ſome Colleges or Societies, which are unto each other as ſeparate *Species*. And in theſe it is to be conſider'd, whether a Perſon can be in one Corporation *neceſſarily*, and in another *voluntarily*. For Example: A Man is a Citizen of *London* by Birth; and thus he is *neceſſarily* a Member of the Corporation of *London*: And in this Caſe, certainly, he may be a [q] D. 50. 1. 20. & 31. Member of another City or Corporation *voluntarily* [q]. But if it be a Queſtion, Whether he may be a Member in ſeveral *voluntary* Colleges or Corporations? I anſwer, That if the Inſtitution of one Corporation be incompatible to the Deſign and Inſtitution of the other, for which ſuch other Corporation is founded, he cannot be a Member of divers Colleges [r] D. 47. 22. 1. 2. or Corporations at the ſame Time [r]. But if the Buſineſs or Inſtitution of one of them be no Impediment to the Deſign of the other of them, there is no Law which forbids a Man to be a Member of two Colleges at the ſame Time. A Man may, in *voluntary* Societies, quit one, and go into the other: But if a Perſon in one State becomes a Denizon in another, I conceive, he loſes his Freedom in the firſt State.

Touching the Diſſolution of Colleges and Corporations, it is to be known, That there is one Kind of Diſſolution, which happens to the whole College [s] D. 47. 22. 1. fin. or Corporation, by the Conſent of its Members [s]; and another Kind, which happens, when all the Members are dead [t]: And there is a third Kind, [t] D. 3. 4. 7. fin. which is made againſt their Conſent; and this is made by the Order of the Sovereign, on the Score of ſome Offence committed by thoſe of the College or

or Corporation, which we ſtile a Forfeiture of their Charter of Corporation. As when, under the Pretence of being a lawful Corporation, they commit unlawful Acts [u]; for a Corporation may be diſſolved upon this Account [x]. Tho' all the Perſons of a Body Politick be changed; yet the Corporation ſtill remains the ſame: yea, if there be but one Perſon remaining of the whole Corporation, the Name and Right of the Corporation is preſerv'd in that one Perſon [y], tho' a Corporation cannot at firſt conſiſt of one Perſon.

[u] D. 47. 22. 5.
[x] D. 47. 11. 2.
[y] D. 3. 4. 7. 2.

Touching the Lands and Eſtates of Corporations upon their Diſſolution, it is to be noted, That there are ſome Corporations, which have their Eſtates in Common, and nothing in particular is reſerved to the Members thereof as their Property, as it fares with Colleges of religious Perſons, and the like: And in theſe Bodies, upon a Diſſolution of the College, the Lands eſcheat to the Prince, or to him unto whom the Prince grants them [z]. And thus it happen'd, when the Corporation of *Knights Templars* was diſſolved by the Pope's Authority: For, as eſcheated Goods, their Lands came unto the Prince's Exchequer. There are other Colleges, which may have Eſtates reſerved unto particular Members, and in Common alſo at the ſame Time; there being ſome Corporations, that are veſted with Eſtates for the Payment of Salaries, and the Remuneration of Mens Labours, which their Members undergo, for the ſake of their Fellow-ſubjects, as in the Caſe of Profeſſors of Learning, and the like: And then, if the Corporation be wholly diſſolved, the Lands given for the Reward of ſuch Profeſſors do not follow ſuch Diſſolution, and eſcheat to the Prince, but remain with the Profeſſors themſelves. And if the Choice and Nomination of ſuch Profeſſors be veſted in ſuch Corporation, ſo that other ſucceeding Electors cannot be elected upon the Diſſolution of ſuch Corporation, the Lands and Revenues of ſuch Corporation, given for the Maintenance of the Profeſſors, ſhall go to the Donor's Heirs, if ſuch can be found; otherwiſe, to the Prince's Exchequer, as eſcheated Goods. Whenever a Lay-corporation is diſſolved by Conſent, the Lands they purchas'd ſhall be divided between the Members, if the Corporation has the Power of diſſolving itſelf, and not otherwiſe: But if it be diſſolved by Forfeiture, then the Lands ſhall go to the Prince, according to the Opinion of the Doctors [a]. Thus, if a Corporation be diſſolved by the Prince, on Account of Forfeiture, or otherwiſe, all its Rights and Privileges are gone, and at an end [b]: But if it be diſperſed upon the Score of ſome Mortality, and the like, its Privileges and Rights are ſaved, and ſhall be reſtor'd to the Members upon their Return.

[z] D. 49. 14. 1. C. 10. 10. 1.
[a] DD. in L. 4. D. 47. 22.
[b] D. 50. 13. 5.

TIT. XXXVI.

Of an Univerſity *of* Scholars, *in our Books ſtiled* Studium Generale; *and of Students, Profeſſors, Doctors, and other Graduates; their Privileges, Immunities,* &c.

AMONG the ſeveral Sorts of Corporations mention'd in the Books of the *Civil* Law, and ſtiled *Collegia Licita*, or Lawful Communities; and among ſuch of theſe as were ſupported by ſpecial Privileges, we may reckon a Corporation, or Body Politick, founded for the ſake of the Liberal

Arts and Sciences; which Kind of Corporation under this Title is ſtiled *Studium Generale*, and is taken for an Academy or Univerſity; wherein Maſters, Doctors, and Profeſſors of divers Sciences are there aſſembled, for the Education of Youth, in the Buſineſs of Learning, and vertuous Principles, by inciting them to Labour and Induſtry. Hence it is, that they who have laid the firſt Foundation of a State, have always been ſolicitous about erecting Univerſities, or general Schools of Learning, under an Opinion, that no good Polity can flouriſh, without the Help of good Letters, and a wholſom Inſtitution of its Youth, as *Ariſtotle* obſerves in his Politicks [c]. And theſe publick Schools of Maſters, the *Grecians*, who were Authors of all Arts almoſt, ſeem firſt of all to have introduced, who not only at *Athens*, but at ſundry other Places, by a mighty Concourſe of Students. began in a publick manner to profeſs divers Arts and Sciences, and to teach them for certain Stipends.

[c] Lib. 5. c. 9.

Afterwards, by the Liberality of Princes, Men of Learning were hired in divers Places to inſtruct the Youth in ſeveral Sciences: For they deemed a private Education to be very inconvenient on many Accounts; becauſe the Indulgence of the Parents corrupts the Minds of Children, and at Home they only learn ſuch Things as are particularly enjoin'd them: whereas in publick Schools they enlarge their Underſtandings, by learning ſuch Things as are commanded and taught unto others, as *Quintilian* remarks in his *Inſtitutions* [d], where he ſays, That *they add many Things unto their own particular Tasks, to be daily approved of, and many Things to be corrected: ſo that they improve in Knowledge, by ſeeing the Sloth and Idleneſs of one Perſon rebuked, and the Induſtry of another commended*; *and are excited unto their Studies, by the Praiſes and Rewards given unto their Fellow-ſcholars.* And young Men being thus fired and kindled with the Love of Letters, hate to ſtay at home in their own Countries, but uſually travel to ſee other Univerſities, and to viſit Profeſſors abroad, for the ſake of increaſing Knowledge. And ſurely, the going Abroad in Queſt of Knowledge, is the beſt End of Travelling; I mean, not only to ſee the fine Buildings of Cities, but likewiſe to retain the Laws and Inſtitutions of them, and to form a right Judgment of their Policies and Government: So that, by this Means, their Obſervations might at length be apply'd to the Benefit of their own State, as *Lipſius* adviſes, in his Epiſtle to *Launoy*. Wherefore, Men of riper Years, when they can make a proper Judgment of Things, do well to travel into ſuch Countries as are endued with politer Manners; and, by viſiting the moſt eminent Univerſities, to hear the Profeſſors, appointed there by publick Authority, inſtructing the Youth; from whence they may learn and carry Home ſomething of Advantage unto themſelves.

[d] Lib. 1. c. 2.

In theſe Univerſities the Profeſſors of the Law were in high Eſteem and Reputation among all Men: But heretofore they could not teach elſewhere than in the Capitol at *Rome*, at *Conſtantinople*, and *Berytus*; and no one cou'd be admitted to be a Profeſſor hereof, without the Approbation of the Prince, and the Decree of the Order of the Profeſſors. And ſuch Perſons as uſurp'd the Title of Profeſſors, and the Authority of Teaching in Publick, without ſuch Licence had, underwent a Mark of Infamy, and were baniſh'd the City [e]: But ſuch as were truly Maſters of their Profeſſion, tho' they had not obtain'd the aforeſaid Decree, were not prohibited the Exerciſe of their Studies, and the Buſineſs of Inſtructing Youth in their private Families. For only ſuch as were appointed to teach within the Capitol, were interdicted to attend young Students, and to read privately; and this, under the Pain of being deprived of the Privileges granted to the Order [f].

[e] C. 11. 18. l. Unic.

[f] C. ut ſupra.

Moreover,

Moreover, the Emperors *Theodoſius* and *Valentinian*, by this Law, ſettled a certain Number of Profeſſors in the State; *viz.* three Orators well vers'd in *Roman* Eloquence, for the teaching of Rhetorick, and the Art of Speaking. which was in great Vogue at that Time; ten Grammarians; and five Sophiſts or Logicians; two Profeſſors of Law; and one in Philoſophy: but did not hereby exclude thoſe liberal Arts mention'd by the Conſtitution of *Conſtantine*: And thus general Schools of Learning were eſtabliſh'd by theſe two wiſe Emperors. But they only ſettled this Number of Profeſſors to read the ſuperior Sciences in the aforeſaid Cities, and not elſewhere; aſſigning to each of them particular Schools and Places to read in at ſome Diſtance from each, that their Scholars might not diſturb one another by a Confuſion of Voices, and divert each other's Mind from his Studies. And as they took Care that they ſhould not hinder each other, by this Means, in their Studies; ſo they alſo prohibited Smiths and ſuch-like Perſons to work near the Schools and Houſes of theſe Profeſſors, ſince the Publick Advantage ought to be preferr'd hereunto; and by this Means the State was fill'd with Men of Learning and Wiſdom. And if any Perſon averr'd himſelf to be a Smith ſettled by publick Authority, for making of Arms for the State, and that he was equally privileged with Scholars, the Magiſtrate was to aſſign him a convenient Place in the City to work in, without any Inconvenience to the Scholars. Thus were Univerſities of Scholars, in former Times, taken Care of, for the Good of the State. But when the Papal Power prevailed, and Popes aſſumed unto themſelves the Founding and Protecting of theſe publick Nurſeries; ſecular Princes ſubmitted the Care of them unto the Church; and by this Means, Darkneſs and Ignorance crept thereinto, and Princes grew negligent of this great Work.

As there was a College of principal Phyſicians in the City of *Conſtantinople*, ſo there was likewiſe there a College of Perſons that profeſs'd the liberal Arts and Sciences in that City: And thoſe Profeſſors were held in ſo much Eſteem, that if they behaved themſelves well by an honourable Exerciſe of their Profeſſion for twenty Years together, they were honour'd with the Dignity of a *Comes* or *Count* of the firſt Order, and were equal to ſuch as were of *vicarial* Dignity [g]. *Quintilian* has a View to this Time, ſaying, *Poſt impetratam ſtudiis meis quietem, quæ per* 20 *Annos in erudiendis juvenibus impenderem*; which is an Argument that Profeſſors heretofore, after 20 Years Buſineſs, uſually had their Diſcharge or *Quietus* given them, as unto *Veteran* Soldiers, and they had alſo other Rewards aſſign'd them after they had finiſh'd their Labours. And this is a Specimen of a flouriſhing State (ſays *Symmachus* [h]) to have the Profeſſors of liberal Arts and Sciences well endow'd with opulent Rewards; for if you take away the Rewards of Learning [i], all Study will ſoon periſh, and come to an End thereby. Hence it was that the Doctors of the Metropolitan Church of *Conſtantinople* were honoured with Epiſcopal Dignity; and in the Patriarchſhip obtain'd the next Place unto the Vicars of the Church. And at this Day there are ſacerdotal Benefices and Canonries in many Places appointed for Doctors and Profeſſors, and theſe are annexed unto their Profeſſorſhips, as at *Oxford*, and elſewhere. And there were alſo ſeveral Dignities and Privileges conferr'd on Lawyers, eſpecially on ſuch as inſtruct the Youth of the Univerſities in the Knowlege of Law and Equity, *&c.* [k].

[g] C. 12. 15. l. Unic.

[h] Epiſt. 73. lib. 1.

[i] Tacit. An. lib. 11.

[k] C. 10. 31. 6.

In an Univerſity we meet with theſe ſeveral Diſtinctions among Men, according to the Degrees of Learning, unto which they arrived, ſome being called *Doctors* or *Maſters*; others ſtiled *Batchelors* or *Licentiates*; and others termed *Students* or *Scholars*. *Doctors* or *Maſters* are thoſe Perſons that have gone through all the neceſſary Parts of Learning in their reſpective Faculties, and are come to the higheſt Pitch of Honour in the Schools.

Schools. *Alciatus* ſays, that *Doctors* of Laws are comprehended under the Title of Maſters; and ſo are *Batchelors* and *Licentiates* included under that Name: But, I think, all the Books are againſt him, for a *Licentiate* or *Batchelor* is only ſuch a one, as by an inferior kind of Learning, has Leave given him to read ſuch Books as may qualify him for a Doctor's Degree. In a ſtrict Senſe of the Word, a *Doctor* is not comprehended under the Name of a *Scholar*; nor, on the contrary, is a *Scholar* included under the Appellation of a *Doctor*. But *Joh. Andreas* will have it, that in an indifferent and favourable Matter, as in Privileges and the like, a Doctor is comprized under the promiſcuous Name of *Scholars*, as an Abbot is under the Appellation of *Monks*; and Senators and the like under the Word *Populus*; and the Maſter of a Family under the Word *Familia:* But it is otherwiſe in odious Caſes, as in a Citation to Law-Suits, and the like, but the Doctors allow the Rectors of Schools to be included under the Word Scholars. A Doctor, according to *Baldus* and *Imola* [l], is not comprehended under the Appellation of Scholars, even in a favourable Matter: Yet it is otherwiſe (ſay they) *in actu individuo.* He who deſires to be promoted to a Doctor's Degree, ought to undergo an Examination, and though he ſhall not be found ſufficient on his Examination; yet if there be any Hopes of his Proficiency, he ought to be admitted to his Doctorſhip, according to ſome Perſons. But this is not the Opinion of *Bartolus*, who ſays, that no one ought to be admitted *ad docendum*, unleſs he has been firſt examin'd and approv'd of in Point of Learning and good Manners, and has all other Qualifications, that are required in the Act of making a Doctor. *Firſt*, *Doctors* ought to excel others in Point of Behaviour and good Manners, and likewiſe in Learning: And, therefore, for a Defect of Learning and good Manners, they may be lawfully reprobated. *Secondly*, A *Doctor* ought to be ſo approved of, that the Preſentation and Oath of ſo many Doctors is neceſſary to ſuch Approbation [m]. This Examination and Approbation of a *Doctor*, according to the Rules of the common Law, ought to be atteſted by ſeven Perſons in Number. See *Papienſis*'s Practice of the Law, in the Preface thereunto.

[l] In l. 1. D. 24. 3.

[m] C. 2. 8. 8.

The Promotion of *Doctors* in Law, firſt began to be in Uſe about the Time of the Emperor *Lotharius*, a *Saxon* by Birth, who commanded the *Roman* Laws to be publickly read and taught in the Schools: And it is ſaid, that the People were ſo much delighted with them, that they began to contemn the Knowlege of the holy Scriptures, and the Study of Divinity waxed cold, in Compariſon of the Study of the Law. But afterwards when the Number of Doctors increas'd, certain Conſtitutions were made touching their Promotion, and the Number of Years they were to compleat before they were to be promoted to Doctorſhips. And, to prevent farther Miſchief by this Novelty in Learning, it was enacted, that all Perſons, who treated of Divinity, ſhould not only follow the received Determinations of the Schools, but ſhould alſo make Uſe of the Terms and Forms of Speech eſtabliſh'd in the Schools in Relation to Divinity, as *Rhenanus* upon *Tertullian* obſerves. As Phyſicians are ſaid to have the Care of human Bodies, ſo are Lawyers ſaid to have the Adminiſtration of Juſtice: And, therefore, Doctors of Law are ſaid to be ſo much more excellent than Phyſicians, as the Soul excels the Body, and as Juſtice is preferr'd unto Health, and the Subject of the Profeſſion being of a more noble Nature, the Science itſelf becomes ſo too [n].

[n] Abb. in c. 5. X. 2. 7. N. 6.

Profeſſors or *reading* Doctors, which is the ſame Thing, have many excellent Titles given them in the Laws: For if they do actually read Lectures in Publick, as their Profeſſion requires them to do, they are ſtiled the *Patrons* and *Defenders* of Mankind, and, in ſome meaſure, ſaid to be *the Rays of the Sun*, the World being illuminated by their Light. They make a lawful

a lawful and approved College: And hence it is, that, as they are the beſt Miniſters of Juſtice, and of all publick Good, they may make and ordain Statutes according to the *Civil* Law, and do all other Matters which relate to an Univerſity or Corporation. Nor is this ſtrange, or to be wondred at, ſince they exerciſe a lawful Profeſſion, and, according to the Text in the *Code* [o], make an Univerſity or Body Politick. And hence the *Gloſs* thereon ſays, That it is *Doctors*, and not *Scholars*, which make an Univerſity; becauſe *Doctors* are thoſe Perſons that exerciſe a Profeſſion, but *Scholars* are only the Diſciples of ſuch as exerciſe a Profeſſion: But that *Gloſs*, I think, is not true; becauſe even *Scholars* do conſtitute and make an Univerſity, as having a lawful Power and Call of Aſſembling together for the Diſpatch of Buſineſs. A Doctor, who has publickly read for thirty Years, is made a *Count*, in an improper Senſe *: For, properly ſpeaking, he only is ſtiled *Comes*, that is, inveſted with the Government of a County: Therefore, without a County, he cannot properly be termed a *Comes* or *Count*, but only improperly ſo, and contrary to the true genuine Senſe of the Word.

[o] C. 3. 13. 2.

[*] Bart. in L. 42. D. 29. 1.

To the Examination of a Scholar, ſeven Doctors, or Perſons skill'd in his Faculty, are requir'd, who ought to depoſe, as skilful and learned Perſons in that Art or ſcholaſtick Faculty, whereunto ſuch Scholar belongs, before the Chancellor of the Univerſity, touching the Sufficiency of ſuch Scholar †. But if ſeven Doctors in ſuch Faculty cannot be found in the Univerſity, as it ſometimes happens in the Faculties of *Arts* and *Phyſick*, then in ſuch a Caſe, for the greater Caution, Practice requires to ſend unto the neighbouring Schools or Univerſities. A College of *Doctors* often conſiſted of twelve Perſons, and in ſuch a Caſe the Teſtimony of the major Part was ſufficient to the Approbation of a Scholar's Learning or Proficiency for his Degree; nay, the Teſtimony of one alone wou'd be ſufficient, ſince the Right of a College may reſide in one Perſon alone, if others ſhould be dead or deficient [p]. And this is the Opinion of *Bartolus*, if more than one cannot be found in the Place; but in another Place *Bartolus* diſſents from himſelf [q]. But, I think, that theſe ſeven Doctors are requir'd as Individuals, and not as a major Part of a College: And this the Text ſeems to prove, ſaying [r], That ſeven ought to be conven'd of thoſe that are found in a College to make this Proof of a Scholar's Sufficiency for his Degree; but this Matter now differs, according to the local Statutes of each Univerſity.

† Id. in L. 10. C. 10. 52.

[p] D. 3. 4. 7.

[q] In L. 7. C. 10. 52.

[r] C. 10. 52. 10.

A *Scholar* does not ſeem to gain a Settlement, or to have a Dwelling, in that Place where he lives on the Score of Study, but is compared unto a Perſon that has a Stall, Warehouſe, or Shop ||: But we have another *Gloſs* on the Law which holds a contrary Opinion. But even this laſt *Gloſs* does not ſay, that he ſhall gain a Settlement there, but only that he ſhall be ſubject to the Court or Juriſdiction of the Place, if he makes a Contract there, ſo that he may be conven'd either before the Rector of the Univerſity, as his own proper Judge, or elſe before the Biſhop of the Dioceſe, according to the *Canoniſts*. For he ſhall not be ſaid to have a ſettled Dwelling there, though he ſhould ſtay there a thouſand Years, if it appears that he was only there upon the Account of Study ‡: But he ſhall be ſaid to have contracted a ſettled Habitation there, if he lived there for ten Years on any other Account.

|| Bart. in L. 5. D. 47. 10.

‡ Bart. ut ſupra.

Scholars have many Privileges granted unto them by the Law, as to be exempted from the Juriſdiction of the ordinary Judge, to be free from ordinary Taxes and Services, and the like. But Scholars, whoſe Names are not written in the *Matricula*, or Matriculation-book (as we call it) ſhall not enjoy the Privileges of Scholars. But *Quære*, whether a Scholar, who has been matriculated, and then leaves the Univerſity, ſhall afterwards upon his Return again retain this Advantage unto himſelf, *viz.* That he was heretofore enrolled or matriculated? In this Queſtion we make this Diſtinction, *viz.* that he was either a Scholar, who was abſent from the Univerſity

for five Years, and then his former Matriculation ſhall be of no Advantage to him on his Return thither again *: or elſe, that he has been abſent from thence for a leſſer Term of Years, and if he has betaken himſelf to Trade, Merchandize, or other manual Occupations, his former Matriculation ſhall then be of no Avail to him on his Return; for he thereby ſeems to have laid aſide the *Animum Scholaſticum*, or the Purpoſe of a Scholar. But if he has not apply'd himſelf, or turned his Thoughts to other Employments, then his former Matriculation ſhall ſtand him in Stead, and he ſhall enjoy the Privileges of the Univerſity as a Scholar. A Perſon is ſaid to leave or depart from the Univerſity, when he goes from thence *cum Pannis*, that is to ſay, with Bag and Baggage.

* Bart. in L. 42. D. 29. 1.

Among Privileges common to Univerſities or privileged Schools of Learning, the Emperor *Conſtantine* ordain'd, that Profeſſors and Doctors of Laws, and their Wives, ſhould be exempted from all Civil Offices, from the Reception and Entertainment of Strangers, and that they ſhould have Salaries paid them during their own Time. 'Tis a Privilege alſo common to Univerſities, that Scholars being in Poſſeſſion of Benefices or Prebends, and ſtudying in Univerſities or privileg'd Schools, ſhould receive the Fruits and Profits of their Benefices: And the Statute of Queen *Elizabeth* has a Reſpect hereunto. But by the *Canon* Law [s] they can only receive theſe Fruits and Profits during the Time of their Incumbency on their Benefices, and no otherwiſe. But thoſe daily Diſtributions were excepted out of this Rule, which were only granted to young Students reſiding in Churches, and preſent at canonical Hours, and not at others. For they, even by the *Canon* Law, ſhall have ſuch Diſtributions as were granted to reſident Clerks, tho' they be not preſent at canonical Hours or divine Service. The Emperor *Frederick*, by the Advice of his Dukes, Judges, Biſhops and other great Men, at a general Viſitation, made a Law to remain in perpetual Force, enacting, that no one ſhould for the future preſume to inflict any Injury on Scholars, nor ſhould any one endamage them on the Pretence of any Debt contracted, or Offence committed in the Province of any Perſon whatſoever, as by perverſe Cuſtom it had ſometimes happen'd to be done, but that every ſuch Scholar ſhould be ſubject to the Chancellor's Court of the Univerſity. And the ſame Privilege, in Favour of our Univerſities here in *England*, is granted and eſtabliſh'd by divers Royal Charters, which are in our Univerſities of *Oxford* and *Cambridge*.

[s] X. 3. 4. 12. X. 5. 5. 5. X. 3. 5. 32.

The Founding of Univerſities, and granting Privileges thereunto, ſeems entirely to depend on the Prince's Will, as does alſo the Authority thereof itſelf, if any other Perſon ſhall think fit to build and endow them, or any ſuch publick Schools, and then they are the Patrons and Viſitors thereof. And this is more eſpecially true in Law; becauſe the erecting of Univerſities is a Matter of a publick Nature: And therefore, the Government of ſuch Communities is committed to the Care of the Prince, or of them who bear chief Rule in the Adminiſtration of publick Affairs. And, for this Reaſon, an Univerſity is ſometimes in the Law ſtiled a *publick*, and ſometimes an *imperial* Auditory. As the Place of Judgment is frequently in our Law-Books, called *Auditorium Principale*; Suits and Cauſes being determin'd there according to the Laws of the Prince, and in Vertue of his Authority. *Tho. Aquinas* affirms, that the Erecting of an Univerſity belongs to the Prince or Pope, that is to ſay, to him who has the Sovereign Authority, becauſe it only belongs to them, who bear Rule in a State, to make Laws and Orders touching the Nature and Education of Youth, as the *Roman* Emperors did. And *Ariſtotle* in his *Politicks* agrees hereunto, ſaying, "That it is the Buſi-
"neſs of civil Policy to ordain all Sorts of Diſcipline, which ought to be
"among Subjects, and to order what Sort of Perſons, Scholars ought to be,
"and how long they ought to continue ſuch. And it is the Prince's Buſi-
"neſs

" neſs alone to give Laws, how long *Scholars* ought to hear their Profeſſors " and remain in the Univerſity, and after what Manner the Laws of other " Princes ought to be learnt and ſtudied by them, and what Conventions " ſhall be admitted to be lawful Schools, " *&c.* And as the Prince has the Direction of *Scholars* in all ſuch Matters; ſo are all Schools of a publick Nature under his Guardianſhip and Protection, as before hinted; and it belongs to him to grant them Privileges, and to permit Degrees to be taken therein. He may alſo eſtabliſh Lecturers and Profeſſors therein, without the Privilege and Faculty of taking Degrees: For theſe Privileges, ſay the *Canoniſts*, ought to be obtain'd either from the Pope, or from local Princes. For, by the Papal *Canon* Law, the Concern and Care of Profeſſors in other Faculties, as well as Theology, belongs to the Pope, and the Power of Teaching is granted by his Authority in all Parts of Chriſtendom dependant on his Authority, as he alone is God's Vicar upon Earth, and St. *Peter*'s Succeſſor, as he himſelf vainly boaſts: And, therefore, he pretends to have a ſpiritual Power over the whole World, or (at leaſt over Chriſtendom.) For, by the Papal Law, Emperors and Princes cannot confer this Power of Teaching out of the Limits of their own Dominions. Therefore, Popes have ordain'd, that whatever Perſons are called and made choice of to teach, read, and treat of any Doctrines whatſoever, in any Univerſity or publick School, or do publickly profeſs to teach Divinity in any private Houſe, they muſt have his Licence to do it. Thoſe that erect new Univerſities, uſually refer themſelves to ſuch Schools as are already founded or erected, or elſe to ſome one of them: And, in granting Privileges, they ought to conſider, what Privileges have been granted to ſome or all of them, according to the Pleaſure of the Granter. As when it is ſaid, that the Univerſity of *Tholouſe* ſhall enjoy the Privileges and Immunities of the Univerſity of *Paris*; and the Univerſity of *Padua* ſhall enjoy the ſame Privileges as the Univerſity of *Paris* and *Bononia*, which Words we ought to underſtand in a relative Senſe, as they reſpect thoſe Privileges, which have been already granted, and are to be granted, eſpecially if it be ſaid in the Charter of Foundation, *viz. per omnia ad exemplum & ad Formam alicujus Academiæ novam Scholam erigimus* [f]. A Prince may grant Privileges, even to Eccleſiaſtical Univerſities and Schools of Learning, as he may alſo do to Churches themſelves. But the *Canon* Law ſays, This only ought to be in Reſpect of Temporals, and not in Regard to Spirituals, wherein Laymen ought not to arrogate any Right or Power unto themſelves: But this Part of the *Canon* Law is little obſerved. It has been a Diſpute between the *Canoniſts* and *Civilians*, whether an Univerſity be a Secular or an Eccleſiaſtical Corporation? But it has been determin'd to be a Secular Body, eſpecially if it was founded for the ſake of Learning the liberal Arts and Sciences, and not for Eccleſiaſticks alone. When the Kings of *France* conſented to the erecting of new Univerſities, or publick Schools of Learning, they always declared this to be their Intention, *viz.* That they did not thereby deſign to admit the Profeſſion of the *Civil* and *Canon* Law thereinto, any further than they would have it uſed and practiſed in *France:* And the Emperor *Charles* the Fifth did forbid the *Roman* Laws to be quoted in Oppoſition to the Laws of the Empire, which Thing the Parliament of *Paris* prohibited to their Advocates for ſome Time. But the Kings of *Spain* went further, and did at the Pope's Inſtance, and through a Jealouſy of their own Power, by a Statute, ordain, that no one ſhould quote the *Roman* Laws in judicial Matters, under Pain of Death. And this is the Reaſon, why the *Roman* Law is ſo little now received in *Spain*. *Alarick* alſo King of the *Goths*, by his Edict, decreed, that no one ſhould make Uſe of the *Roman* Laws in Oppoſition to his own Conſtitutions; not that the *Roman* Law was unjuſt, but that it was not adapted to Conqueſts, as the *Gothick* Law was.

[f] Bald. in l. 35 c. 1. 3.

T I T.

TIT. XXXVII.

Of Phyſicians, *and their Exemptions; how they may recover their Salaries, and in what Manner they are puniſh'd for Mal-Practice,* &c.

[g] D. 50. 13. 13. PHyſicians, according to *Ulpian* [g], are thoſe Perſons, who promiſe Health or Eaſe to any Part of the Body of Man, that is afflicted with Sickneſs or Pain, by an Application of Remedies proper thereunto, and not by Incantations and Exorciſms [h]: For theſe are no Sort of Medicines, but ſtrange Fancies, found out by the Wickedneſs of the Prieſts, to make themſelves neceſſary to a Cure of the ſick Perſon. But, under the Word *Medicus*, the *Civil* Law reckons Apothecaries, Chirurgeons and Phyſicians, properly ſo called [i], that is to ſay, ſuch Perſons, as by their Skill in Medicines and Diſeaſes incident to human Bodies, are licenſed to practiſe the Art of Phyſick.

[h] Bald. Conſ. 195. Vol. 4.

[i] D. 48. 8. 4. fin. D. 50. 13. 3.

[k] C. 11. 8. 1. unic. The *Gloſs* on the *Code* [k] thinks, that Phyſick or the Art of Healing Diſtempers, may be comprehended under the Name of Philoſophy. But others maintain, that it has its Foundation only from Phyſicks or natural Philoſophy, and is a diſtinct Part of Knowledge: For, ſurely, there is a wide Difference between Naturaliſts and Phyſicians, tho' Phyſicians owe much to the Knowledge of ſome Part of natural Philoſophy. A Naturaliſt conſiders all natural Bodies in general, or univerſally, and a human Body alſo at the ſame Time, for the Sake of a thorough Knowledge in natural Philoſophy: But a Phyſician only contemplates the Body of Man, not only to know the Nature thereof, but that he may from this Knowledge put the ſame into Practice by ſome Means or other, for the ſake of curing Diſtempers. And, therefore, the Profeſſors of Phyſick are diſtinguiſhed from Philoſophers [l].

[l] D. 50. 13. 1. 1.

Suetonius reports, that *Julius Cæſar*, who had a greater Regard for learned and uſeful Men than many Princes have had ſince, granted the Freedom of the City to all Perſons that profeſſed Phyſick at *Rome*. And hereupon at that Time we meet with ſeveral eminent Men, that cultivated their Minds, and improved themſelves in this Sort of Learning, and were an Ornament to their Profeſſion, as *Zonaras* obſerves in his Annals [m]. And ſeveral wiſe Princes have ſince his Days thought theſe Perſons ſo neceſſary to a State, that they have endow'd practiſing Phyſicians with large Privileges and Immunities, and limited the Number of them [n]. But the Care of aſſigning this Number of Phyſicians among the *Romans* was not committed to the Preſident of the Province, but was entirely in the Breaſt of the Magiſtrates, and ſuch Perſons as bore Rule in the Cities, who were to chuſe Men of Probity and Skill in Phyſick; becauſe they committed themſelves and their Children to the Hands of thoſe for the Cure of their Diſtempers [o].

[m] Lib. 2.

[n] C. 10. 52. 6.

[o] D. 50. 9. 1.

It is not to be doubted, but that the Art of Phyſick is neceſſary in a State, as all Perſons muſt acknowlege, who have been cured of dangerous Diſtempers by this Means. Wherefore the Son of *Sirach* ſays [p], *Honour a Phyſician with the Honour due unto him, for the Uſes or Neceſſity you may have of him, for the Lord hath created him*, &c. The Abuſe of Phyſick is not always the Fault of Phyſicians; for they cannot always heal a ſick Perſon; and

[p] Eccluſ. c. 38. v. 1. 2. 3 & 4.

and as they cannot know the Cauſes of Maladies, their Knowlege is but conjectural at the beſt. But if he dies thro' their Unskilfulneſs, they may be puniſh'd for meddling with that, which they do not underſtand, as I ſhall again remark by and by. *Diodorus Siculus* aſſures us [q], there is a Law in *Egypt* relating to Phyſicians, who, if they took Care of their Patients, according to the Direction of the publick Book, were not anſwerable, if their Patients died under their Hands: But if they acted contrary to thoſe Directions, they were try'd for their Lives. See the *Cornelian* Law touching Murder [r]. Yet *Pliny* in his natural Hiſtory [s] tells us, that there was no Law among the *Romans* in his Time to puniſh the capital Ignorance of Phyſicians, nor Precedent or Example hereof. They ſacrifice Mens Lives for the Sake of Experiments, and yet come off with Impunity, ſays he. The *Syracuſian* comick Poet *Philemon* obſerves, that it is only granted to a Lawyer and a Phyſician to kill with Impunity, and without Danger of the Law. But yet, notwithſtanding this, ſuch was the Care of the *Roman* Law to puniſh the Ignorance of Quacks and bungling Phyſicians, that if a Phyſician made Uſe of a depraved and bad Medicine, he was liable to an Action *ex locato* [t], and might be puniſhed by the *Aquilian* Law on the Score of Damage for his Ignorance, though he cured his Patient [u]. This, I think, was only peculiar unto ſuch as profeſſed the Art of Phyſick, among whom we may reckon Apothecaries and Chirurgeons, as aforeſaid: For no Action lay againſt Lawyers, or others who gave wrong Advice unto their Clients, becauſe the Perſon, who conſults ſuch ignorant Perſons, muſt blame himſelf, that he made Application unto them, when there was a Number of other Lawyers to be had and conſulted; and he might have deliberated with himſelf and his Friends, and likewiſe with other Lawyers, whether it was expedient for him to follow ſuch Advice, or not [x]? See *Jaſon* and *Zazius*, in l. 2. D. 2. 2. And tho' a Phyſician cannot excuſe a Fault committed by himſelf, through his Unskilfulneſs, on the Pretence of human Frailty; yet the Event of Mortality ought not to be imputed to him, ſince all Men muſt die ſome Time or other.

[q] Lib. 1. c. 82.

[r] D. 48. 8. 4.

[s] Lib. 29. c. 1.

[t] D. 19. 2. 9. 5. D. 19. 2. 13. 5. D. 19. 2. 51. 1.

[u] D. 9. 2. 5. 1.

[x] 17. 1. 2. fin.

Phyſicians are ſaid to be in Fault three ſeveral Ways, *viz.* *Firſt*, before the Fact, as when a Phyſician intermeddles and concerns himſelf about that, which he is ignorant of: For he ought to be ſo skilful in all the Rules of Phyſick, and to have ſuch a Knowlege in all Maladies and Diſtempers of the Bodies, that, according to *Hippocrates*, in his Preface or Prologue to his *Prognoſticks*, he may be able to prognoſtick Things paſs'd, preſent, and to come, that is to ſay, he ought to be acquainted with them. *Secondly*, a Phyſician may be to blame *in ipſo facto*, *viz.* in the very Act of adminiſtring Phyſick: Becauſe though he may be an expert and skilful Perſon in the Buſineſs of his Profeſſion, yet if he acts indiſcreetly, and does not follow the Art and Rules of Phyſick in preſcribing, but rather purſues new Experiments, and ſuch as are ſeldom in Practice, and of little Vogue, or his own proper Will and Fancy, he is in Fault. And *thirdly*, a Phyſician may be in Fault *in poſt facto*: For though he be verſed in his Buſineſs, and all his Preſcriptions and Operations are according to Art; yet if he does not give diligent Attendance on his Patient or the ſick Perſon, he is adjudged to be in Fault. But a Phyſician, who viſits a ſick Perſon *gratis* and without a Fee, may leave his Patient at Pleaſure, and viſit him no more. Now, therefore, from what has been ſaid, four Things ought to concur, that the Patient's Death be not charged upon the Phyſician, *viz.* *Firſt*, that he does not exceed the Limits of his Profeſſion, becauſe it is a Fault for a Man to intermeddle in thoſe Things, which do not belong to him. And, hence, Apothecaries, whoſe Buſineſs it is to make up and ſell Medicines, and not to direct in preſcribing of Phyſick, are in Fault, if they order Phyſick beyond their Calling, and the Patient miſcarries or dies. And the ſame may

be ſaid of Chirurgeons, who dreſs and cure Wounds, *&c.* *Secondly*, A Phyſician ought to be skilful in the Art of Phyſick, becauſe Want of Skill is equivalent unto a Fault or Knavery in a Phyſician. *Thirdly*, He ought to be diligent in attending his Patient, and in ſeeing that due Care be taken of him. And *fourthly*, He ought to inſtruct the ſick Perſon in thoſe Things, which are for the Cure of his Diſeaſe. And if he does all theſe Things, which every honeſt and good Phyſician ought to obſerve, he ſhall be free from all Imputation of Blame, Malice, Deceit, *&c.* But a Phyſician is in Fault, if he does not provide that, which a careful Phyſician is able to provide, or does not conſult other Phyſicians, or make a Report of the Caſe, when the Danger thereof cannot be avoided. Theſe four Things concurring, if Death ſupervenes, *Socinus* ſays [y], the Phyſician is ſafe not only in *foro externo*, but even in Conſcience alſo. It is a common Concluſion among the Doctors, that a Phyſician ought to be puniſh'd *extra ordinem*, *viz.* according to the Will and Diſcretion of the Judge, when he offends thro' want of Skill, even though it be without Fraud and Malice; but if it be maliciouſly done, and not through Unskilfulneſs that he kills his Patient, he ſhall then be liable to the *Cornelian* Law touching Murder [z], and ſhall be puniſh'd as a Ruffian with Death, it being a greater Crime to kill a Man by Poiſon than by the Sword.

[y] Conſ. 178. par. 2.

[z] D. 48. 8. 4. fin.

A Phyſician that has promis'd to cure any one of an Ague or Fever, ought to have his Fee or Salary, and is not oblig'd to any Reſtitution thereof, if the Cauſe be removed, and the Diſtemper ceaſes, by Reaſon of the Cure apply'd by him, tho' ſuch Ague or Fever ſhould afterwards (notwithſtanding) return and ſupervene from ſome new Cauſe, becauſe he ſeems to mean by ſuch a Promiſe only a Cure of the preſent Malady: But if he has promiſed to cure any one of the Gout, he ought not to have his Salary, if he has not cured the Diſtemper, or removed the Cauſe thereof, but only cauſed the ſame to ceaſe in ſome Meaſure, and afterwards by that Means it returns and comes again unexpected. For a Phyſician, who promiſes to make a Cure, is underſtood to promiſe, that he will work a perfect one, ſince Words ought to be underſtood *cum effectu*. But a Phyſician does not ſeem to have worked a Cure, when he has wrought a vicious Cure, and his Cure is not laſting: In which Caſe a Salary promis'd to him on the Account of a Cure ought not to be paid him, becauſe ſuch Cure is fraudulent. *Alexander de Rhodes* relates, that in the Kingdom of *Tunquin* they agree with a Phyſician on a certain Price at the Beginning of the Diſtemper, which Price or Reward he does not receive till he has wrought his Cure; and if the Patient miſcarries, he has nothing; by which means they think to quicken the Diligence of the Phyſician, and heretofore it has been thus practis'd here in *England*. The ſame Author merrily obſerves of a Phyſician, who being conſulted and bargaining with his Patient for his Fee, ſaid, that were the Patient a young Man, he would not cure him under a hundred *Scudi*; but ſince he was old, he would content himſelf with twenty, becauſe the Life he was to reſtore was not like to laſt long. If a Phyſician, who had undertaken the Cure of a Perſon, ſhall forſake his Patient, and leave him deſtitute of Help, and the Perſon dies upon this Account, he ſhall be liable to the *Aquilian* Law [a]. And though this be only ſaid of a Bondman or Servant in that Law; yet it has a Reſpect to other Perſons. But then, I think, a Phyſician ought to have a Salary promiſed him for the Cure, unleſs it be in the Caſe of a *Pauper*, whom he is obliged to cure without any Fee or Salary, for the Life of our poor Neighbour ought to be of greater Value to us than the Love and Advantage of any Sum of Money. But a Phyſician may not bargain with his Patient for any unjuſt or unreaſonable Salary; for that would ſavour of Extortion and Iniquity [b], as in the Caſe of Advocates. But a Phyſician may receive and demand his Salary, though his Patient dies

[a] l. 4. 3. 6.

[b] D. 50. 13. 3.

dies under his Hands: For it is ſufficient, if he has began his Buſineſs or Cure according to the Rules of his Profeſſion, and with ſome Advantage unto the ſick Perſon, tho' the Effect does not follow thereon; for a Phyſician is not always ſure to work a Cure, ſince the Diſeaſe may be more powerful than all his Art [c]. A Phyſician, who cures a Servant, or adminiſters any Phyſick to a Bondman, has an Action *for Buſineſs done*, againſt the Maſter of ſuch Bondmen, for ſuch Phyſick or Cure, yea, tho' the Servant dies. And an Action *ex Conducto* will alſo lie for a Phyſician to recover his Fee or Salary, if it be deny'd him; becauſe a Phyſician's Salary is *quid Mercenarium*, and not an Honorary Fee. By the Law of *England*, an Action of Debt lies upon a *Quantum meruit*; for a Phyſician may ſue for his Salary or Fee, tho' a Lawyer, it is ſaid cannot. Phyſicians ought to hide and conceal all the ſecret Diſeaſes of their Patients, otherwiſe, by the *Civil* Law, an Action of Injury will lie againſt them.

[c] D. 1. 18. 6. 7.

Plato has divided Phyſick, or the Art of Healing, into the following *Species* or Methods of Curing. The firſt Part he ſtiles *Pharmaceutice*, or that Part which cures with Medicinal Potions, *&c.* The ſecond Part he calls *Chirurgical*, which cures by Cauſticks, Launcing, and the like. The third he terms *Dieting*, which cures alone, by the Order and Method of proper Food. And the fourth Part, which gives Relief to the Patient, by diſcerning what his Diſtemper is, he, in *Greek*, calls Νοσολνώμενη, or the Judging of Diſtempers. In Phyſick there are five Things to be conſider'd; *viz.* the Phyſician; the Art itſelf; the Patient; the Diſeaſe; and the Force and Virtue of Medicines: Among which there may be ſuch a Conflict, that the Patient often dies. For if the Will of the Patient concurs with the Preſcription of the Phyſician, the Direction of Art, and the Power of the Medicines, the Diſtemper is conquer'd: But if he does not comply with thoſe Things, he ſuffers himſelf to relapſe, and often dies. Sometimes a Weakneſs of Nature ſtruggles with thoſe Things; and then, tho' the Patient willingly complies, yet no Remedy can be had, tho' the Phyſician himſelf be a skilful Perſon. But if the Phyſician purſues the Rules of Phyſick, he is excuſed, tho' his Patient dies, as before hinted: But if he does not follow theſe Rules, he ſhall be puniſh'd.

The Phyſicians of our Times do not look upon Phyſick to be a Science, but an Art; becauſe of the Rules which they are obliged to follow therein. There are three Sorts of Phyſicians, according to the preſent Way of Practice in the World. The firſt is that of Quacks and Empiricks, which ſeparates the Art of Healing from the *Rationale*. The ſecond is that of thoſe who purſue ſome Method in their Practice, tho' without the Reaſon and Grounds thereof. And a third Sort of Phyſicians there is, who ſtudy and follow the *Rationale* of Phyſick, of which *Hippocrates* the *Coan* was the Author; and if theſe, upon Examination and due Proficiency, are promoted unto Degrees in Phyſick, or licenſed by proper Perſons to practiſe, ſuch are ſtiled *Regular* Phyſicians.

If a Queſtion be touching Diſeaſes and Wounds, we ought to abide by the Judgment of Phyſicians; becauſe we ought to ſtand to the Judgment of every one that is skill'd in his Profeſſion and Buſineſs. Thus, in Matters relating to Building, Architects are to be conſulted, as Merchants are in Matters which concern Trade; and the Opinion of Midwives, who are number'd among Phyſicians by the *Civil* and *Canon* Law, is to be had in Matters touching the Immaturity of a Woman's Delivery. A Phyſician, whilſt he is in the Service of the Army, is exempted from all Civil Offices; becauſe he is in the Service of the State: but afterwards he is not excuſed, unleſs he can plead ſome other Privilege of Exemption, or ſhew ſome other Cauſe [d].

[d] C. 10. 52. 1.

Herodotus

Herodotus aſſures us, That the *Babylonians* made uſe of no Phyſicians at all, but the ſick Perſon was to be brought out into the Market, or ſome other publik Place of Reſort; and all Perſons that came thither, or paſſed by, were to be conſulted what Methods they made uſe of in the like Caſe, to get rid of their Ailments or Diſtempers; and all were obliged to declare the Means, and not to paſs by in Silence, without enquiring what the Perſon's Diſtemper was [e]. The *Egyptians* had Phyſicians for every particular Diſtemper: And thus all Places, as *Herodotus* obſerves [f], were filled with Phyſicians. For they had ſome for the Eyes, ſome for the Head, ſome for the Teeth, and others for the Belly, *&c.* All theſe Perſons were anſwerable for the Care of their Patients, and had ſtrict Duties enjoined them.

[e] Herodotus, lib. 1.
[f] Herodotus, lib. 2.

Phyſicians are diſcharged from bearing the Office of Conſtable, or any other Office, within the City of *London*, or Suburbs thereof, and from keeping Watch or Ward; and any of the Company of Phyſicans in *London* may alſo practiſe Chirurgery [g].

[g] 32 Hen. 8. c. 40.

TIT. XXXVIII.

Of Pupils *and* Minors, *and after what Manner the Law treats them; what Things they may do in their own Perſons, without the Guardian's Conſent, and what not; and how they may be relieved againſt Craft, Fear, and the like.*

THE Word *Pupil*, in *Latin* called *Pupillus*, is a diminutive Term, according to *Alciatus* [h], from the Word *Pupus*, which ſignifies the ſame as *Puer*, a Child; and in this Senſe the Poet *Catullus* uſes the Word *Pupulus*: And, from this Etymology of the Word, a *Pupil* may be ſaid to be him, who is in the Power of the Father, according to the *Roman* Law [i]. A Bondman under the Age of Puberty may alſo, in a large Senſe of the Word, be ſtiled by this Name [k]. But as this Word is more commonly taken by the Lawyers, it is taken in another Senſe, *viz.* to denote him who is under the Age of Puberty, and yet is releaſed from the Power of the Father, either by Death, or Emancipation, before he arrives at the full Age of Puberty [l]; tho' ſometimes even he is ſaid to be a *Pupil*, who is under the Power of the Father. The full Age of Puberty in Males was at Fourteen, and in Females at Twelve Years of Age, as I have already remembred. A *Pupil*, in Strictneſs of Speech, differs from a *Minor*; becauſe a *Minor* is ſaid to be him, who is paſs'd the Age of Puberty, and yet not arriv'd at the Age of Five and Twenty Years: But theſe two Terms are in Law confounded, and promiſcuouſly uſed the one for the other. A Pupil was ſaid to be releaſed from the Power of his Father by Death, either when the Father was truly dead, or elſe ſent into Baniſhment: Becauſe a Perſon in Baniſhment cou'd not have a *Roman* Citizen in his Power, as being a Man *Peregrinæ Conditionis*. And hence Baniſhment, which is a Civil Death, is, in this Caſe, the ſame Thing as a Natural Death. And a *Pupil* was ſaid to be releaſed from the Power of Emancipation, when the Father wou'd have his Son become *ſui Juris*, and independent on him. See the Title of *Emancipation*.

[h] In L. 239. D 50. 16.
[i] D. 45. 1. 141.
[k] D. 15. 1. 7.
[l] D. 50. 16. 239.

Tho'

Tho' a *Pupil*, or *Minor*, generally ſpeaking, is not bound by his own Act and Deed; yet it is otherwiſe in ſuch a Caſe, wherein he betters his own Condition thereby: For a *Pupil* or *Minor* may, in two Caſes, be obliged, without the Authority of his Tutor or Guardian [m]; as in the Caſe of Partnerſhip, and the Caſe of Improving his Condition. But if a Perſon, that is a Debtor to a Pupil, ſtiled a *Pupillary* Debtor, ſhall, by ſuch *Pupil*, pay Money unto the *Pupil*'s Creditor without the *Pupil*'s Authority, he indeed diſcharges the *Pupil* from his Creditor; yet, in Strictneſs of Law, ſuch Debtor ſtill remains bound to the *Pupil*; but yet, in Equity, he may defend himſelf by an Exception *Doli mali*, alledging, That the *Pupil* was a Gainer thereby. *Titius* ow'd an hundred Pounds unto *Mævius* a Pupil, who had a Tutor or Guardian. The Pupil, without his Tutor's Approbation, order'd *Titius* to pay his Creditor *Seius* the ſaid hundred Pounds. And hereupon it was reſolved, That the Pupil was diſcharged from the Debt which he ow'd unto *Seius*. And tho' *Titius* ſtill remain'd bound unto *Mævius*; yet he might defend himſelf by this Exception *Doli mali*, or *of Deceit*. If a Perſon ſhall, without the Tutor's Authority, pay Money unto a Pupil, that is due to him, and the Pupil enriches himſelf thereby, or (at leaſt) does not become the poorer, as becauſe he has, with the ſaid Monies paid him, purchas'd ſome convenient Eſtate, or other Thing neceſſary for his Uſe, which otherwiſe he would have purchas'd out of his own Money or Allowance: In this Caſe, an Exception *of Deceit* will lie, if the Money be ſued for again; becauſe he who is enriched by a Payment that is made him, may be repelled or ouſted of his Action by ſuch an Exception [n]. A Pupil, whether Male or Female, cannot pay Money, or any Thing elſe, without the Tutor's Authority, on the Account of a Debt: And if he does, he is not diſcharged from the Debt, nor does he transfer the Property thereof on him that receives the ſame; ſince a *Pupil* cannot make any Alienation of his Property without the Authority of his Tutor [o]. But ſome may think this ſtrange; ſince every one is allow'd to better his Condition, without a Tutor's Authority; as a Perſon does, in this Caſe, by being diſcharged from a Debt: And moreover, becauſe it is ſaid, That a *Pupil* is diſcharged from a Debt by *Acceptilation* [p], which is but a feigned Payment of a Debt. And why ſhould not the ſame Thing happen to a true and real Payment? To which the Doctors anſwer, That the real Payment of Money belongs to the Adminiſtration of an Eſtate [q], which Adminiſtration is not veſted in a *Pupil* [r]. But tho' a *Pupil* be not hereby diſcharged, yet he ſhall be relieved againſt his Tutor, who ought to ſhew a Reaſon why he has rather thought fit to retain his *Pupil*'s Money in his Hands, than to diſcharge him from his Debts, by a Payment thereof.

[m] D. 44. 7. 46.

[n] D. 44. 4. 4. 2.

[o] I. 2. 8. 2. fin.

[p] D. 46. 4. 2.

[q] D. 46. 3. 14. fin.

[r] D. 12. 2. 17. 1.

What, therefore, ſhall be done, if a *Pupil* pays Money, and is not diſcharged from the Debt, the Perſon to whom it is paid not being the Proprietor thereof? To which I anſwer, That if the Money be extant and forthcoming, the *Pupil* may reclaim it by a *real* Action: But if it be ſpent, the *Pupil* ſhall be diſcharged from the Debt; becauſe the ſpending thereof, ſuppoſes that the Money effectually came from the *Pupil* to the Perſon that receiv'd the ſame; and conſequently, no Fraud could happen between the Pupil and Perſon to elude the Guardian's Truſt. And thus, the Spending of the Money, has the Force of Transferring the Property [s]. But the Law ſeems to make a Diſtinction herein, *viz.* when a Pupil pays a Debt, which cannot be defeated by any Exception; then, if the Money be ſpent, the Pupil ſhall have a perſonal Action, according to *Zazius* [t], to recover the ſame. But that if Money paid to a Creditor by a Pupil be not ſpent, but is loſt, by ſome fortuitous Caſe, in the Hands of the Receiver, as by Robbers, and the like; Who ſhall then bear the Loſs, the Pupil, or

[s] D. 46. 3. 14. fin.

[t] In L. 19. D. 12. 1.

the Receiver? *Azo* thinks, that the Pupil ought to ſtand to the Loſs of it: For 'tis certain, that a Pupil, paying Money without due Authority, cannot transfer the Property of it to the Receiver, as long as it is extant; but the Pupil remains the Proprietor thereof, and fortuitous Caſes do always reſpect the Proprietors of Things themſelves [u]. But it has been frequently adjudged in Courts of Law, That a Pupil ſhall not ſtand to the Loſs or Hazard of a Thing paid, but he who receives the ſame; for otherwiſe a Pupil's Condition would be far worſe than that of a Major: For when a Major lends Money, the Perſon who receives or borrows it, immediately takes the Hazard or Loſs of it himſelf: Who then can imagine that a Law ſhould be otherwiſe in reſpect of a Pupil? Nor is the aforeſaid Rule in Law any Objection hereunto, *viz.* That fortuitous Caſes affect the Proprietors of Things themſelves; becauſe this Rule ceaſes in a Pupil. For it is particularly introduced in Favour of Pupils, that they cannot transfer Property, either by borrowing, paying, or lending Money: And therefore, this Favour ought not to be wreſted to their Loſs or Diſadvantage [x]. What is here ſaid of a *Pupil*, is alſo underſtood to be true in reſpect to a *Minor*, generally ſpeaking.

[u] C. 4. 24. 5 & 8.

[x] C. 1. 14. 6.

By a Conſtitution of the Emperor *Juſtinian*, if a Pupillary Debtor, or a Debtor to a Pupil, pays Money unto a Tutor or Guardian, by an Order or Decree of the Judge, he ſhall obtain an abſolute and full Diſcharge. But, ſometimes, a Payment made to him, without the Intervention of the Judge's Authority, diſcharges the Debtor: As when Perſons are Debtors on the Account of yearly Rents, Penſions, or Intereſt of Money; and when that which is due, does not exceed the Sum of an hundred Solids or *Aurei*, nor go beyond the Bounds of two Years. Yet a Debtor, who makes a Payment unto a Pupil, is not diſcharged from an Obligation, on the Payment of ſuch a Debt, without the Tutor's Authority. But yet, notwithſtanding this, tho' ſuch Debtor be not diſcharged, and the Pupil may, *ſummo jure*, demand ſuch Debt again, which has been paid him; yet, in Equity, an Exception *of Deceit* is given to the Debtor againſt the Pupil, if the Money be ſtill extant in his Cuſtody, and the Pupil becomes the richer, or (at leaſt) not the poorer, by ſuch Payment, as aforeſaid.

[y] D. 4. 3. 13. 1.

A Perſon is ſaid to be a *Pupil*, who is *proximus Pubertati* [y], or borders upon Puberty: And he is ſaid to border on Puberty, who is within ſix Months of Puberty [z]. Tho' a Pupil has, in Point of Acquiſition of Property, *Legitimam Perſonam*, that is to ſay, a Lawful Capacity of acquiring for himſelf, even in thoſe Things which are Matters of Law [a]; yet a Pupil, who has no Underſtanding, cannot acquire Poſſeſſion for other Perſons.

[z] C. 3. 1. 13. 2.

[a] D. 41. 2. 1. 2.

A *Pupil* or *Minor* who is capable of Trick or Deceit, is liable to an Action *ex Depoſito*, if he betters his Condition thereby, and ſo in other Caſes, though, regularly ſpeaking, he has not, *Perſonam legitimam ſtandi in judicio.* But a Pupil may be in Judgment or Court in four ſeveral Caſes, without the Intervention or Authority of his Tutor; tho' he cannot be *civilly* bound, without his Tutor's Conſent. As, 1*ſt*, In a *Momentaneous* Poſſeſſion [b]. 2*dly*, A *Minor* may, in a Cauſe *Violati Thori*, or where his Bed is violated by Adultery, accuſe the Perſon who injures him, without a Curator [c]. 3*dly*, He may be thus in Judgment, if he ſues, or implores to have the Benefit of Age granted him [d]. And, 4*thly*, He may appear in Judgment, on the Account of an Interdict *de libero homine exhibendo* [e].

[b] C. 8. 5. 1.

[c] D. 48. 5. 2.

[d] C. 2. 45. 1 & 2.

[e] D. 43. 29. 3. 10.

If there be any Controverſy on Foot, touching the Eſtate or Goods of a Pupil or Minor, in Favour of ſuch Perſons, it is ordain'd, That ſuch Suit or Controverſy be poſtponed 'till the Time of the Pupil's Puberty: But if ſuch Pupil or Minor has any Proofs making for him, ſuch Suit or Controverſy ſhall not be deferr'd, but immediate Cognizance and Examination ſhall

ſhall be taken thereof. In all thoſe Caſes, wherein the Condition of a Pupil or Minor may certainly become better; whatever is done by ſuch Perſons, is Valid without the Authority of a Tutor or Guardian: But where their Condition may be rendred worſe, whatever is done without ſuch Authority, does not oblige the Perſon that does it. As when a Pupil or Minor binds himſelf in an Obligation, aſſigns over an Action, or ſells any Thing to his Loſs. There are ſome Caſes, wherein it is doubtful, whether a Pupil or Minor's Condition be made better or worſe: As in taking on himſelf the Office and Duty of an Heir for the Diſpoſition and Adminiſtration of an Inheritance; becauſe there may be ſome latent Incumbrances in the ſaid Office, whereby he may prejudice himſelf. And therefore, in theſe Caſes, what is done by the Pupil or Minor, without the Tutor's Authority, is not obligatory. And this is the Reaſon, why a Perſon under the Age of Puberty cannot take on himſelf the Heirſhip or Executorſhip, as we ſtile it, leſt that which is in Favour of him, ſhould redound to his Diſadvantage: For as that which is introduc'd in Hatred and a Puniſhment unto a Perſon, ought not to turn to his Advantage; ſo *vice verſâ*, that which was introduced in Favour of a Perſon, ought not to be converted to his Prejudice. By the Law of *England*, when a Perſon under Age is made an Executor by Will, Adminiſtration is granted during the Minority of ſuch Executor.

Though a Pupil or Minor be forbidden to alienate his Eſtate without the Decree of the Judge; yet ſuch Prohibition in Law is not extended to neceſſary Alienations, as on the Account of Debt and the like [f], for then his Guardian may do it. A Father mortgag'd his Eſtate on this Condition, *viz.* That if the Money, which he had borrow'd, was not paid by ſuch a Day appointed, the Creditors might ſell the Eſtate; and then he died, and was ſucceeded therein by a Minor, who not ſatisfying the Debt on the Day appointed, the Creditor ſold the Eſtate; whereupon the Minor would reſume the Eſtate as ſold contrary to Law, or the Decree of the Senate; which enacts, that a Minor's Eſtate ſhall not be alienated without the Judge's Decree: And it was reſolved, that ſuch Minor's Petition ſhould be rejected. But yet if the Creditor ſold it for a leſſer Price than the juſt Value, the Judge might reſtore the Minor ſo far, as that he ſhould have a juſt Value for the Eſtate. Thus the Eſtates of Minors may be alienated on the Account of a Debt, or any other juſt Cauſe, after the Teſtator's Death. But then, I think, in this Caſe it ought to be done by the Judge's Decree on Cognizance had of the Cauſe [g]; otherwiſe, too great a Power and Liberty would be given unto Guardians and prodigal Minors. The real or immoveable Eſtates of Minors alienated without the Judge's Decree, in what Territory ſoever they are ſituated, may be reſumed, with the Fruits and Profits thereof: But if the Purchaſe-Money be converted to the Minor or Pupil's Advantage, it ought to be reſtor'd to the Purchaſer, with Intereſt, on ſuch a Revocation or Reſumption, and likewiſe with the Charges he has been at in improving the ſame [h]. And ſuch Minor, on a Claim of ſuch Eſtates alienated, ſhall be ſet aſide from his Claim, if he does not refund the Purchaſe-Money thus converted to his Advantage, with Intereſt for the ſame [i].

[f] C. 5. 71. 1.

[g] C. 5. 71. 12.

[h] C. 5. 71. 16.

[i] C. 5. 71. 14.

A Minor is preſumed to be injur'd in a Loan or *Mutuum*, unleſs the Perſon lending proves, that the Money or Thing lent was apply'd to his Advantage; and, therefore, ſuch a Minor may be reſtor'd *in integrum* [k]. *Titius* lent 100 Pounds to a Minor under 25 Years of Age, and the ſaid Minor loſt the Money. In this Caſe the Minor may be reſtor'd, if he pleaſes, againſt the ſaid Obligation of a *Mutuum*, unleſs *Titius* proves that he enrich'd himſelf thereby. But the Minor then ought to prove three Things, *viz.* *Firſt*, That he was under Age at the Time of the Contract. *Secondly*, That he did not want the Money for his neceſſary Occaſions, but was rather circumvented, and that he had loſt the Money. This Law was particularly made

[k] C. 2. 38. 1 & 2.

made in Hatred of Uſurers, who let Money unto prodigal Minors for the ſake of making an Advantage of their Weakneſs. But I ſhall treat of Reſtitution *in integrum*, in a particular Title by itſelf hereafter. In Crimes or criminal Matters, Minors are not favour'd through a Protection or Suffrage
[l] D. 4. 4. 37. of Age itſelf [l]: For the Infirmity of the Mind does not excuſe the ill Manners and Behaviour of wicked Men, if they are capable of Deſign and Malice. Yet if the Crime or Offence proceeds *extra animum*, and not intentionally, *viz.* Thro' Negligence, and not thro' Deceit and Malice, a Crime or Offence is not ſaid to be committed, though a pecuniary Mulct or Fine be inflicted *cauſâ pœnæ*: And, therefore, the Aid of Reſtitution *in integrum* accrues unto Minors.

A Minor cannot renounce Benefit of Age; and if he ſhould do it, he would by the very Attempt itſelf ſeem to be deceived; for a Minor may make his Condition better, as aforeſaid, but cannot make it worſe. When a Minor alledges himſelf to be hurt and damnified by ſome Act, he ought to plead, that he is hurt and damnify'd through his own Eaſineſs and Imbecillity, not that he is bound to prove his own Weakneſs and Imbecillity, becauſe the Truth of ſuch a Plea reſults from a Preſumption of Law. Yea, a Minor ſhall be relieved without alledging his own Weakneſs and Imbecillity, ſince ſuch Weakneſs or Eaſineſs is *ipſo Jure* notorious: Nor is a Minor bound to prove Damage, where the Damage reſults from the Face and Appearance of the Act itſelf. In Favour of a Minor it is introduced, that he cannot be in Judgment without the Authority of his Guardian, and if he litigates without Authority, and a Sentence be pronounced againſt him, ſuch Sentence is null and void *ipſo Jure*: But if it be pronounced for him, it is valid. A Perſon contracting with a Minor cannot reſume a Contract contrary to the Will of ſuch Minor, tho' the ſaid Minor may annul the ſame.

Tho' the Sale of a Minor's Eſtate made without the Judge's Decree be null and void: Yet it ſometimes happens, that ſuch Sale may be confirm'd. As when a Minor, on his coming to full Age, does expreſly ratify ſuch Sale: And this is true, whether the Minor ſells ſuch Eſtate himſelf, or whether it be done by his Tutor or Curator. Such Sale may alſo be confirm'd by a tacit Ratification: As when the Minor five Years together, after he becomes a Major, makes no Claim thereof. But though a Minor, after he becomes a Major, does ratify an Alienation made by him of his Eſtate, during his Nonage; yet when leſs than half of the Value of the Thing is only paid, he may claim the ſaid Eſtate again by a *real* Action, unleſs the juſt Value be afterwards paid him, or a Compenſation be made for the
[m] C. 5. 74. 1. ſame [m].

A Pupil cannot borrow Money without the Approbation and Authority of his Tutor; and if he ſhall borrow it, he is not bound to pay it, unleſs he becomes richer by ſuch Loan. Becauſe whenever a Pupil enriches himſelf by any Act of his own, he is both *naturally* and *civilly* bound, as any other Perſon is, according to the common Opinion of the Doctors. And a Pupil is ſaid to become richer thereby, when he pays that which he was to pay out of the Money which he has borrow'd, and not out of his own proper Stock or Eſtate.

TIT.

TIT. XXXIX.

Of Guardians *and* Guardianſhip, *commonly called* Tutelage *and* Curatorſhip; *when it expires; of the ſeveral Cauſes which may excuſe Men from this Office; and for what Reaſons Perſons are removed from thence, as being ſuſpected, &c.*

AMONG ſuch Perſons as are *ſui juris*, and independent on the Power of a Father, there are ſome that are govern'd by the Authority of Tutors or Guardians; others that are under the Direction of Curators; and ſome that depend on neither, but are entirely left to their own Will and Diſcretion [n], being ſuch as are of full Age. Wherefore, I ſhall here conſider what Perſons are under Tutelage or Guardianſhip; which is that Power and Authority, which is given by the *Civil* Law unto Freemen, to defend that Perſon from all Injuries, who by reaſon of his tender Age cannot defend himſelf [o]. For a Tutor or Guardian muſt be a Freeman, and his Pupil or Ward muſt be under the Age of Puberty, which is called the *Pupillary* Age. In Males, Puberty regularly begins after they are Fourteen Years of Age compleat; and in Women, after they are Twelve Years old [p]: For a Woman, according to *Plutarch*'s Problems, grows and increaſes faſter than a Man, and ſooner comes to Perfection. The *Gloſs* on the *Digeſt* ſays, That a Woman ſooner arrives at Puberty than a Man, becauſe ſhe is more Sagacious: But the *Gloſs* on the *Code* is a little more ſevere on the Sex, ſaying, That a Woman grows faſter than a Man, becauſe ill Weeds grow apace.

[n] I. 1. 13. pr.

[o] D. 26. 1. 1.

[p] I. 1. 22. pr.

Now *Tutelage* or *Guardianſhip*, is not only a Civil, but alſo a Publick Office, in reſpect of its Authority, tho' a Private one in reſpect of its Advantage; and it is likewiſe, in its own Nature, a gratuitous Office; tho' a Salary may, according to *Bartolus* [q], for a juſt Reaſon, be aſſigned and ſettled on a Tutor by the Decree and Authority of the Judge. See alſo *Baldus* on the Law here referr'd to [r]. The Word *Tutela*, which we tranſlate Tutelage, is very ſeldom made uſe of by our *Engliſh* Lawyers; but rather the Word *Cuſtodia*, or Guardianſhip. For, as we have borrow'd many Parts of our Law from the *Normans*; ſo we have alſo taken many of their Terms, as appear from the Grand *Cuſtumier* of *Normandy* almoſt in every Page. For him whom the *Romans* called a *Tutor*, they ſtile a *Gardien*, and comprehend a Tutor and a Curator under this Word alone; and we in *England* herein imitate the *French* Lawyers, and call him a *Guardian*. Theſe Guardians are by the Law of *England*, as well as by the *Civil* Law ſometimes appointed by the Will of the Father, ſometimes by a Diſpoſition of Law, and ſometimes by the Office of the Magiſtrate: For by the Law of the Twelve Tables there are three Kinds of *Tutelage*. The firſt is ſtiled *Teſtamentary*, as being aſſigned by the Teſtator; the ſecond is termed *Legal*, as being given by the Law itſelf; and the third is called *Dative*, as being granted by the Order of the Magiſtrate. By the Law of *England*, if a Father ſhall leave Monies or Chattels only unto his Children, which he has in his Power under the Age of Puberty, he may commit the Government and Guardianſhip of ſuch Children, together with their Legacies, unto any Friend whatſoever, to be taken Care of for their Uſe [s]. And as Parents and

[q] In L. 9. D. 26. 1. D. 27. 3. 1. 6.

[r] C. 6. 61. 6.

[s] Cok. Rep. 3. fol. 37. b.

and Friends are Guardians unto ſome, ſo Lords of Manors were Guardians unto others, till the Court of Wards and Liveries was taken away by Parliament [t]. *Teſtamentary* Tutelages (I ſay) is, when Parents do by their Wills aſſign Guardians unto ſuch Children as are under Puberty, and who are under the Power of the Father. And *Legal* Tutelage is that, which has Place, when there is no Tutor aſſign'd in the Will, but given by the Law. And this is four-fold. The firſt is that, which the Law of the Twelve Tables expreſly gives unto the neareſt of Kin by the Father's Side [u]; and is alſo now by the Novels, given unto ſuch as are of Kin by the Mother's Side: And this ſeems to have been firſt introduced by the Words and Intention of the Law. By the *Engliſh* Law, in reſpect of an Eſtate belonging to Perſons under the Age of Puberty, by Right of Succeſſion, it is an eſtabliſh'd Rule, That if a Tenant in Socage (as all Perſons are at this Day, by aboliſhing of Knight-ſervice) dies, the next Heir, whether Son or Daughter, being under the Age of Puberty, falls into the Guardianſhip of the neareſt of Kin on that Side, who cannot inherit the ſaid Eſtate. As for Example, if the Eſtate ſhall come by the Father, then the Mother, or, on her Death, the next of Kin unto the Mother, ſhall have the Guardianſhip of the Minor: But if the Eſtate ſhall come by the Mother, then the next of Kin by the Father's Side. And *Glanvil* ſays [x], the Reaſon of this, is, becauſe Pupils have leſs to fear from thoſe, who cannot get any Thing by their Death. See the Statute of *Marlebr.* [y]. And ſuch as held in Burgage-Tenure, being under the Age of Puberty, on the Death of the Father or Anceſtor, are in the ſame Manner as Tenants in Socage, committed unto the Guardianſhip of their neareſt Kindred. The ſecond *Species* of *Legal* Tutelage, is that, which Patrons [z] have over their *Liberti*, and their Children: And this alſo ſeems to flow from the Law of the Twelve Tables, though it be not there expreſly enacted. But touching this Kind of Guardianſhip, our Law has ordain'd nothing, as I know of. But among us there was a Kind of Patrons, in reſpect of the Fee we poſſeſs'd, who are by another Name called Lords of the Fee: And there were ſome few Minors ſucceeding to large Eſtates under the Guardianſhip of thoſe Perſons: But, as this kind of Guardianſhip is now at an End, I ſhall ſay no more of it in this Place. The third *Species* of *Legal* Tutelage is that of Parents [a], when they become Tutors unto their emancipated Children, after the Manner of Patrons, by extending the Senſe of the Law. By the Law of *England* a Father is preferr'd unto all Perſons, in the Guardianſhip of his eldeſt Son. For if an Eſtate comes to ſuch a Perſon being a Minor, during his Father's Life-time, the Heir himſelf ſhall remain in the Cuſtody of the Father; nay, tho' the Lands, if they were held by Knight-ſervice, were in the Cuſtody of the Lord of the Fee [b]. But now both the Perſon of the Heir and the Lands themſelves are in the Father's Cuſtody. And the fourth *Species* of *Legal* Tutelage, according to the *Roman* Law, is that of Brothers, which is called *Fiduciary* Tutelage [c]; and is, when Brothers have the Tutelage of their emancipated Brother, being under the Age of Puberty. But this Kind of Tutelage our Anceſtors in *England* ſeem to have entirely neglected or diſregarded; and I find nothing mention'd thereof in any of our old Law-books. Again, by the *Roman* Law, if there was no Tutor or Guardian, exiſting either by the Teſtator's Will, or by a Diſpoſition of Law, the Judge or Magiſtrate appointed a Guardian [d], as above hinted; and this was called a *Dative* Tutelage, as being granted by the Judge or Magiſtrate. So that from the Premiſes, it appears, that the efficient Cauſe of Tutelage was either the Teſtator's Will, or a Diſpoſition of Law, or the Nomination of the Judge. And thus a Tutor is he, unto whom the Right and Power of defending his Pupil's Perſon is principally committed; and, conſequently, a Power alſo of managing and defending his Pupil's Eſtate. For he is ſtiled a Tutor, *quaſi Tuitor.*

[t] 12. Car. 2. cap. 24.

[u] I. 1. 15. pr. D. 26. 4. 1.

[x] Lib. 7. c. 11.

[y] 52 Hen. 3. cap. 17.

[z] I. 1. 17. 1.

[a] I. 1. 18. 1.

[b] Litt. lib. 2. c. 4.

[c] I. 1. 19. 1.

[d] I. 1. 20. 1.

Tuitor [e], that is to ſay, a Defender, from the *Latin* Verb *Tueor*, to defend; Tutors taking an Oath that they will not leave their Pupils undefended.

[e] I. 1. 13. 2.

There is one kind of Tutor with Adminiſtration, and another without the Adminiſtration of his Pupil's Eſtate, who is an *Honorary* Tutor, being given *Honoris Cauſâ*; or elſe for the ſake of Inſtructing ſuch Perſons in their Duty [f], as have the Management of the Pupil's Concerns. Wherefore, I ſay, that a Tutor is principally aſſign'd for the ſake of protecting the Pupil's Perſon, and not his Eſtate [g], tho' he may alſo have the Adminiſtration of his Eſtate: And therefore, ſuch Perſons cannot be Tutors, who cannot yield Protection and Defence unto a Pupil; as Perſons Deaf and Dumb [h], Minors [i], Madmen and all others, who ſtand in need of the Care of another Perſon: nor can Women be Guardians, according to the antient Law, unleſs it be by the Grant and Indulgence of the Prince. But now, by a *novel* Conſtitution [k], the Mother and Grandmother may be Guardians, tho' they are Creditors or Debtors unto their Children, and may continue Guardians as long as they remain chaſte Widows: But if they contract a ſecond Marriage, or proſtitute their Modeſty, they ceaſe *ipſo Jure* to be Guardians; otherwiſe a Creditor cannot be a Guardian unto his Creditor or Debtor [l], unleſs he be thus aſſign'd by the Teſtator's Will, according to *Baldus* and the Doctors [m]. Nor can a Perſon be a Tutor or Guardian, who has a Law-ſuit with a Pupil, thro' Fear of Hatred and Enmity [n]; nor he who is not ſubject to the Juriſdiction and Territory, unto which his Pupil is ſubject; nor a Bondman, unleſs he be ſet at Liberty by the Teſtator's Will [o]; nor he who is a Step-father unto a Pupil, whether ſuch Pupil be Male or Female [p]. By the Law of *England*, every Perſon who is of full Age, and has the free Adminiſtration of his own Eſtate, may be made a *Teſtamentary* Guardian [q]; yea, even a Woman according to *Britton* [r]. But if a Minor, or a Perſon *non compos mentis*, be made a Guardian by the Teſtator, he ought not to act as ſuch, till ſuch Defect of Age and Underſtanding be removed entirely, as by the *Civil* Law. A Father might alſo, by Will, aſſign his own Villain or Bondman to be a Guardian unto his Children, and likewiſe the Villain or Bondman of another Perſon, at leaſt with the Lord's Conſent. But *Quære*, whether ſuch Villain obtain'd his Freedom or not. *Brooks* ſays [t], That a Perſon may make his Apprentice Guardian unto his Son: For ſuch as may be Executors, may alſo be Guardians.

[f] D. 26. 7. 3.
[g] 1 & 2. C. 5. 38. 1.
[g] D. 26. 2. 14.
[h] D. 26. 1. 1.
[i] C. 5. 30. 5. D. 26. 2. 10. 3.
[k] Nov. 72. c. 2.
[l] Nov. ut ſup.
[m] In L. 8. c. 5. 30.
[n] Nov. 72. c. 1.
[o] C. 5. 34. 7.
[p] C. 4. 58. 3.
[q] Glanvil. lib. 7. c. 6.
[r] Cap. 35.
[t] Tit. Teſtam.

But though a Tutor be *principally* aſſign'd for the Sake of protecting the Pupil's Perſon [u], as aforeſaid; yet he is deemed to be aſſigned *ſecondarily* for the Adminiſtration of the whole Eſtate [x]: Nor is it of any Moment or Conſequence of what Dignity or Fortune the Pupil is. With us here in *England*, the chief Lords of thoſe Perſons, who were Tenants by Knight-ſervice, had the full Cuſtody or Guardianſhip of all their Eſtates, ſometimes without the Care, and ſometimes with the Care of the Heir's Perſon, and by this Means they had the full Diſpoſal of vacant Livings, and might preſent thereunto, and might do all other Matters for the Advantage of the Heir, as they would do in reſpect of their Eſtates: But they could not alienate any Part of the Inheritance, or ſell the Remainder. Guardians are likewiſe by our Law bound to maintain and uphold all their Minor's Houſes, Parks, Mills, Fiſh-Ponds, *&c.* that they do not go to Decay and Ruin by their Negligence; for this ſhall be adjudged Waſte in them, if they ſuffer it [y]. By the *Civil* Law one Guardian may be aſſign'd unto ſeveral Perſons, as by our Law: And the Tutelage of ſeveral Children in one Family ſhall not be reckon'd as ſeveral Guardianſhips. The Children of Perſons baniſh'd or taken Priſoners by the Enemy, have not a *Tutor*, but a *Curator* ſet over them by the *Roman* Law [z].

[u] D. 26. 2. 14.
[x] I. 1. 25. 17.
[y] Fleta. lib. 1. c. 12.
[z] D. 26. 1. 6.

It has been ſaid, That Parents may by their Will aſſign Guardians unto their Children: And this Kind of Guardianſhip the Law prefers unto all other

other Kind of Tutelage, from a Preſumption that they will, thro' the great Affection which they bear towards their Children, have a greater Concern for their Welfare and Proſperity; and, therefore, I ſhall here, firſt, in a more particular Manner treat of *Teſtamentary* Tutelage. And *firſt*, it is to be noted, that Male Parents may by their Will aſſign Guardians unto their Children, whether they be of the Male or Female Sex: And this Power a [a] D. 26. 2. 1. Law of the Twelve Tables [a] has given them; wherein we meet with theſe Words, *viz. Tutores liberis in poteſtate teſtamento parentes danto.* By the Word *Children*, the Law extends itſelf even unto Grandchildren, Great- [b] D. 2. 4. 3. 1. grandchildren, and other Deſcendants [b]. To eſtabliſh this *Teſtamentary* Aſſignation of Guardians, three Things are requir'd, as before hinted. *Firſt*, the Children ought to be under the Age of Puberty, ſince Perſons above that Age do not want the Direction of *Tutors*, but are under Curators. *Secondly*, Thoſe Perſons under Puberty ought to be in the Power of their Parents: For by the *Roman* Law a Guardian could be aſſign'd by Will unto an emancipated Child, without the Confirmation of the Judge had thereunto. And *Thirdly*, If a Grandfather ſhould have a Mind to aſſign a Guardian unto his Grandchildren, it was held neceſſary by that Law, that his Grandchildren after his Death ſhould not come into the Father's Power: For if they came into the Father's Power, he could not do it, becauſe the Father is in the Place of a Guardian. But the Power of the Father, as the *Romans* exercis'd it, is now at an End, and ſo conſequently whatever depends thereon. A Guardian may not only be appointed by Will, but alſo by Codicils confirm'd by a Will. *Note*, At this Day Codicils do always ſeem to be confirmed by a Will, and a *tacit* Confirmation of them. But if an inteſtate Father dying without a Will, aſſign'd a Guardian in his Codicils, a ſimple Aſſignment was not ſufficient, but the Judge's Decree and [c] In L. 2. C. 5. 28. Confirmation of him was requir'd, according to *Baldus* [c]; becauſe ſuch Guardian is not ſolemnly appointed. I uſe the Word *Guardian* here, as being a Term moſt familiar to us. If a Father aſſign'd a Guardian unto his emancipated Son, he was to be confirm'd by the Judge, without any Inquiſition whether he was a fit Perſon, or not; becauſe the Teſtator had judg'd him ſo: But this was otherwiſe, if the Father had made his Will, for any Length of Time, before his Death. For the Guardian thus aſſign'd, might in ſuch Interval of Time, decreaſe in his Subſtance, and become very obnoxious, in Point of his Morals and the like: And, therefore, the Pupil's Advantage ought to be more regarded than the Writing of the Will, or of the Codicils. *Accurſius* has made a doubt, whether a Guardian thus confirm'd, be a *Teſtamentary* or a *Dative* Tutor; becauſe *qui confirmat, dare conſetur*: Which is true, if the Act which is done has its Subſtance [d] D. 1. 7. 16. from the meer Will of the Perſon that confirms it [d]; but not otherwiſe.

I have likewiſe obſerved before, That if there be no Guardian aſſign'd by Will, the Guardianſhip devolves by Law to the neareſt of Kin. For if the Father died without making a Will, or made a Will and forgot to aſſign a Guardian, or he who was aſſigned Guardian, died in the Teſtator's [e] D. 26. 4. 1. Life-time; then the Law, with great Wiſdom, (as *Ulpian* phraſes it [e]) provides a Guardian, by giving the Guardianſhip unto the neareſt of Kin by the Father's Side: Theſe Perſons being moſt likely to preſerve the Eſtate from Waſte and Dilapidation, as having a Proſpect of ſucceeding thereunto. At this Day the Law calls thoſe Perſons unto this Kind of Guardianſhip, whom it calls unto the Hereditary Succeſſion, without the Diſtinction of *Agnation* and *Cognation*, provided they are the neareſt of Kindred in Degree, and otherwiſe qualify'd to be Guardians. But this is otherwiſe by the Law of *England*, as already remembred. The *Legal* [f] Groenw. de LL. Abrog. Guardianſhip of Patrons is at this Day out of Uſe [f], there being now no Difference between a *Libertus* and a Perſon abſolutely free from the Beginning

ning of his Lineage : And therefore I ſhall here paſs over this *Species* of Legal Guardianſhip without any Remarks, and proceed to that which was call'd *Fiduciary* Guardianſhip. For, upon the Father's Death, the eldeſt Son had the Guardianſhip of his Brother, if he was under the Age of Puberty, and emancipated : The Law believing no Perſon would be more faithful and diligent in his Adminiſtration, than one Brother towards another : And having this Hope and Confidence in him, this Kind of Tutelage was ſtiled *Fiduciary* Guardianſhip [g] ; for he was not call'd a *Legal*, but a *Fiduciary* Guardian ; as an adopted Parent is termed a *Fiduciary* Father. But at this Day a *Fiduciary* Guardian may well enough be named a *Legal* Guardian ; and thus he is ſtiled in the *Code*. In moſt Countries now, all Tutelage is either *Teſtamentary* or *Dative*, according to *Groenwegen de Legibus Abrogatis* [h] : Which brings me, in the *Laſt* Place, to ſpeak of *Dative* Tutelage.

[g] I. 1. 19. 1.

[h] D. 1. 15.

For if there was no Tutor aſſigned by Will, and the Law could not find a proper Perſon to caſt the *Legal* Guardianſhip on ; then, according to the *Attilian* Law, the Judge or *Prætor* in the City of *Rome* had the Nomination of a Guardian ; and, according to the *Julian* and *Titilian* Law, the Provincial Preſidents in the Provinces had the naming of him [i]. And ſuch Guardian was call'd a *Dative* Guardian ; being aſſigned by the Magiſtrate either *ex Officio*, or upon a Petition made to him. In *France* all Tutelages are in a manner *Dative* ; and the Pupil's Kindred may name another in Conjunction with the Magiſtrate, and the Judge will confirm the Choice, and adminiſter the Oath to him [k]. We have ſometimes *Dative* Guardians among us here in *England*. For, if the Mother dying firſt, the Father dies inteſtate, and leaves Children under the Age of Puberty, that cannot ſucceed to an Inheritance, the Eccleſiaſtical Judge often aſſigns them a Guardian, who is to take Care of their Perſons and Eſtates, until they have compleated fourteen Years of Age : And this is frequently teſtify'd by an authentick Inſtrument under the Seal of the Court. But our Laws compel no one to undergo this Office, but the Judges rather chuſe them, and ſtir them up hereunto by kind Perſwaſions, and name either ſuch as are of the Conſanguinity or Affinity. And I think *Bracton* [l] ſpeaks of a *Dative* Tutor, when he ſays, that a Man who gives Lands or Tenements unto a Minor, ought to give him a Guardian at the ſame Time : And he gives this Reaſon for it, *viz.* becauſe the Donor himſelf cannot be a Guardian, leſt he ſhould ſeem to continue his own Seiſin, that is to ſay, in Poſſeſſion of the Eſtate given ; nor can the Minor conſent to ſuch a Gift, unleſs he does this by the Authority of his Guardian. The King may, by his Letters Patents, conſtitute an univerſal Guardian unto a Minor, who is to anſwer for ſuch Minor in all Actions commenced, or to be commenced, before any Judges whatſoever ; or he may appoint two or three Guardians jointly and ſeverally to anſwer for him, or to proſecute any Action. And, by the ſame Letters Patents, he may, at the Inſtance of ſuch Minor, give Authority unto the ſaid Guardians to ſubſtitute other Guardians jointly and ſeverally to implead Perſons in the Behalf of ſuch Minor, and alſo to defend him. See *Fitzherbert's Nat. Breviam.*

[i] I. 1. 2. pr.

[k] Les Loix. Civ. tom. 2.

[l] Lib. 2. c. 11.

By the *Civil* Law, if a *Teſtamentary* be taken Priſoner by the Enemy, a *Dative* Tutor is ſubſtituted in his Room, to ſupply his Place, leſt the Pupil ſhould be without a Defender : But if ſuch Tutor return again, he ſhall be readmitted to his Office or Guardianſhip by the Right of *Poſtliminy* [m], and ſhall recover the ſame, as he ſhall do all other Rights which he ſeemed to have loſt by his Captivity. And this Subſtitution or Surrogation of a *Dative* Tutor is extended to every other Caſe, wherein a *Teſtamentary* Tutor is hinder'd, by any juſt Impediment, from executing his Office. A Tutor may be aſſigned either for a Time, or under a Condition, or elſe abſolutely.

[m] I. 1. 2. 5.

If he be aſſign'd by Will, under a certain Condition, then a *Dative* Tutor may be appointed pending ſuch Condition; or at the End of the Term,
[n] I. 1. 20. 1. if he be only conſtituted for a Time certain [n]. But a Tutor cannot be aſſign'd by the Judge *ſub Conditione*, tho' he may be thus aſſign'd by the Teſtator.

A Tutor or Guardian, as ſoon as he is made ſuch, is bound to undertake the Adminiſtration of his Office; and if he ceaſes to do it, it is at his own
[o] D. 26. 7. 1. pf. Peril and Hazard [o]. And becauſe he cannot have the Adminiſtration otherwiſe than by a Decree of the Magiſtrate, he ought to pray to have the Adminiſtration decreed him. But ſuch Adminiſtration is not decreed
[p] D. 27. 7. 7. to him, before he has prepared an Inventory of all his Pupil's Effects [p],
[q] Nov. 72. c. 8. deliver'd it to the Court, and taken an Oath *de bene eſſe* [q], and given
[r] C. 5. 37. 28. 4. I. 1. 24. Caution *bona fide* to defend and preſerve his Pupil's Eſtate [r]; which he ought to do, by ſubjecting all his Goods as an Hypotheque or Mortgage for the ſaid Purpoſe. This Caution or Security he ought to give, unleſs he be a *Teſtamentary* Tutor, or a Guardian aſſigned upon Inquiſition. For, by the *Civil* Law, ſuch Guardians as were aſſign'd by the Judge, on Inquiſition taken, were not obliged to give Security for the Fidelity of their Adminiſtration. But as all Guardians and Tutors are at this Day aſſign'd by the Judge, on Inquiſition taken, or (at leaſt) confirmed by him, according to the modern Uſage of ſeveral Countries, this Sort of Guardians are not neceſſarily oblig'd to give Security, but the Matter is left to the Diſcretion of the Judge; the Adminiſtration being entirely truſted to the prudent Honeſty of ſuch as preſide over Pupillary Eſtates. Nor were Magiſtrates, who have without Fraud and Mal-engine taken inſufficient Security of Tutors and Guardians, in thoſe Days, liable to a *Subſidiary* Action: For now, Magiſtrates not being entirely oblig'd to demand Security of Guardians, they cannot be anſwerable for taking inſufficient Security, unleſs they ſhall be convicted of doing it with or through Fraud and evil Deſign; in which Caſe an Action of Fraud and Deceit will lie againſt them. When Caution is given to a Pupil *rem ſalvam fore*, ſuch Pupil may then, at the End of his Tutelage, and not before, have an Action, in Virtue of ſuch Caution, againſt his Guardian, for his Mal-adminiſtration; becauſe he may then implead him in an Action
D. 46. 6. 1. of *Tutelage* [s]. If a Pupil be abſent, or cannot ſpeak, this Caution may then be given to him by the Means of his Bondman or Servant; and if he has no Bondman, a Bondman ought to be purchaſed for him, according to the *Roman* Law, which is now antequated: And if he has not wherewithal to purchaſe a Bondman, or a Purchaſe be not made for him, the Judge or *Prætor* muſt ſubſtitute a Notary Publick, or ſome other
[t] D. 46. 6. 2 & 3. Officer of the Court, in the Room of ſuch Pupil [t]. I ſay, this Action may be brought againſt a *true* Guardian, on the Determination of his Guardianſhip: But it lies againſt a Proctor and Curator, as ſoon as they
[u] D. 46. 6. 4. 3. begin their Mal-adminiſtration [u]. Nor ſhall a Perſon be exempted from this Action, if he has once acted as a Guardian, tho' he be not a *true* and *real* Guardian: But he who has not acted at all, ſhall not be liable unto this Action, tho' he be a *true* Guardian; but yet he ſhall be liable to a *direct* Action of Tutelage. Of which ſee hereafter, under the Title of *Action*, in the IId Volume of this Work. *Note*, That an *Action* of *Tutelage*, and an *Accuſation* of *Tutelage*, are incompatible Things at the ſame Time.

If a Perſon, who has taken on himſelf the Adminiſtration, ſhall refuſe or neglect to make an Inventory, (as aforeſaid), he ſhall be liable to make good all Damage that ſhall accrue, and which ſhall be adjudged to be due, by an Oath *in Litem*; and be, moreover, removed, as a ſuſpected
[x] D. 26. 7. 7. C. 5. 51. 5. 5. Perſon [x]. And if he ſhall neglect to make the beſt Advantage of his Pupil's

Pupil's Money, by ſuffering the ſame to lie dead and idle, or converts it to his own Uſe, he ſhall be obliged to pay lawful Intereſt for it [y]. But he is not ſaid to convert ſuch Money to his own Uſe, who, being a Debtor to the Pupil's Father, does not afterwards pay the ſaid Money to himſelf. But at this Day, by the *Code*, a Tutor and Curator are not obliged to lend out their Ward's Money upon Intereſt or Uſury: For if they thus lend it out, unleſs the Eſtate and Subſtance of their Wards be very ſmall, and not enough to maintain otherwiſe; the Danger belongs to the Perſons thus lending it, and they ſhall make good the ſame, if loſt. For if their Ward's Eſtate be ſmall and ſlender, they ought then to put out ſo much of the Minor's Money to Uſe or Intereſt, as the Intereſt or Revenue thereof will ſerve to maintain them; and the Reſidue they ought to lay up for the Purchaſe of Eſtates in Land and Annuities [z].

[y] D. 26. 7. 7. 3.

[z] C. 5. 56. 3.

If a Tutor or Curator trades with his Pupil's Money, he is not bound to pay Intereſt for the ſame; Uſury being at this Day forbidden by the modern *Civil* Law. So that the *Code* and *Digeſt* differ in reſpect of putting out a Pupil's Money unto Intereſt, and paying Uſe for the ſame. The Judge order'd a Guardian to purchaſe Eſtates with his Pupil's Money; and he purchaſed the ſame in his own Name, and not in that of his Pupil. In this Caſe, it is in the Minor's Choice, whether he will demand the Eſtates thus purchaſed with his Money, or the Money itſelf, with lawful Intereſt [a], which among the *Romans* was Twelve *per Cent.* If a Guardian lends his Pupil's Money for a Term, and the Pupil be fourteen Years of Age before the Day of Payment comes, and demands his Money; the Guardian, in this Caſe, ought to pay the ſaid Money, if he could not warrant the lending of it: but it is otherwiſe, if he could juſtify the lending of it [b]. A Guardian may not only pay himſelf what is due to him from the Pupil's Father, but may likewiſe borrow his Pupil's Money, and make himſelf a Debtor to his Pupil, in the Inventory [c]. A Guardian ought not only to expend on the Perſon of his Pupil that which is cuſtomary, decent, and ſuitable to his Condition and Eſtate [d]; but he ought alſo to pay all Debts and neceſſary Expences which his Pupil has contracted, and is the Occaſion of, if his Pupil has not a ſufficient Income to live on: But he cann't give away any Thing which belongs to his Pupil. And he ought likewiſe to impeach ſuch as are Guardians with him, if they are guilty of any Fraud or Mal-adminiſtration; otherwiſe he makes himſelf liable, by concealing their Iniquity [e]. For the Act of a Fellow-guardian is imputed to his Collegue, if he could accuſe him of Mal-adminiſtration, and does not do it [f]. But if a Guardian be a proper and ſufficient Perſon, and on a ſudden breaks, and becomes inſolvent, nothing ſhall be imputed to his Collegue [g].

[a] C. 5. 51. 5.

[b] D. 26. 7. 8.

[c] D. 26. 7. 9. 3 & 4.

[d] D. 26. 7. 12. 2.

[e] D. 26. 7. 13. 3.

[f] D. 26. 7. 18.

[g] D. ut ſupra.

If a Guardian, being aſſigned *de novo*, has, through his Sloth and Negligence, not demanded the Money which the former Guardian borrow'd, or had in his Hands, or lent unto other Perſons, and ſuch Debtors become inſolvent; he is liable to pay the Money which cannot be recover'd from them. And 'tis the ſame Thing, according to the *Digeſt* or Old Law, if the new Guardian does not lend his Pupil's Money within ſix Months from the Time that he was aſſigned Guardian; for, in this Caſe, he ſhall be liable to pay Intereſt for it [h]. By the Law of *England*, a Guardian is not bound to put out his Ward's Money, without a Decree in *Chancery*; for if he does, and loſes the ſame, he ſhall be anſwerable for it.

[h] D. 26. 7. 15.

If there are ſeveral Perſons made Guardians, they are all and each of them bound *in ſolidum*; becauſe they act in a publick Office: But it is otherwiſe, if they act ſeparately in ſuch Office [i]. If there be two Perſons aſſigned Guardians, either of them may bring an Action, or both of them together; but they cannot bring the ſame Action ſeparately [k]. Every Guardian

[i] D. 26. 7. 31.

[k] D. 26. 7. 24. 1.

Guardian is bound to do that, which a careful and diligent Father of a Fa-
[l] D. 26. 7. 33. mily would do for his Family, in the Managment of his own Eſtate [l], and is obliged to defend his Pupil's Perſon from all Injuries: But a Guardian does not ſeem to defend his Pupil, who only does thoſe Things which every
[m] D. 26. 7. 10. one does in his own lawful Defence [m].

A Tutor or Curator is not only liable to anſwer for the Damage inflicted on his Ward, but alſo if he omits any Thing which may be for his Advantage: But he is not anſwerable *de culpa leviſſima*, but only *de latâ et levi culpâ*, that is to ſay, for *groſs* Negligence or Careleſneſs; and hereupon the Pupil may either have an Action of *Tutelage*, or for *Buſi-*
[n] C. 5. 51. 7. *neſs done* [n]. But in Reſpect of demanding Things in Action, called
[o] C. 5. 51. 2. *Nomina Debitorum*, a Guardian is only liable to anſwer for a *groſs* Fault [o], as ſupine Negligence is; nor is a Guardian liable to make good ſuch
[p] D. 26. 7. 32. Damage as happens without his Fault [p], as by Means of fortuitious Caſes, and the like. A Preſcription founded upon Length of Time, does not hinder Guardians from being conven'd and called to an Account for their Adminiſtration: Wherefore, if a Pupil has not brought an Action of *Tutelage* (which is a perſonal Action) for ten or twenty Years, he ſhall not be
[q] C. 5. 51. 8. ouſted or barr'd by ſuch a Limitation of Time [q]. If a Guardian be negligent, or makes too great Haſte in ſelling Things which belong to his Pupil, ſuch Haſte or Negligence is puniſhable: But if a Guardian does not ſell thoſe Things, which periſh and conſume by Length of Time, he ſhall
[r] D. 26. 7. 7. 1. abide by the Loſs [r]. An Action of *Tutelage* lies againſt Guardians, if they have made a bad Contract in the Pupil's Behalf; as in Purchaſing of improper Eſtates, *&c.* But in the Purchaſe of an Eſtate, a Guardian is not
[s] D. 26. 7. 7. 2. liable, unleſs it be on the Account of ſome Fraud or *groſs* Fault [s].

The *Authority* of a Guardian, is that Approbation which he gives touching an Affair, which his Pupil tranſacts with a Stranger in the Preſence of
[t] D. 26. 8. 3. his Guardian [t]: And hence, or herein, *Authority* differs from *Conſent*; for Conſent may be had in his Abſence, and either before or after the Buſineſs tranſacted; but the Tutor's Authority muſt be had at the very Time
[u] D. 29. 2. 25. 4. of tranſacting the Buſineſs [u], in order to give it Life, otherwiſe it cannot take Effect. Only a Tutor can give an Authority, but a Curator can give a Conſent, and ſuch a Conſent given either before or after the Act is ſufficient; for the Act of a Minor, under a Curator, is only voidable, and not void. Tho' this Nicety be not now obſerv'd in Practice, according to
[x] D. LL. abr. I. 1. 21. *Groenwegen* [x]; yet it ſeems to carry ſome Weight along with it; becauſe Pupils under fourteen Years of Age are more liable to be circumvented in their Dealings, than adult Perſons above that Age. In ſome Caſes it is neceſſary, that Pupils ſhould make their Condition better, without the
[y] D. 2. 14. 28. Authority of their Tutor; but they cannot make it worſe [y], as I have often related: And, therefore, in thoſe Caſes where they can better their
[z] I. 1. 21. pr. Condition, the Tutor's Authority is not requir'd [z]. Yea, a Pupil that borders upon Puberty may *naturally* oblige himſelf without the Tutor's
[a] I. 3. 30. 3. Authority [a]; but he cannot do this *Civilly* without his Tutor's expreſs
[b] D. 26. 8. 9. Approbation [b], unleſs he enriches himſelf thereby. A Guardian is ſaid to give or interpoſe his Authority, when he approves of that which is done. If a Tutor interpoſes his Authority, either by Letter or Meſſenger, it is not valid, becauſe his Preſence is requir'd, as aforeſaid. Heretofore if there was any Law-ſuit between a Guardian and his Ward, the Judge was
[c] C. 5. 44. 1. wont to aſſign the Pupil a Curator for the Time of ſuch Suit [c]: But at this Day, by the *Novels*, this cannot happen; becauſe a Perſon, who is a Debtor
[d] Nov. 72. c. 1, 2, & 4. or Creditor unto his Pupil, cannot be made his Guardian [d]. For if a Tutor, after he has taken the Guardianſhip on himſelf, ſhall become a Debtor or Creditor unto his Pupil, a perpetual Curator ſhall, by way of
[e] Nov. 72. c. 2. Adjunct, be joined with ſuch Guardian [e]. In ſome Caſes, the Law of

England

England extends ſo much Favour unto Minors, that it does not ſuffer them to riſque the Danger of a Law-ſuit, even with the Authority of their Guardians, but reſerves ſuch Plea till the Minor comes to the full Age of twenty one. See *Glanvil* [f] and *Bracton* [g]. For they can neither ſue nor be impleaded on the Property of their Eſtates, before they are perſonally poſſeſſed thereof.

[f] Lib. 7. c. 9.
[g] Lib. 5. tract. 5. c. 21.

I ſhall next conſider after what Manner Guardianſhip is ended: Which is ſaid to be determin'd either by the Act of Man, as by an Excuſe, and by the Removal of a ſuſpected Tutor [h], or elſe by the Law itſelf. In Reſpect of the Pupil Guardianſhip is entirely ended, when the Pupil arrives at the Age of Puberty [i], *viz.* in Males at fourteen Years of Age, and in Females at twelve. In Reſpect of the Pupil, it is likewiſe ended by his natural or civil Death, or elſe by the *capitis diminutio*, or the Disfranchiſing of him [k]: For no one could be under Guardianſhip, unleſs he were a *Roman* Citizen, and *ſui Juris*. In Reſpect of the Guardian, Tutelage is ended by his natural and civil Death: But then it is not entirely determin'd in reſpect of the Pupil; for as long as he is under the Age of Puberty, he muſt have another Guardian aſſign'd him [l]. If Curators are aſſign'd unto a Minor (for a Tutor at the End of his Guardianſhip ought to admoniſh his Pupil to ask for a Curator) the Adminiſtration is tranferr'd on them, and the Office of a Tutor is at an end. A Perſon may ſometimes, for juſt Reaſons, deſert and quit his Guardianſhip, even after he has taken the Adminiſtration on himſelf. By the Common Law of *England*, all Wards that were not Tenants by Knight-ſervice, whether Males or Females, were without Diſtinction releaſed from Guardianſhip, when they came to fourteen Years of Age. But ſuch held by Knight-ſervice, if they were Males, were not diſcharged, till they were one and twenty Years of Age, and Women at fourteen [m], and ſometimes at ſixteen. For though a Woman might contract Matrimony at twelve Years of Age [n], yet our Law does not eſteem her to be of mature Judgment ſo ſoon, as to manage her own Eſtate. But a Woman might always diſcharge her Guardian ſooner than a Male in this Point, *viz.* for if ſhe married, ſhe ceaſed to be in the Guardianſhip of her Lord, and entred into the new Power of her Husband [o]. But Tutelage has a cogent Force and Power attending it.

[h] I. 1. 22. 6.
[i] C. 5. 60. 3.
[k] I. 1. 22. 1. 3 & 4.
[l] I. 1. 22. 3.
[m] Little. lib. 2. c. 4.
[n] Bract. lib. 2. c. 37.
[o] Glanv. lib. 11. c. 3.

Becauſe as a Perſon may by the *Civil* Law be compelled, even againſt his Will, to accept hereof [p], as it is a publick Office, according to that Law [q]: So may a Ward or Pupil be obliged to receive a Tutor againſt his Inclination [r]. Wherefore, if a Perſon thus aſſign'd Guardian ſhall not excuſe himſelf, at the Time he is made acquainted with ſuch Aſſignation, he ſhall be liable to the Conſequences of *Tutelage*, though he never acted as a Guardian. Yet all Perſons without Diſtinction are not called to this Office of Guardianſhip. For ſome are excluded from thence, becauſe they have not ſufficient Capacity and Underſtanding for the Execution of the ſaid Office; others the Law prohibits for certain Reaſons; and others may excuſe or exempt themſelves from it by a Plea of Immunity. I ſhall firſt here conſider what Perſons may excuſe themſelves from this Office by a Plea of Immunity or Exemption; becauſe I have already touched upon the other Points at the Beginning of this Title, and then afterwards I ſhall repeat ſomething of them.

[p] D. 26. 7. 1.
[q] I. 1. 25. pr.
[r] I. 1. 25.

There are ſeveral *Species* of Excuſes, which may be pleaded, in order to exempt Men from Tutelage or Curatorſhip. Now an Excuſe is nothing elſe but the Alledging of ſome juſt Cauſe or other, for which a Perſon ought not to be compelled to undertake the Buſineſs of Tutelage or Curatorſhip. And this obtains, when the Aſſigning of a Tutor or Curator is valid and effectual *ipſo Jure*. For if it be not thus valid, as becauſe he who aſſigns him cannot lawfully do it, or when he aſſigns him who

ought not to be aſſign'd, or aſſigns him after ſuch a Manner, as he ought not to do, an Excuſe is not neceſſary. The firſt Cauſe, which affords an Excuſe from Tutelage and Curatorſhip, is a Number of Children [s]: Which Plea of Excuſe *Ariſtotle* in his *Politicks* [t] aſcribes to the *Lacedemonians*. For if a Perſon at *Rome* had three Children, or four in *Italy*, or five in the *Roman* Provinces, he was for this Reaſon, in Favour of his Children, exempt from this Incumbrance of Guardianſhip, as he might be from all other perſonal Offices [u]. Among the Number of theſe Children, they even reckon'd Daughters and Grandchildren of a Son deceaſed, but not the Grandchildren deſcended from a Daughter [x], ſince they change the Family of the Grandfather, by the Father's Side [y]. Yet Grandchildren are only of ſuch Service to the Grandfather, herein, that tho' they are ſeveral, yet they ſhall only be computed as one, if they are born from one Son. Children emancipated [z] and as it were emancipated, were likewiſe of Advantage to the Father herein, as Biſhops, Monks, *&c.* were deemed as Children emancipated. Such Children alſo as are killed in Battle, fighting for their Country, are likewiſe of Uſe to the Father herein [a]; and as they loſe their Lives for their Country, they die with Glory. But adoptive Children afford no Excuſe at all unto their adoptive Father, and ſuch as are only *lawful* Children: For to give an Excuſe they muſt be *natural* and *lawful*, and ſuch as are already born [b]. But yet adoptive Children are of Advantage herein to the natural Father [c]. *Secondly*, A Perſon, that has the Management of the Prince's Revenue, may be exempted from the Office of Guardianſhip, whilſt he has the Adminiſtration and Concern of theſe Affairs in his Hands [d]: For the Prince's chief Treaſurer is excuſed from Tutelage and Curatorſhip during that Time. And this Exemption is alſo extended to ſuch as have the Care of Proviſions, vulgarly called Clerks of the Market, and likewiſe to ſuch as have the Superintendency of the Watchmen [e]. But this Exemption is for the moſt Part only temporal, becauſe it laſts no longer than the Time of the Perſon's Adminiſtration; for at the End thereof the Perſon returns to the Office intermitted, a Curator being aſſigned in the *Interim* [f]. The *Civilians* alſo extend this Plea of Exemption to ſuch as are of the Prince's Privy Council; and ſuch an Excuſe is a perpetual Plea. A third Plea of Excuſe is Abſence, on the Account of the State [g]: Fot he, who is thus Abſent, is excuſed from Tutelage and Curatorſhip, during the Time of his Abſence, though he had not then taken ſuch Office on himſelf. And he, who is likely to go abroad every Day, may plead the ſame Excuſe, as an Ambaſſador, who is preparing for his Journey, and the like. But this Excuſe of Abſence laſts no longer than the Perſon's Abſence; for when he returns, he ſhall be reaſſumed to his Office [h]. If a Perſon be a Guardian or Curator unto three other Perſons at the ſame Time, it is a good Excuſe [i], provided their Eſtates are large, and their Account are of an intricate and difficult Nature; for otherwiſe a Number of Pupils in the ſame Family is no ſufficient Plea of Exemption [k]. And if the Eſtate to be looked after be not very large, one Guardian is enough [l]. There are ſeveral other Excuſes admitted by Law: As ſuch a bad State of Health, that the Perſon cannot well look after his own Concerns [m]; want of Learning in reſpect of Keeping and Making up Accounts [n]; an advanced Age, as being above ſeventy Years old [o]; Profeſſing the liberal Arts and Sciences, if the Perſon be exercent or a Practitioner therein, as a Grammarian, Phyſician, Rhetorician, and the like [p]; and eſpecially if he diſcharges his Office as he ought to do [q]. If the Father of the Pupil has had a capital Hatred unto the Perſon of ſuch Guardian aſſign'd, it is alſo a valid Plea of Exemption unto him, leſt he ſhould be deem'd a ſuſpected Perſon in his Office [r]: But it is no Excuſe, if the Father and Guardian were reconciled before the Father's Death. And laſtly, Poverty, if it be ſuch as obliges a Man to work

[s] I. 1. 25. pr.
[t] Lib. 2. c. 7.
[u] I. 1. 25. pr.
[x] I. 1. 25. pr.
[y] I. 1. 9. 3.
[z] I. 1. 25. pr.
[a] D. 27. 1. 15.
[b] D. 27. 1. 2.
[c] I. 1. 25. pr.
[d] I. 1. 25. 1.
[e] D. 27. 1. 42.
[f] I. 1. 23. 5.
[g] I. 1. 25. 2.
[h] D. 27. 1. 45.
[i] I. 1. 25. 5.
[k] D. 27. 1. 3. & 31.
[l] D. 27. 1. 31. 4.
[m] I. 1. 25. 7.
[n] I. 1. 25. 8.
[o] D. 27. 1. 2. I. 1. 2. 5. 13.
[p] I. 1. 25. 15.
[q] C. 10. 52. 2.
[r] I. 1. 25. 11.

work for his Livelihood, is a good Excuſe; for ſuch a Perſon is very unfit for ſo great a Task as Guardianſhip [s]. Such Perſons as would plead any of theſe Excuſes, ought not to ſupport their Plea by falſe Suggeſtions and Allegations; for if they do, they are ſo far from being exempted from this Office [t], that they ſubject themſelves to the Danger and Conſequences of an Adminiſtration, from the Time of their Appointment [u]. If a Perſon has ſeveral Excuſes to alledge, he ought to propound them all together, and not at different Times; for an Excuſe is a *Species* of a Defence, or an Exception [x]. The Time for propounding theſe Excuſes is within Fifty Days after the Appointment of Guardians, if they are within a hundred Miles of the Place where they are aſſign'd, and have Notice of it [y], otherwiſe within the Space of four Months [z], which four Months ſhall run from the Day of ſuch Nomination, and having Notice thereof.

[s] I. 1. 25. 6.
[t] I. 1. 25. 20.
[u] C. 5. 63. 3.
[x] D. 50. 17. 43.
[y] I. 1. 25. 16.
[z] D. 27. 1. 38.

By the *Canon* Law, Immunity from Tutelage or Guardianſhip is only granted unto Clerks in holy Orders; wherefore this Immunity is diſallow'd to ſuch as are only in the inferior Order of the *Romiſh* Church, as Exorciſts and the like. But tho' Clerks and Monks are exempt from Guardianſhip, whilſt they ſerve at the Altar, and continue as Monks; yet if they ceaſe ſo to live, they may be compelled hereunto [a]; for *ceſſante cauſa ceſſat effectus*. The Laws of *England* take no Notice of theſe Excuſes given by the *Civil* Laws; becauſe by our Law no one is obliged to undergo the Office of Guardianſhip againſt his Will. At this Day in *France*, the Number of five Children exempts a Perſon from Guardianſhip, according to *Paponius* and *Charondas* Lib. 3. Reſpon. 98. And tho' this Law alſo obtains in *Frieſland*; yet in *Holland* it is not receiv'd. Want of Learning at this Day is no Excuſe to exempt Perſons from Guardianſhip; becauſe they may be aſſiſted by other Men.

[a] C. 1. 3. 39.
[b] Lib. 15. Tit. 5. Art. 11.

Among ſuch as are excluded from the Office of Guardianſhip for want of a ſufficient Capacity or Underſtanding, we may firſt reckon a Perſon under the Age of Puberty, as before related; becauſe even he himſelf ſtands in need of another's Aſſiſtance, and cannot defend himſelf: Wherefore, a Guardian is aſſign'd to defend his Perſon and Eſtate. And for the ſame Reaſon a Minor cannot be a Guardian [c]; becauſe he is not deemed to be qualify'd to take Care of others, who has a Curator himſelf; and, therefore, the Law ſets him aſide [d]. If an Idiot ſhall be appointed Guardian, he is underſtood to be appointed under this Condition, *viz.* that if he ſhall be able to diſcharge the Truſt of a Guardian: And in this Caſe the Judge ſhall in the mean Time aſſign the Pupil a *dative* Guardian [e]; for if the Impediment of Idiocy or Madneſs be removed, he may undertake the Guardianſhip [f]. But, I think, a Prodigal can by no means be admitted to be a Guardian, becauſe his riotous Inclinations render him incapable of this Truſt. Perſons naturally Deaf and Dumb cannot be made Guardians: But it is otherwiſe, if a Perſon be not entirely Deaf or quite Dumb, though he be Thick of Hearing, or Stammers in his Speech [g]. Touching Women, the Law did not think it ſuitable to the Character and Modeſty of their Sex to make them Guardians, this being a publick Office; and, therefore, they were forbidden. But of this, ſee before [h]; as alſo touching Debtors and Creditors being made Guardians. In ſhort, all Perſons that ſeek after this Office are prohibited as ſuſpected Perſons [i].

[c] C. 5. 49. 1.
[d] D. 26. 2. 10.
[e] C. 5. 30. 5.
[f] D. 27. 1. 10. 7.
[g] I. 1. 14. 2.
[h] D. 26. 4. 11.
[i] Page 223.
[i] I. 1. 26. 12.

The laſt Thing I ſhall conſider in reſpect of Guardians, is, for what Reaſon they may be removed from their Truſt and Adminiſtration as ſuſpected Perſons. For not only the Crime of Diſhoneſty, but the very Suſpicion thereof is a ſufficient Motive for thus removing them. And a Tutor or Curator is ſaid to be ſuſpected not only for his Male-adminiſtration, but even when he does not diſcharge his Office as he ought to do. Hence a Perſon is ſaid to be ſuſpected, not from his ſmall Eſtate, or the Lowneſs of his Fortune,

Fortune, but from his Manners and Behaviour: For a Man may be poor, and in mean Circumſtances, and yet be diligent in Buſineſs, and honeſt in his Truſt [k]. This Crime of a ſuſpected Tutor and Curator, had its Riſe not only from a Law of the Twelve Tables [l]; but it likewiſe became a Crime, and is puniſh'd by a Law in the *Code* [m]. And as it is a Crime in Law, an Accuſation of it ought to be ſolemnly propounded, *viz.* by a Libel in Writing. But yet, in Favour of a Pupil, it is admitted, that an Accuſation and a Removal may be made even without ſuch Libel [n], when the Judge enquires by way of Office: but if there be an Accuſer, it cannot be done without a Libel in Writing [o]. All Perſons may be accuſed, and all may become Accuſers, even Women that are led thereunto either by Affection [p], or Nearneſs of Kindred; for it is, as it were, a publick Action [q]. And tho' Perſons under the Age of Puberty are not allow'd to accuſe ſuſpected Tutors; yet adult Perſons are, by their Relations Advice, admitted to ſuch Accuſation [r].

[k] I. 1. 26. 12.
[l] D. 26. 10. 1. 2.
[m] C. 8. 4. 6.
[n] D. 26. 13. 3. 3.
[o] D. 47. 1. 3.
[p] D. 26. 10. 1. 4.
[q] C. 5. 5. 1.
[r] D. 26. 10. 7.

A Tutor may be removed, not only on the Account of Fraud and groſs Negligence in his Office, but upon the Score of ſome atrocious Acts and Crimes. And atrocious Acts or Crimes are ſaid to be the Denial of Alimony to his Pupil [s]; the not making of an Inventory; or if he ſhall refuſe to make a Purchaſe of Lands with the Pupil's Money, being order'd by the Judge; or ſhall, by evident Fraud, alienate his Pupil's Subſtance, *&c.* A Tutor may be removed, on the Score of ſelling Things contrary to a Rate or Price warranted by Law [t]. But tho' a Tutor may be removed on the Account of any Fraud committed in his Office; yet it is otherwiſe, if it be not committed in his Office of Tutelage [u].

[s] D. 26. 10. 3. 14.
[t] D. 26. 10. 3. 6.
[u] D. 26. 10. 3. 4.

A Perſon may be removed from his Guardianſhip, *ex Officio Judicis*, without any Accuſation at all, if he be ſuſpected [x]: But if a Magiſtrate, *ex Officio*, removes a Tutor, as ſuſpected, the Reaſons of ſuch Suſpicion ought to appear by very clear and liquid Arguments [y]. This Cauſe of Suſpicion may be handled both before an ordinary and a delegated Judge, as it was anciently before the *Prætors* of *Rome*, and in the Provinces before the Preſidents, and their Delegates [z]. But if a ſuſpected Tutor was a *Plebeian*; he was remitted to the Preſect of the City, and was puniſh'd by him [a]: But all Perſons were not ſo puniſh'd, but only Perſons of the lower Rank [b]. If a Perſon accuſed a Tutor or Guardian of being ſuſpected, and failed in his Proof, he was puniſh'd *Pœna Talionis*, *viz.* by Infamy; tho' a ſuſpected Tutor ſuffers other Puniſhments beſides, which the Accuſer ſhall ſuffer, or (at leaſt) be puniſh'd according to the Diſcretion of the Judge [c]. Tho' a Tutor, removed on the Account of Fraud and Deceit, becomes infamous; yet he is not ſtigmatized and branded with Infamy, if he be removed for any other Reaſon [d]; as, for groſs Negligence, and ſometimes alſo on the Account of a light Fault [e], which he may be guilty of.

[x] D. 26. 10. 3. 3 & 12.
[y] D. 26. 10. 3. 4.
[z] D. 26. 1. 2.
[a] D. 36. 10. 1. 5.
[b] D. 26. 10. 1. 8.
[c] D. 48. 16. 3.
[d] I. 1. 26. 6.
[e] D. 26. 10. 3.

If the Proceſs of a Cauſe be commenced againſt a ſuſpected Tutor or Curator, the Cognizance of ſuch Cauſe is extinguiſh'd, if either of the ſaid ſuſpected Perſons ſhall die before it comes to a Determination [f]. Finally, It is to be obſerv'd, That ſuch Perſons as are guilty of a fraudulent Adminiſtration, are to be remov'd from their Guardianſhip, though they offer ſufficient Security, that they will keep and preſerve their Pupils Eſtate in Safety, *&c.* Becauſe ſuch Security or Caution does not change a malevolent Purpoſe, but only ſerves to give them a Power of being greater Raſcals in the Management and Adminiſtration of their Pupils Eſtates [g].

[f] I. 1. 26. 8.
[g] I. 1. 26. 12.

The Common Law of *England* makes little or no Proviſion againſt knaviſh and ſuſpected Guardians, but only gives the Heir within Age an Action of Waſte againſt the Guardian in Socage; and the Heir at full Age

Age ſhall have an Action of Waſte againſt a Guardian appointed by the King [h]. When an Heir within Age brings an Action againſt his Guardian in Socage, he may conſtitute an Attorney to act in his Name in the Suit. A Writ of Account alſo lies againſt a Guardian in Socage; and the Heir at full Age ſhall have a Writ of Account againſt the Guardian for the Profits until he comes to the Age of fourteen Years, and then ſhall have a Writ of Account againſt him as Bailiff, and not as Guardian; for he cannot be a Guardian longer for Socage Lands, than 'till the Heir comes to fourteen Years of Age [i]. If an Heir wou'd remove a Guardian as ſuſpected, he muſt apply to the Lord Chancellor, who is the King's Delegate in this Matter.

[h] Fitzh. N. Br.

[i] Fitz. N. Br.

Guardianſhip, in a large Senſe of the Word, denotes a Contract; and, by Impropriety of Speech, may be ſtiled a Contract, tho' in Reality it is only a *quaſi*, or an *improper* Contract, (as I ſhall note hereafter, under the Title of *Obligations*). The Pupil, by an Implication of Law, contracts with his Guardian for his Advantage; and, on the other hand, the Guardian, by the ſame Implication, contracts with his Pupil to be indemnify'd as to all Expences he ſhall be at in his Office *. And as a Guardian or Tutor is obliged, by Virtue of an *improper* Contract; ſo likewiſe is a Pupil, in three Caſes: For when a Tutor or Guardian is employ'd in his Pupil's Affairs, and has the Diſpenſation and Management thereof, tho' it be not by a direct and expreſs Agreement ſtipulated that he ſhall have his Charges born, yet he ſhall recover the ſame by a tacit Contract for *Buſineſs done*. And, on the other hand, if ſuch Perſon ſhall be guilty of any Maladminiſtration, the Pupil ſhall have an Action againſt his Guardian, by Virtue of an *improper* Contract †. For if the Guardian has laid out his own Money on his Pupil's Eſtate, or has perſonally engaged himſelf as a Surety for him, or has pledged and mortgaged his own Eſtate in his Pupil's Behalf; it is but Equity that the Guardian ſhould be indemnify'd by his Pupil; which he may be by a croſs or contrary Action.

* D. 27. 4. 1. pr.

† I. 3. 28. 2.

There are two Actions, that lie againſt a Tutor or Guardian: The one is ſtiled an Action of *Tutelage*, which lies *in ſimplum* on the Account of any Deceit, and for what we call a *groſs* or *light* Fault [k]. And the other Action, unto which a Guardian is liable, is an Action *de diſtrahendis rationibus*, viz. for not rendring a fair Account of his Adminiſtration: For a Guardian is obliged, at the End of his Office, and oftener, (if Need be) to paſs his Accounts, tho' appointed Guardian, without Account, by the Teſtator; for it is a publick Concern, that Minors ſhould be protected, and that Guardians ſhould diſcharge themſelves with Fidelity.

[k] D. 27. 3. 1.

In *France*, if the Guardian obtains a Releaſe from the Minor, when he comes to full Age, without giving a particular Account of his Adminiſtration, ſuch a Releaſe is void; for it looks like a Contrivance, and an Act of Deceit [l]. But a Guardian may voluntarily paſs an Account during the Minority of his Pupil, if he thinks it neceſſary [m]; and he ſhall be allow'd all neceſſary Expences for Reparations, Coſts of Suit [n], Journies, Voyages, for neceſſary Allowance to a poor Mother or Siſter of the Pupil, *&c.* And for theſe Expences he has Security from his Ward's Eſtate [o], and has a Privilege before other Creditors. By the *Canon* Law, and in *Germany* and *Holland*, (according to *Bokelman* [p]), a Guardian ought to paſs his Accounts every Year. Tho' a Perſon leaving Guardians to his Children, ſhould ſay in his Will, That he will not have ſuch Guardians accountable to them; yet ſuch Guardians ſhall be anſwerable for any Fraud they ſhall be guilty of: becauſe he cannot remit ſuch Fraud to them, tho' (perhaps) he may remit the rendring of an Account. But he may remit any Damage they ſhall ſuſtain through the Fault and Negligence of their Guardians [q]. An Action of *Tutelage* lies againſt a Guardian and his Heirs; but an

[l] Les Loix Civ. tom. 2.

[m] D. 27. 9. 5. 11.

[n] D. 27. 3. 1. 9.

[o] C. 5. 13. 1. 1.

[p] De Differ. Jur. c. 18.

[q] D. 26. 7. 5. 6.

Action *de Diſtrahendis Rationibus*, to bring the Guardian to a fair Account, lies only againſt the Guardian himſelf [r], and on the Score of Deceit alone. But if one Action be commenced, the other vaniſhes, tho' there is more contain'd in the one than in the other. If a Father has in his Will aſſign'd a Guardian to his Son, and therein declared, that he has left his Son an hundred Pounds in Effects, whereas he has only left fifty Pounds; ſuch Declaration ſhall not prejudice the Guardian in rendring an Account; for his Ward ſhall demand no more than fifty Pounds: Nor ſhall it prejudice the Pupil from demanding more, if the Teſtator ſhall ſay, That he has bequeath'd all his Goods to him, amounting to five hundred Pounds, when they amount unto a thouſand Pounds [s].

[r] D. 27. 3. 1 & 2.

[s] C. 5. 51. 1.

All the Guardians and their Heirs, in an Action of *Tutelage*, ought to be convened before the ſame Judge on the Account of the ſame Guardianſhip: For when ſeveral Perſons are bound by the ſame Law or Obligation, and in reſpect of the ſame Office, they ought all of them to be remitted or referred to the ſame Judge [t]. Therefore, if your Father has acted as Guardian with another Perſon, and your Father be dead, his Heir ſhall be liable to the ſame Judge or Juriſdiction as the other Guardian. Where there are ſeveral Guardians, it is in a Minor's Choice to ratify an invalid Sale made by one of his Guardians, and likewiſe to recover a juſt Price, (if the Thing be ſold for leſs than it ought), from the Seller himſelf, according to the Common Law; and afterwards he may come at the other Guardians, if he be not ſatisfy'd: And if all the Guardians were equally concern'd in the Sale, he may convene one of them *in Solidum.* But if one of them be only convened, ſuch Minor ought to aſſign over Actions to him againſt the others, that the Perſon convened may indemnify himſelf [u].

[t] C. 5. 51. 5.

[u] C. 5. 51. 6.

TIT. XL.

Of Madmen, Idiots, Lunaticks, Prodigals, *&c. how they are taken Care of, and reſtrained from acting in their own Concerns: muſt have Curators or Governors ſet over them by Law; and how it is proceeded to convict them of* Madneſs, Idiocy, Lunacy, *&c.*

AS the *Civil* Law ſhews more Compaſſion to the Caſe of *Madmen*, *Idiots*, *Lunaticks*, and *Prodigals*, than any Law I know of; I ſhall here, *Firſt*, conſider, what Perſons may come under any of theſe Appellations. *Secondly*, I ſhall examine what Acts they may do, and what not. *Thirdly*, I ſhall enquire, what Proviſion the Law has made for taking Care of their Eſtates. And, *Laſtly*, ſhew what Proof is neceſſary to convict them of Madneſs, Idiocy, Lunacy, and Prodigality. Among Madmen, properly ſo called, there be ſome Perſons that are *actually* Mad; ſome that are *habitually* ſo; and others that are ſo at certain Times and Seaſons of the Year. Thoſe are ſaid to be *actually* Mad, who are ſo at this very Inſtant of Time, being agitated by an outragious Emotion and Impetuoſity of Mind, which is cauſed by a violent Hurry of the animal Spirits; and from hence they know not what they do or ſay. Thoſe Perſons are deemed *habitually* Mad, who have their right Senſes for ſome ſmall Point of Time, and then preſently fall back and relapſe into Madneſs again. Theſe Perſons, in

in the *Civil* Law, are ſtiled Men *inumbratæ quietis.* The third Sort are thoſe, whom we ſtile Lunaticks, or by a new Name *ſtatu-furioſi*; as we do ſuch as are *ſtatu-liberi.* Theſe are thoſe that have their ſtated lucid Intervals, and are ſometimes raving, and then again in their right Underſtanding, by a ceaſing of their Madneſs for ſome conſiderable Time, and afterwards their Madneſs returns on them again. An *Idiot* is a Perſon, that cannot give a ſuitable Anſwer to any plain or vulgar Queſtion; and is in our Law-books ſtiled *mente captus*, and ſometimes *demens*; as a Madman is termed *Furioſus.* See *Alciatus* touching this Matter in his *Parergon juris.* For the Lawyers term him *Furioſus*, who has by ſome violent Means entirely loſt the Light of his Underſtanding, and wants common Senſe, as is reported of *Athamanthus*, *Alcmæon*, *Ajax*, *Oreſtes*, *&c.* But him they ſtile *Demens*, or Half-witted, in *Engliſh*, who is not ſo far deprived of his Underſtanding, but that he has ſome Gleams of Reaſon ſtill left him, and is only in part led by ſome Error. The Doctors ſay, that the Difference between a *Madman* and an *Idiot*, is, that the firſt is acted by a Kind of Rage of Mind; but that the latter is more Calm, and has his Mind at Reſt, ſhewing no external Signs of Madneſs. By a *Prodigal*, I here mean ſuch a Perſon as has no Regard, either to the Time or Meaſure of his Expences, but in a profuſe Manner ſquanders away his Eſtate in a riotous and wanton Courſe of Life, without conſidering the Waſte he commits thereof [x]. And the Care of Prodigals is near of Kin unto that of Madmen: For Prodigals are *parum mentis ſuæ compotes.* For in Words and outward Appearance they may ſeem Wiſe Men; yet in Reality they act as Madmen. And therefore, according to *Ulpian*, the Emperor *Antoninus Pius* admitted the Mother's Complaint, touching her prodigal Children, praying, they might have a Curator aſſign'd them. 'Tis no new Thing (ſays he) that tho' ſome Perſons from their Diſcourſe ſeem to be in their right Senſes and of ſound Underſtanding; yet they ſo manage their patrimonial Eſtates, that unleſs ſome Care be taken of them, they will be reduced to Poverty; wherefore, a Perſon ſhall be choſen, who by his Counſel and Advice ſhall have the Government of them. For 'tis fit, ſays the good Emperor, we ſhould take care of thoſe, who, in reſpect of their Eſtates, act like Madmen. And, therefore, as Madmen, they are forbidden to enter into any Obligation or Engagement with a Curator.

[x] D. 27. 10. 1.

A *Madman* and an *Idiot* are ſaid to have a *quaſi voluntas*, or an improper Will: which is true, when an *expreſs* or *tacit* Conſent is not requir'd. But it is otherwiſe, where an *expreſs* or *tacit* Conſent is required. For the Words *Voluntas* and *Conſenſus* do very often in our Books denote the ſame Thing, and are us'd promiſcuouſly in the ſame Senſe [z]. In Caſes, wherein Conſent is not required, a Madman, Idiot and Lunatick are not looked upon as Perſons dead, but only as Perſons not diſſenting. Though a Madman cannot enter into a Monaſtery; yet if he be once admitted, he cannot be ouſted; for a Madman may retain a Benefice, though he cannot obtain one. A Madman or Idiot cannot be ſaid to be *in culpa*; for what Fault is he in, that is not *ſanæ mentis?* ſome have compared a Madman unto a *Quadrupes* or brute Beaſt; but a Madman is not in every reſpect like unto ſuch a Creature, ſince an Action *de Pauperie*, or for Damage done by a Beaſt, lies on the Score of a *Quadrupede*, but none on the Score of a Madman [a]: For a Madman is ſufficiently puniſh'd by his Madneſs; and the Unhappineſs of his Fate, is a Defence unto him. Thus if a Madman kills his Father, he is not puniſhable, ſince we ought not to add Affliction to an afflicted Man: But then he ought not to pretend or counterfeit Madneſs, or commit an Offence in the Time of his lucid Intervals; but he ought to be in Cuſtody, and if he ſhall commit a Crime thro' the Negligence of his Keeper, his Keeper ſhall be puniſh'd. But what if a Perſon has committed

[y] D. 44. 7. 24.

[z] C. 6. 61. 8.

[a] D. 6. 1. 60.

Homicide

Homicide or any other Crime, at the Time when he was *compos mentis*, for which he has been condemned to ſuffer Death, and after Sentence he becomes a Madman, ſhall ſuch a Sentence be executed? Some ſay, that he ought not to ſuffer Puniſhment in his Body, but only in his Eſtate and Goods, becauſe a Madman is in the Place of a dead or abſent Perſon, who cannot be condemned and puniſh'd in his Abſence. And tho' the contrary Opinion may be defended in Strictneſs of Law; yet we ought not to recede from the firſt Opinion in giving Sentence, eſpecially ſince in Puniſhments the more gentle Part ought to be follow'd. And thus that, which is done thro' Madneſs, produces Impunity: For Madneſs carries its own Puniſhment along with it [b]. But a Man in his Madneſs may be puniſh'd for thoſe Crimes and Offences, which he committed in perfect Health, if no judicial Proceſs be requir'd to the Puniſhment. As the Power of the Father is not diſſolved by Madneſs in him, ſo neither does a ſupervening Madneſs toll a Juriſdiction [c]: But he, who has no Underſtanding, though he has Juriſdiction, yet cannot exerciſe the ſame. If a Madman, or Perſon under twenty five Years of Age, be by Will aſſign'd a Guardian unto any one, he ſhall then become a Guardian, when he becomes *compos mentis*, or is above twenty-five Years of Age [d]: But a Judge or Magiſtrate cannot aſſign a Madman or a Minor to be a Guardian, though a Teſtator may; becauſe Guardianſhip requires a Perſon that is able to defend ſuch as are weak through Imbecillity of Age, and is proper for the Management of their Concerns, which a Madman is not. Upon which Account ſuch Madman is interdicted the Management of his own Eſtate [e], and is committed to his Kindred by the Father, to the Intent that they ſhould help and take Care of him [f]. But becauſe Madmen are not under a continual Alienation of Mind, but have their Senſes by Intervals, it has therefore obtain'd, that a Teſtator, may in his Will make a Madman his Heir, as well as a Guardian to his Children, and ſuch Heir or Guardian may act as ſuch, whenever they return to their perfect Senſes.

[b] D. 26. 7. 61. fin.

[c] D. 26. 5. 8.

[d] I. 1. 14. 2.

[e] D. 27. 10. 1 & 13.

[f] D. 1. 18. 14.

But both a Madman and an Idiot are prohibited by the Law to make a Laſt Will and Teſtament: For in making Laſt Wills and Teſtaments, Sanity of Mind and not of Body is requir'd. Wherefore, Notaries ſay, in Laſt Wills and Teſtaments, that the Perſon was of ſound Mind, though he was weak and languiſhing in Body: Which Soundneſs of Mind is not in a Madman or Idiot, who are reputed to be in the Place of abſent or quieſcent Perſons, and in the Room of a Perſon deceaſed. So that a Madman and Idiot cannot make a Will, even to charitable Uſes: Nor is the Will of a Madman valid, though he ſhould afterwards return to his Senſes, and die *compos mentis*, unleſs ſuch Madman ſhould, during his lucid Intervals, declare his Will to be valid, becauſe at ſuch a Time he may make a Will; or unleſs he ſhould have made his Will before he became a Madman, becauſe Madneſs afterwards ſupervening does not annul a Will, which was made before ſuch Fit of Madneſs. But ſee more of this under the Title of *Teſtaments*. A Madman, Idiot, *&c.* cannot tranſact or manage any Buſineſs, becauſe they do not underſtand what they do: Nor can a Madman, Idiot or Prodigal, who is like unto a Madman, be obliged by any Promiſe they ſhall make. But though a Madman and a Prodigal are in this reſpect under the ſame Predicament as to the Bond of an Obligation; yet the Condition of each of them is not alike, as to the Power of acquiring of a Thing. For a Madman, Fool, Idiot, and the like, cannot make a Contract for Buſineſs upon any Account at all, tho' they would ſtipulate for themſelves; becauſe they have no Gleams of Judgment in the leaſt reſpect; But a Prodigal, who has only the Adminiſtration of his Eſtate interdicted him, that he ſhould not indiſcreetly alienate the ſame, is not forbidden to better his Condition by any Stipulation made, leſt that the Interdict, which is made in Favour

MVSEVM BRITANNICVM

Favour of him, and for the Sake of preſerving his Eſtate, ſhould reflect and turn to his Diſadvantage. But a Prodigal, by the *Civil* Law [g], is prohibited the making of a Laſt Will and Teſtament, as Madmen and Idiots are, ſince he has not the Management and Diſpoſal of his own Eſtate, it being taken from him by the Judgment of the Court upon Cognizance had of the Cauſe: But a Teſtament made by him, before the ſaid Adminiſtration was interdicted him, is not made void, though it plainly appears, that he was a Prodigal. For the common Opinion here obtains, *viz.* That in whatever Caſe the Judge's Decree is neceſſary, if an Act be done before ſuch Decree be had, the ſame ſhall be valid: And therefore, a Prodigal may do all Things before ſuch Decree be made, as well in reſpect of Contracts as in regard to laſt Wills and Teſtaments [h]. But to return to the Caſe and Buſineſs of Madmen and Idiots.

[g] I. 2. 12. 2.

[h] D. 45. 1. 6.

A Madman may not only oblige others, but be alſo obliged himſelf in ſuch Matters as are not performed by Conſent: For a Madman and Idiot are looked upon as Perſons conſenting, when a true and real Conſent is not requir'd in Law [i]. If a Madman lends his Money to me, and it afterwards appears, that he was a Madman, and not capable of conſenting; *Quære*, whether I am bound to repay him his Money? And it is held, that I am obliged, and he may have a perſonal Action to recover the Money: But then he cannot have this Action in his own Name and Perſon, but ſhall have a Curator aſſign'd him, and the Curator ſhall proſecute the Action; becauſe 'tis a Rule in Law, that *ex quibus cauſis, nobis ignorantibus, acquiruntur Actiones, ex eiſdem cauſis furioſo acquiritur.* Madneſs and Idiocy, though each of them do hinder a Contract of Matrimony; yet Madneſs diſſolves not Matrimony after it is contracted; for a Madneſs is ſufficiently puniſh'd by Madneſs itſelf, without adding any Puniſhment thereunto, as already remembred. A Madman cannot divorce or repudiate his Wife, nor can he be repudiated upon this Account, unleſs ſuch Madneſs grows intolerable, and of ſo fierce and pernicious a Nature, that there is no Proſpect of his Recovery, and he becomes terrible unto all Miniſters and Servants round about him [k]: And the Reaſon, is, becauſe Madneſs is no Offence or Crime in a Perſon, but a Misfortune only. And hence it is ſaid, that a Man and his Wife ſhall not each of them ſhare in the Puniſhment of their reſpective Crimes: Yet they ſhall each of them bear their Part in the Puniſhment of their reſpective Misfortunes, according to *Bartolus* [l]. For there is nothing more agreeable, than that the Wife ſhould ſhare in the fortuitous Caſes of the Husband, and the Husband in the fortuitous Caſes of the Wife [m]. A Husband is bound to maintain his Wife, being ſeized with Madneſs, and to allow her all manner of Neceſſaries: And if the Husband ſhall waſte and diſſipate her Dower, her Dower ſhall be put under Sequeſtration, that the Woman together with her Family may have from thence a competent and comfortable Subſiſtence [n], and the *Pacta dotalia*, entred into between them at the Beginning of Marriage, ſhall remain in their proper State. And they are to wait for the Recovery of each other, in Caſe of Madneſs; or elſe for the Event of Death, which diſſolves all Things. By the *pactum dotale*, I mean the Marriage-ſettlement. But this Alimony or Allowance ought to be in Proportion to the Wife's Dowry or Wedding-portion. The Wife's Curator or Kindred may apply to a competent Judge upon this Account, as likewiſe for a Sequeſtration on the Score of Waſte [o], as aforeſaid. Some will have it, that if the Wife has no Dowry, the Husband is not bound to maintain her in her Madneſs: But this Opinion of theirs, I think, to be falſe. But though a Daughter cannot repudiate her Husband in her own Perſon, becauſe ſhe wants Underſtanding; yet her Father may pray ſuch Divorce or Separation for her, and may bring an Action for himſelf and his Daughter [p]. And this is looked upon to be good Law among us.

[i] D. 24. 3. 2. 2.

[k] D. 24. 3. 22. 7.

[l] In L. 22. D. 24. 3. 7.

[m] D. 24. 3. 22. 7.

[n] D. 24. 3. 22. 8.

[o] D. 24. 3. 22. 8.

[p] D. 24. 3. 22. 9.

us. And if the Father be Mad, his Curator or Daughter may have an Action for the Recovery of her Dower: And it is the ſame Thing, if the Father be taken Priſoner by the Enemy [q]. See afterwards the Title touching *Dower*.

[q] D. 24. 3. 22. 10.

As a Madman, Idiot, Prodigal, *&c.* are by Law interdicted the Adminiſtration of their own Goods [r]; ſo the Law aſſigns them Curators and Governors to take Care thereof; and on Cognizance had of their Condition, by the Magiſtrate, he aſſigns them a Curator, *viz.* the neareſt of Kin by the Father's Side, if he be a fit Perſon; if not, then ſome other Perſon is appointed [s]. And theſe Curators ought to give Security, by Sureties, for the ſafe Keeping and Preſerving of their Eſtates, unleſs they have ſufficient Eſtates, to anſwer for the Eſtates under their Care and Management. And they ought alſo to make an Inventory of all the Goods and Effects of ſuch calamitous Perſons, and deliver it to the Judge; and by a Conſtitution of the Emperor *Juſtinian*, the Judge ought to give them an Oath for the faithful Diſcharge of their Office [t]. This Curatorſhip is determin'd, when the Cauſe, for which the Curator was aſſign'd, ceaſes, as when a Madman returns to his Senſes again, or a Prodigal conforms himſelf to good Manners, and a ſober Way of Living [u]. But a Curator cannot alienate any Part of his Ward's Eſtate, without the Judge's Decree [x]. The *Prætor* or Judge aſſigned a Curator unto a Madman, decreeing, that the ſaid Curator ſhould give Caution by Sureties, *rem ſalvam fore.* But the Curator did not give this Caution or Security, and yet he alienated the Madman's Eſtate with the Judge's Decree, by ſelling it for a juſt Price, the Madman's Intereſt and Advantage requiring ſuch a Sale: And thus this was deemed a legal Alienation. Afterwards the ſaid Madman died, and his Heirs claimed the ſaid Eſtate from the Purchaſer, who urged, by Way of Exemption, that the Madman's Curator had ſold the Eſtate to him. Hereunto the Heirs reply'd againſt the Purchaſer, that the Curator had given Caution, according to the Judge's Decree, when the Eſtate was ſold; and therefore the Alienation was void. But this Replication of the Heirs was over-ruled, as an inſufficient Plea, becauſe the ſaid Eſtate was ſold by the Judge's Decree, for the Payment of the Madman's Debts, which was for his Advantage; and, therefore, the Purchaſer was held ſafe in his Poſſeſſion. The Curator of a Madman or Idiot ought not only to have the Cuſtody and Guardianſhip of his Eſtate, but likewiſe that of his Body and Perſon [y].

[r] D. 27. 10. 1.

[s] C. 5. 70. 7. §. *& inventario.*

[t] C. 5. 70. 7. 4.

[u] D. 27. 10. 1. pr.

[x] D. 27. 10. 11 & 12.

[y] D. 27. 10. 7.

A Curator is not only aſſign'd unto Idiots, Madmen and Prodigals, but even unto others who cannot intend their own Eſtates; as to Perſons entirely Deaf and Dumb, and to ſuch as labour under any perpetual Diſeaſe and Infirmity. A Curator is ſometimes aſſign'd to look after the Effects of a Perſon deceas'd: As when the Heirs appointed, debate and deliberate with themſelves, whether they ſhall accept of the Heirſhip, or not [z]. Several Perſons above the Age of twenty-five Years at *Rome*, and elſewhere, feign'd themſelves to be Madmen or Idiots, in order to have a Curator, that they might avoid civil Offices of a perſonal Nature: Wherefore, the *Prætor* was not raſhly to aſſign a Curator with a full Adminiſtration, without Cognizance firſt had of the Cauſe [a], as he might otherwiſe do in a Curatorſhip, *in litem.* *Titius* dying, left his Wife big with Child; from whence the *Venter*, or Child in the Womb, was put into the Poſſeſſion of the Goods of the Deceas'd; and the *Prætor* without any Inquiſition, aſſign'd a Curator in the Name of the *Venter*, to take Care of the Goods. In this Caſe, the Curator ought to give Caution with Sureties, *rem ſalvam fore*, to ſee the Goods ſafely forth coming: But if a Curator had been aſſign'd upon Inquiſition, he was not obliged to give this Caution [b]. Thoſe that have the Adminiſtration of their Goods interdicted them by the Judge, cannot tranſfer the Property of any Thing to another Perſon; becauſe, in reſpect of this

[z] D. 27. 10. 3.

[a] D. 27. 10. 6.

[b] D. 27. 10. 8.

this Matter, they have nothing to do with their own Goods, as being forbidden to adminiſter or diminiſh the ſame : But the Curator of ſuch Perſon may rightly do it, if he alienates a Madman's Eſtate, declaring it to be the Eſtate of ſuch Madman ; yet he cannot alienate a Madman's Eſtate as his own Eſtate [c]. And thus a Pawn made by the Curator of a Madman is valid, if the Curator made it for the Madman's Advantage [d] : But *Azo* thinks that it is otherwiſe of Immoveables, or a real Eſtate, which cannot be mortgaged without the Judge's Decree.

[c] D. 27. 10. 10.

[d] D. 27. 10. 11.

This Law of aſſigning Curators unto Prodigals and Madmen, the *Romans* borrow'd from the Cuſtom of the *Lacedæmonians* [e] : But in *England* it has not Place in reſpect of Prodigals ; for which Reaſon, many Eſtates are conſumed by riotous Perſons, and ancient Families of Nobility and Gentry are reduced to Poverty and Obſcurity. But by the Law of *England*, the King, of Right, ought to have an Idiot in his Cuſtody, and to rule him, and his Lands and Tenements, Goods and Chattels, as appears by the Statute of *Prærogativa Regis* [f] ; becauſe ſuch a Perſon cannot defend and govern himſelf, nor order his Lands, Tenements, Goods, nor Chattels. And therefore, when the King is inform'd, that one who has Lands or Tenements is an Idiot, and a Natural from his Birth, the King may award his Writ to the Eſcheator of the County where ſuch Idiot is, or unto the Sheriff, to enquire thereof. See the Form of the Writ which ſhall be thus directed to the Eſcheator, in *Fitzherbert's Natura Brevium* [g] ; where we have alſo the Form of the Writ recorded which is ſent unto the Sheriff [h]. And tho' a Man be found an Idiot, by Inquiſition taken before the Eſcheator, or before the Sheriff, and by their Examination, *&c.* and that he be return'd into the Chancery as ſuch ; yet he who is ſo found an Idiot, may, in his Perſon, or by his Friends, come into Chancery, before the Chancellor and the King's Council, and ſhew the Matter, and pray that he may be examin'd before the Chancellor and King's Council, whether he be an Idiot or not. Or he may ſue forth a Writ out of Chancery, to certain Perſons, to bring him who is thus found an Idiot before the King and his Council to *Weſtminſter*, to be there examin'd : And if he be brought thither and examin'd, and found to be no Idiot ; then the Inquiſition found before the Eſcheator, or Sheriff, and alſo the Examination which the Sheriff has made, and return'd thereupon, ſhall be of no Effect, but the ſame Office ſhall be taken as void, without any other Traverſe. See the Form of the Writ, directed to the Party to bring the Idiot before the King's Council, in the ſaid *Natura Brevium* [i]. And he who ſhall be ſaid to be an Idiot from his Birth, is ſuch a Perſon who cannot account or number twenty Pence, nor tell who was his Father, or Mother, nor how old he is, *&c.* ſo as that it may appear, that he has no Underſtanding or Reaſon what ſhall be for his Profit, or what for his Loſs : But if he has ſuch Underſtanding, that he knows and underſtands his Letters, and can read, by the Teaching and Information of another Man, then it ſeems he is no Idiot or natural Fool.

[e] I. 1. 2. 10.

[f] Cap. 8.

[g] Pag. 517.

[h] Pag. 518.

[i] Pag. 519.

I ſhall next conſider, how we are to know whether a Man be Mad or not : For every Perſon is preſumed to be of ſound Mind and Underſtanding, unleſs the contrary appears to be proved [k]. And the Proof is incumbent on him who avers a Perſon to be a Madman, as it has been determin'd in the *Imperial* Chamber, and elſewhere. See *Mynſinger's Obſervations* [l]. Now Madneſs may be proved by ſeveral Arguments ; as, when a Man who has been raving, or any other ways extravagant in his Behaviour, upon his being examin'd or interrogated upon eaſy Queſtions, anſwers very wide from the Purpoſe, and utters Things inconſiſtent, not knowing what he ſays. And thus he may be adjudged a Madman, from his Speech and Diſcourſe, and from his Speech and Actions, when they are not agree-

[k] C. 6. 36. 5.

[l] Obſ. 77. Cent. 3.

able

able to the Speech and Actions of a Man in his ſober Mind. Madneſs is alſo proved, if the Perſon wanders up and down the Country after the manner of a Madman [m]; or tears his own Cloaths through Rage and Fantaſtickneſs; or throws Stones, without any regard had to Fear and Diſcretion, according to *Alexander* [n]; or commits any other extravagant Actions, whereby Madneſs may be evidently inferr'd [o]. And if a Man has been once proved to be a Madman, he is always preſumed to be ſuch, unleſs it appears that he has lucid Intervals. But he is not deemed to be a Madman, according to *Lud. Romanus*, in his *Singularia Juris* [p], who throws Stones in Defence of himſelf, when he is aſſaulted [q]; becauſe this ſhews a Token of Diſcretion. Tho' Madneſs is not preſum'd; yet great Credit herein is given to the Depoſitions of Phyſicians, as to skilful Men; becauſe Madneſs depends on the Diſpoſition of the Body, as well as of the Mind.

[m] D. 21. 1. 4.

[n] In L. 22. D. 24. 3.

[o] 3. Q. I. 14. Gloſſ. ibid.

[p] V. *Furioſus.*

[q] Gloſſ. in C. 1. Diſt. 41.

TIT. XLI.

Of Reſtitution in Integrum, *granted unto Pupils, Minors, abſent Perſons,* &c. *and of the great Advantages of this Law to ſuch as have loſt the Opportunity of alledging any thing in their own Behalf, or have been deluded through the Deceit of others, or the Imbecility of their own Minds,* &c.

AS there are ſome Perſons, who may be compelled to ratify and confirm ſuch Acts of theirs, which they tranſact by the Means of other Men, as by Proctors, and the like; ſo there are others, who are not bound by the Acts which they do even in their own Perſons, as Pupils, Minors, Madmen, Idiots, *&c.* being relieved and aſſiſted herein by a Judgment of Reſtitution *in Integrum:* Which is rightly deſcribed to be an extraordinary Remedy in Equity, whereby the Prince or Magiſtrate, for ſome juſt Cauſe or other, replaces a Perſon that has been injur'd or circumvented, either by his own Weakneſs or Abſence, in that State wherein he was before ſuch Injury or Circumvention happen'd to him [r]. And by this Means, a Perſon may reſcind and void his own Acts, if they are founded upon Fear, Force, Deceit, Want of Age, Abſence, and other the like Cauſes, reckon'd up in the *Digeſts* here quoted [s]. Among theſe Cauſes, ſome are juſt and certain, as now mention'd, *viz.* Fear, Force, Deceit, Want of Age, Abſence, *&c.* And others are uncertain, and contain'd under a general Clauſe, ſet down at the End of the firſt Law in the *Digeſts* [t], touching this Matter. Wherefore, having already treated of Pupils, Minors, Madmen, *&c.* who may be thus injured and circumvented, and therefore are not bound by their own Acts; I ſhall here diſcourſe of Reſtitution *in Integrum*, and conſider the juſt and certain Cauſes, for which Reſtitution *in Integrum* may be granted; and, in the *Firſt* Place, enquire, what is a ſufficient Fear, to cauſe Reſtitution *in Integrum*; and then ſhew what Kind of Action ariſes from that which is done on the Account of Fear.

[r] D. 4. 4. 24. 4.

[s] D. 4. 4. 1 & 2.

[t] D. 4. 6. 1.

In reſpect of Fear, let it be remember'd, That the ancient Edict of the *Prætor* was drawn after this manner; *viz.* That *that which ſhall be done thro'*

thro' Force, or on the Account of Fear, ſhall not be ratify'd. Which Form of Words *Cicero* calls *Formulam Octavianam*; becauſe the Prætor *Livius Octavius* propos'd it in his Edict; and it was uſed by all the enſuing *Prætors* 'till *Adrian*'s Time, and then it was alter'd. By *Fear*, mention'd in this Edict, we only mean a juſt and preſent Fear [u], and ſuch as may happen to a Man of Prudence and Reſolution [x], either thro' a Dread of ſome bodily Torture; the being in Danger of his Life [y]; the Fear of Bondage; Loſs of his Eſtate; ſome real Infamy; and the like: And it matters not whether he fears any of theſe Things will happen to himſelf, or to his Wife and Children, for whom he is concern'd [z]. *Bartolus* and *Baldus* think, that if there be a *Conſtat* of a light and vain Fear in the Perſon that does any Act, it is ſufficient to induce a Reſtitution *in Integrum*, at leaſt, by means of the Judge's Office [a]. *Sed Quære?* Becauſe a light and vain Fear is as no Fear at all. See how *Fear* may be inferr'd from the Nature and Quality of a Perſon, and from the Circumſtances of Things, according to *Decianus* [b], in a foregoing Title related. For ſome Perſons are more fearful than others, and Women naturally more eaſily ſtirr'd up to *Fear* than Men: And what is a light and vain Fear in a Man, may be a powerful Fear in a Woman; and conſequently, ſhe may be reſtor'd on a lighter Fear than that of a Man [c]. But a reverential Fear does not come within the Words of this Edict, unleſs ſome other Violence or Impreſſion be added thereunto [d]. Nor is the Fear of Power and Dignity alone ſufficient to induce a Reſtitution *in Integrum* [e]; nor of Menaces and Threatnings, unleſs they are utter'd by Perſons that are wont to execute the ſame.

[u] D. 4. 2. 9.
[x] D. 4. 2. 5 & 6.
[y] D. 4. 2. 7. 8 & 9.
[z] D. 4. 2. 8. fin.
[a] Bart. & Bald. in L. 14. C. 2. 4.
[b] In L. 39. D. 50. 17.
[c] D. D. In L. 14. C. 2. 4.
[d] D. 4. 2. 8. fin.
[e] D. 4. 2. 6.

Force, is that which controlls and impoſes a Neceſſity upon the Will, by ſome external Act of Violence, and which cannot be repelled [f]. He that offers Force, does at the ſame time induce Fear [g]; which was the Reaſon that the Form of this Edict was afterwards alter'd: Wherefore, Force is now comprehended under the Name of Fear [h]. By *Force*, I here mean ſuch an Act as is contrary to good Manners, and not that which is inflicted by the Magiſtrate in Purſuance of the Laws [i]. But as I have already diſcourſed of theſe juſt and certain Cauſes alledg'd for obtaining Reſtitution *in Integrum*, under proper Titles apart in this Work; I muſt, to avoid Repetition, and for Brevity's ſake, refer the Reader to theſe ſeveral Titles. Wherefore, I ſhall next conſider Reſtitution *in Integrum* in reſpect to the Want of Age, which very often happens. For the Law ſo far favours Minors, or Perſons under Age, on the Score of the Infirmity of their Mind and Underſtanding, as not being able to adviſe themſelves, that it not only reſtores them to a Thing *in Integrum*, but it likewiſe orders that the Thing ſhall be reſtor'd to them, with all the Fruits and Profits thereof [k].

[f] D. 4. 2. 2.
[g] D. 4. 2. 1. fin.
[h] D. 4. 2. 3.
[i] D. 9. 2. 29. pen.
[k] D. 4. 4. 24. 2. D. 4. 4. 27. 1. D. 4. 4. 40.

And under this Paragraph, which reſpects the Reſtitution of Minors, I muſt obſerve, that Two Things are to be proved, in order to come at an effectual Reſtitution on the Account of Nonage; *viz. Firſt*, The Perſon, who prays Reſtitution, ought to prove that he was a Minor at the Time when he ſuſtain'd an Injury [l]. And a Perſon's Age may be proved either by Witneſſes, or by Inſtruments; that is to ſay, by publick Acts, and the Regiſter-books of Mens Births, in *Latin* ſtiled *Tabulæ Cenſuales* [m]. And, *Secondly*, He ought to prove, that he has been circumvented or injured: And ſuch Injury or Circumvention may be deduced and prov'd, after the ſame manner as he proves his Age, *viz.* either by Inſtruments, or by Witneſſes [n]. But it is not neceſſary to prove, that ſuch Injury was founded upon Fraud and Deceit; for it is enough, if I ſimply prove that I have been injur'd in my Minority [o]. Minors or Perſons under twenty-five Years of Age, if they are injur'd, may be reſtor'd *in Integrum* within the *Annus Utilis*, within which Time they

[l] D. 4. 4. 7. 3.
[m] D. 27. 1. 2. 1. D. 22. 3. 29. 1.
[n] D. 22. 4. 1.
[o] D. 4. 4. 7. 3 & 7.

p C. 2. 53. 7. might pray Reſtitution p: And it was called *Annus Utilis*, becauſe this Year did not from the beginning thereof run againſt them, when they were hinder'd to ſue for Reſtitution. But at this Day it is otherwiſe; for now Minors, after they are twenty-five Years of Age, may, within four con-
q C. ut ſupra. tinued Years, pray Reſtitution, if they are anywiſe injured q. And they are call'd *continued* Years, becauſe they do immediately begin to run on continually, and without Intermiſſion, after Minors have compleated twenty-five Years of Age, whether ſuch Minors are hinder'd or not from ſuing Reſtitution. And thus a Minor had heretofore twenty-ſix Years, within which he might pray Reſtitution; which laſt Year was call'd the *Annus Utilis*: but now he may do it within twenty-nine Years; the four *continued* Years being added to his Lawful Age.

Perſons injur'd, have ſometimes Reſtitution *in Integrum* granted them, in reſpect of the whole Cauſe, if they are Minors or under Age, tho' they have been admitted to their Defence, and have juſtify'd themſelves: But ſuch as are out of their Minority, and are ſtiled *Majors*, tho' they have been abſent even in the Service of the State, ſhall not be reſtored, unleſs it be by
r D. 4. 1. 8. an Appeal, if they have been admitted to their Defence r. But a Man ought not to be reſtored *in Integrum* in a Matter of a light and modern Nature, ſo as to prejudice a Major thereby. As when I have ſold Farms and Eſtates unto a Minor, and he ſays, that he was deceiv'd in the one of them; and thereupon prays Reſtitution *in Integrum*: For in this Caſe he ſhall not
s Gloſſ. in L. 37. D. 4. 4. pr. be heard, unleſs he be willing to forego the whole Purchaſe of Sale s.

A Minor may be reſtor'd *in Integrum*, even againſt an Oath, which he has given the Defendant in a Suit; provided he proves himſelf to have been a Minor at the giving it, and that he is abuſed thereby; and this he may do either by the Help of an Exception or Replication. For Example; *Seius* being under Age, ſued *Titius* for a Debt of an hundred Pounds. *Titius*, upon *Seius*'s giving him his Oath, deny'd himſelf to be his Debtor, and ſwore that he ow'd him nothing. *Seius*, afterwards, by many Documents, found that *Titius* had taken a falſe Oath: And thus, when he ſaw himſelf abuſed and circumvented, he renew'd his former Action, by demanding the hundred Pounds. *Titius* propounded an Exception upon the Account of the Oath taken, ſaying, That no Demand ought to be made, on ſuch an Oath taken. *Seius* replied, That he was a Minor, and therefore pray'd to be reſtor'd *in Integrum* againſt this Oath. And it was held, That he ought to be reſtor'd and heard touching his Right, notwithſtanding *Titius* pleaded an Oath taken by him.

A Minor ſhall not be reſtored upon the Account of his not Appealing, unleſs he appears to be prejudiced thereby; becauſe (perhaps) the Sentence may be juſt. Nor is the bare Confeſſion of a Minor alone, in *Civil* Cauſes, ſufficient to reſtore him *in Integrum*, unleſs it appears that he has been injur'd by ſuch Confeſſion: As when he confeſſes a Debt that is not due, and the like: But in Criminal Cauſes, his Confeſſion of an Offence not committed ſhall reſtore him.

A Sentence pronounced againſt a Guardian who has not the Adminiſtration of his Pupil's Eſtate, or who has not given Caution *Rem pupilli ſalvam*
t C. 2. 41. 4. *fore*, is null *ipſo Jure*, and ſhall not prejudice his Pupil t in ſuch a manner as to require Reſtitution *in Integrum*: For where an Act is void *ipſo Jure*, the Miniſtry of the Judge is not requir'd; ſo that here there is no need of Reſtitution *in Integrum*. If a Man lends Money to a Minor, ſuch Minor is preſum'd to be injured thereby, unleſs the Lender ſhall prove that ſuch Loan tended to the Minor's Advantage: And from ſuch a Preſumption, the Minor
u C. 2. 38. 1. ſhall have Reſtitution *in Integrum* granted him u. And this Law was made in particular Hatred to Uſurers, who were wont greatly to prejudice Minors, by lending them Money. Whenever the Law would have any Thing to be

be reſtored, it is always to be underſtood, that it ought to be reſtored with the Fruits and Profits thereof [x]. Thus when a Man becomes a Poſſeſſor *malæ fidei*, and the Thing is taken from him, before he can preſcribe thereunto, he ought not to gain the Fruits and Profits thereof; becauſe ſuch a Poſſeſſor does not make the Fruits of the Thing his own [y]. All lawful Communities, and eſpecially ſuch as are for charitable Uſes, which are govern'd by Curators and Miniſters, do enjoy the Benefit of Minors: And therefore, Reſtitution *in Integrum* accrues unto them, as unto a Minor [z].

[x] D. 22. 1. 38. D. 50. 17. 173. 1.

[y] D. 6. 1. 35. ib. Bart.

[z] Bald. Conſ. 465. lib. 1.

I have before obſerved, that a Judge ought not to reſtore a Perſon, that acts on the Score of any vain Fear, but only ſuch as act thro' a juſt Fear of ſome very great Evil, which may enſue, and thro' ſuch a Fear as may happen to a Man of Prudence and Reſolution: For he that runs away on the Sight of armed Men, before they enter his Houſe, is ſaid to incur a vain Fear. But it is otherwiſe, if he ſhall run away, after they have entred his Doors: And thus of other Matters of the like Nature, touching which, ſee *Cicero*'s Oration for *Cæcina*. Though a Judge ought to be more eaſy in granting Reſtitution *in Integrum* to a Perſon deceived by his own Weakneſs, than in granting an Action, which draws Infamy after it, as an Action of Theft, and the like do; yet he ought not readily to reſtore a contumacious Perſon, in Oppoſition to a Sentence pronounced againſt him, unleſs he proves a juſt Cauſe for ſuch Reſtitution, *viz.* for that he had not Notice of the Citation, or (perhaps) did not hear the Voice of the Beadle, or did not appear, being deceived by the Artifice of the adverſe Party [a].

[a] D. 4. 1. 7.

Reſtitution *in Integrum*, is either the Revival of a Cauſe that is loſt, or elſe the Reinſtating of a Perſon in the Condition he was anciently in, or laſtly, the Reſtoring of ſome Thing to its former State. And it ought to be demanded and ſued for in that Place, where the Defendant has his Dwelling or Reſidence [b]; but, according to *Paulus*, in the firſt Book of his Sentences [c], it ought not to be decreed more than once. Nor is it wont to be granted without Hearing, and Cognizance had of the Cauſe, by ſummoning ſuch Parties, as ought to be ſummon'd, or (as we ſay) *vocatis vocandis* [d]: And it is always to be ſued for from ſome ſuperior Judge or Magiſtrate; for an inferior Magiſtrate has not the Power of granting Reſtitution *in Integrum* [e]. But by the Law made Uſe of in *England* and *Holland*, if it only concerns a Matter relating to a judicial Proceſs, it may be ſued for in the inferior Courts, as when it is ſued for againſt the Lapſe of a Day on which the Citation is made, or that it may be lawful to produce Witneſſes, after a Concluſion had in the Cauſe, *&c.* But if ſuch Reſtitution concerns the Cauſe, it is when any one deſires to be reſtor'd againſt a Contract, he ought then, according to *Zipœus* [f], to ſue for it from that Court, which preſides over the whole Province. Not only the Perſons themſelves, that are injur'd, but even their Heirs ſhall be reſtor'd *in Integrum*, if their Teſtators have been injur'd [g].

[b] C. 2. 47. 2.

[c] Sent. 7.

[d] D. 4. 1. 3.

[e] D. 50. 1 26. C. 2. 47. 3.

[f] Not. Jur. Bel. de in Int. reſt.

[g] D. 4. 4. 6. pr.

But as Reſtitution *in integrum*, is an extraordinary Remedy, it ceaſes, if a Man has any other Remedy or Means whereby he may defend himſelf [h]: And, therefore, regularly ſpeaking, that Perſon cannot be reſtor'd *in Integrum*, who has in his Abſence conſtituted a Proctor; ſince he may have an Action *ex mandato* againſt his Proctor, on the Account of his Sloth and Negligence [i], if he has been injur'd by it; and thus it has been adjudged at *Utrecht*, upon a ſolemn Argument in a Cauſe of Review [k]. I ſay *regularly*, becauſe if a Proctor has ſubmitted himſelf unto a Sentence, and has pray'd a Term, to ſatisfy the Judgment within the ſaid Term, this ſhall not affect his Client, but that he may (notwithſtanding) pray to be reſtor'd; becauſe an Action *ex mandato* does not lie in this Caſe; the Proctor's Proxy in the firſt Inſtance, being ended by a definitive Sentence in the ſaid Inſtance:

[h] D. 4. 3. 1. 1. 4. & 4. D. 4. 1. 16. pr.

[i] D. 3. 3. 42. 2.

[k] A. D. 1605

Inſtance: And in this Caſe the Proctor is not admitted to appeal without a new Proxy [l], as it has been adjudged before the ſupream Court of *Savoy*. Reſtitution alſo ceaſes, if there be not a fit and proper Cauſe for granting Reſtitution *in Integrum*: which ſeveral Cauſes I have already enumerated; and therefore ſhall here omit to ſpeak of them again. *Thirdly*, as Reſtitution *in Integrum* ceaſes, where the Matter is of little or no Importance [m], as before hinted; ſo it alſo ceaſes, if the Perſon injur'd, does not ſue for the ſame within four Years, from the Time that the Injury happen'd [n], unleſs as a Minor or an abſent Perſon cou'd not pray the ſame ſooner. In which Caſe the Term runs, either from the Time that ſuch abſent Perſon returns into his own Country, or from the Time that the Minor becomes a Major [o], as above remembred. At this Day in *Holland*, it runs from the Time that it appears the injur'd Perſon had Knowlege of the Injury, as it has been adjuged there, in a Cauſe of Review [p]. So that now it is not enough for a Minor to be a Major, but he ought alſo to have Knowlege of the Injury done him. In *Scotland* they follow the *Civil* Law, and four Years only are granted after full Age, to recover what a Minor did to his Prejudice, during his Minority. See *Mackenzy*'s Inſtitutes of the Laws of *Scotland* [q]. In *England*, by an Act of Parliament, four or ſix Years are allow'd, according to the Nature of the Action [r]. *Fourthly*, Reſtitution *in Integrum* ceaſes, when a Minor has tranſacted any Buſineſs, by the Authority and Commiſſion of his Guardian [s]: And likewiſe, it does, if a Perſon, when he becomes a Major, has approved of that which he did, when he was a Minor [t]. But yet Reſtitution ſhall be granted in the Behalf of a Minor, if he be circumvented, tho' the Tutors and Curators were preſent and conſenting to an Act, and tho' the Decree was made againſt the Minor in a judicial Manner [u]. *Note*, It is not an unſucceſsful Event, but an inconſiderate Lazineſs of the Perſon, that produces Reſtitution *in Integrum*, when a Perſon is hurt at the very Beginning of a Contract [x]. In Offences, the Law admits of no ſuch Thing as Reſtitution *in Integrum* [y] in Favour of Minors, leſt it ſhould give Encouragement unto Offenders: But yet if a Minor be deceived thro' the Frailty of his Judgment, and be enſnared by many captious Artifices, it has Compaſſion on him, and in theſe Matters is wont to mitigate the Puniſhment [z].

As ſoon as the Judge has decreed Reſtitution *in Integrum*, the Party injur'd receives his full and perfect Right, and all his Coſts and Charges, laid out on the Thing, ſhall be reſtor'd him, together with all the Fruits and Intereſt that ariſes thereupon [a]. And thoſe Perſons, who have contracted with Minors, are put into the ſame State they were in before ſuch Contract made. A Minor is ſaid to be circumvented by his own Eaſineſs and Facility, upon an Allegation made, that he has not done that which a careful and diligent Perſon ought to do. *Titius* ſold ſeveral Commodities unto a Minor, as Wine, Oyl, Corn, *&c.* and in one Part of the *Species* the Minor was deceived: And it was reſolved, that he ſhall not be reſtor'd upon this Account; becauſe from his Skill in the other *Species*, he is preſumed to have a good Judgment in Buying. Where a Minor offends or commits a Treſpaſs with an evil Intent of hurting another, he ſhall not be reſtor'd *in Integrum*, but where he commits ſuch Offence by ſome Default, as through Imprudence, and the like, he ſhall have the Benefit of Reſtitution: or thus, a Minor ſhall be relieved by Reſtitution againſt an Offence or Treſpaſs committed *per Culpam*, but not againſt an Offence or Treſpaſs committed *per Dolum*, if the Suit be criminally commenced; but 'tis otherwiſe, if it be civilly commenced [b]. A Minor may be reſtor'd againſt a Sentence, that is partly *condemnatory*, and partly *abſolutary*, in that Part wherein he is injur'd: But if the Sentence happens in the Time of his Majority, Reſtitution ceaſes [c]. If a Minor has tranſacted

[l] D.4.1.8 fin.
[m] D. 4. 1. 4. D.D.4. 3. 10.
[n] D. 4. 1. 6. C. 2. 53. 7.
[o] C. 2. 53. 7.
[p] Dec. 17. A. D. 1646.
[q] Page 45.
[r] 21. Jac. 1. cap. 16.
[s] D.4.4. 23.
[t] D.4. 4. 3. 1.
[u] C. 2. 25. 2.
[x] D.4.4.11.2 & 5.
[y] D. 4.4. 37. D. 4. 4. 9. 2.
[z] D. 4. 4. 37. D. 50. 17. 108.
[a] D. 4. 4. 24. pen.
[b] C. 2. 35. 1.
[c] C. 2. 27. 1.

tranſacted the Buſineſs of another Perſon, without a Mandate or Proxy, he may in this Caſe be reſtor'd *in Integrum*, leſt another Perſon ſhould be damnify'd by him: But if he will not be thus reſtor'd, he may be conven'd *for Buſineſs done*, and being conven'd, he ſhall be compelled to quit the Benefit of Reſtitution, *in Integrum* [d]. Hence, it appears, that tho' Minors may ſometimes be relieved, in reſpect of their own Acts; yet this is not always true: For if it were, they would be deprived of all human Commerce and Dealing; ſince no one would be willing to contract with them; and this might be a great Prejudice to them, in Regard to the Neceſſaries of Life.

[d] D. 4. 4. 24.

TIT. XLII.

Of Ambaſſadors, *and the Rights and Privileges granted to them, and to other Foreign Miniſters reſiding in a Country; the Nature of their Office; their Admiſſion, or Non-admiſſion by Princes and States; their reſpective Precedency had of each other, after they are received; the Right of Detaining and Impriſoning them, for publick Crimes committed againſt the Sovereign Majeſty of the Prince or State unto which they are ſent,* &c.

IN treating of Ambaſſadors, and other publick Foreign Miniſters, and alſo of their Rights and Privileges, *&c.* I ſhall here, in the firſt Place, for a better Underſtanding of this Matter, explain by ſome Deſcription or Etymology, what I mean by the Word *Ambaſſador*, in the Purity of the *Latin* Tongue, commonly known by the Name of *Legatus, ab eligendo*; becauſe, in the Time of the *Roman* Commonwealth, their Ambaſſadors were wont to be choſen and elected to this high Office, by the publick Voice of the *Roman* Senate. *Varro*, in his Treatiſe *de Lingua Latina* [e], obſerves, that the Word *legare* and the Word *mittere* have each of them the ſame Signification, and that the firſt of them is ſo called *à legendo*: So that an Ambaſſador ſignifies both a Perſon choſen, and a Perſon ſent. In ſome of our ancient *Civil* Law-books (indeed) and even among ſome of the *Roman* Hiſtorians and Poets too, we meet with Ambaſſadors under the Appellation of *Orators*, *Nuncio's* and *Interpreters* (in *Latin* ſtiled *Oratores* [f], *Nuncii & Interpretes*); but, according to the Criticks, very improperly: For in a ſtrict and legal Senſe of Words (ſay they) thoſe Diſtinctions ought only to be apply'd to Perſons in reſpect of the particular Nature of the Employment in which they acted, when they were ſent Abroad for the Management of ſome publick Buſineſs. As for Example;

[e] Lib. 4.

[f] D. 48. 6. 7.

Thoſe Perſons are ſtiled *Oratores*, who were delegated and ſent abroad, to argue and plead ſome particular Cauſe of the State with a Foreign Prince or Commonwealth: And, for this End and Purpoſe, heretofore, the *Romans* elected the moſt eloquent Perſon to adminiſter the Office and Province of ſuch an Ambaſſador. *Budæus* ſays, that an *Orator* differs from an Ambaſſador; for that he, who came *ad orandum*, to intreat, and the like, was ſtiled by the Name of an *Orator*: But the learned *Albericus Gentilis*, in his Treatiſe of *Ambaſſadors*, diſapproves of this Reaſon, as being repugnant to the Uſage of ancient Authors, who tell us, that an Ambaſſador was ſome-

times called *Legatus*, and ſometimes ſtiled *Orator*. By the modern Uſage of this Political Term, we do not call every Ambaſſador by the Name of an *Orator*, but only the firſt and chiefeſt Ambaſſador of the greateſt Kings and States alone. Thus the Emperor's Ambaſſador at the *Porte*, that is to ſay, at the Court and Palace of the great *Turk*, is by Way of Excellency termed *Orator*. The *Venetian* Ambaſſador to the Emperor, Pope, *&c.* is ſtiled after the ſame Manner. And he is ſaid to be an *Orator*, who is the Head and Chief Perſon of the whole Embaſſy, as *Augerius Busbequius* was in the Reign of *Ferdinand* the Emperor, whoſe elegant Epiſtles, touching his Journey to *Turky*, are ſtill extant. And,

Thus, for the ſame Reaſon alſo, as I ſuppoſe, thoſe Perſons were ſtiled *Nuncii*, or (as we ſay in *Engliſh*) *Nuncios* or *Envoys*, who were ſent to deliver ſome ſpecial Meſſage of the Senate, without further Authority, to act or debate in the Matter, about which they went; much like unto our Envoys or Ambaſſadors of *Condoleance*, *Congratulation*, and the like. An Ambaſſador is diſtinguiſhed from what we here call an *Envoy* or *Nuncio*, not only becauſe a *Nuncio* is ſent without any Solemnities, and uſually paſſes between Friends, without any Pomp or Noiſe, but becauſe he is ſent in a private Manner about private Buſineſs; and, *laſtly*, becauſe he comes from ſuch as have not the Power of ſending an Ambaſſador. Thus *Livy*, diſcourſing of the *Carthaginians*, informs us, that they ſent *Aſdruval* and *Syphax* by Letters and *Nunciatures*, as Friends and Collegues, and private Monitors, without any Solemnities; and (at length) they ſent by Ambaſſadors as publick Magiſtrates, and uſed their publick Authority. Nor had *Turnus* the Power of ſending an Ambaſſador (as ſome will have it) but only a *Nuncio* or private Meſſenger, becauſe he fought under the Command of King *Latinus*, though otherwiſe an independent Prince of himſelf: But it appears from *Virgil* (I think) that this Meſſage was ſent, not by the private Authority of *Turnus*, but by the publick Order of *Latinus*, as that excellent Poet ſubjoins in the following Verſes, *viz.*

Æneas acuit Martem, & ſe ſuſcitat ira
Oblato gaudens componi fœdere Bellum, &c.
Regiq; jubet reſponſa Latino
Certa referre Viros, et Pacis dicere leges.

Thirdly, There were ſome Perſons, that were ſtiled *Interpreters*, whoſe ſole Buſineſs and Commiſſion it was (by Way of Interpretation) to adjuſt the Meaning of ambiguous Alliances, Leagues, and other national Contracts referr'd unto the Determination of the *Roman* Empire. They had likewiſe the Interpretation of all Mandates, Commiſſions, Words and Sentences, without the Solemnity of a Miſſion, and the Right and Power of an Embaſſy. But at preſent, he is ſtiled an *Interpreter*, who is aſſign'd and given to an Ambaſſador, for the ſake of interpreting Languages among Foreigners: And it was, heretofore, the ſame Thing among the *Romans*, in the like Caſe. For we read, that *Cato* had an Interpreter join'd to him, when he was ſent Ambaſſador unto the *Greeks*; for that he did not then underſtand the Pronunciation of the *Grecian* Language. And, in an Embaſſy from the Emperor to the Landgrave of *Heſſe-caſſel*, there came in that Ambaſſador's Retinue, an Interpreter to the Court of Prince *Maurice*, who tranſlated the Anſwers of that illuſtrious Prince into *Greek* and *Italian*, and interpreted them to the *Perſian* Ambaſſador.

And now, ſince I am upon the Buſineſs of Etymologies, or rather the Signification of Words, I deſire Room to add the Original of that of an *Ambaſſador*, in our modern and barbarous *Latin* call'd *Ambaſſiator*; and ſometimes *Ambaſchiator*, from the *German* Word *Ambachten*, which, *Lindenbrogue* ſays, ſignifies a Miniſter, or one employ'd in the Service of a Maſter.

But

But others will have it to be derived from the old *French* Word in *Cæſar's Commentaries*, call'd *Ambactus*, denoting a Servant or Vaſſal: And from hence, in the *Baſil* Edition of the *Salique* Laws, we may find it thus recorded, *viz. Si in Dominicâ Ambaſchiâ fuerit occupatus*; meaning, *If he ſhall be employ'd in the Service of his Maſter:* Which another Edition of thoſe Laws mentions, with a various Reading, in this manner, *viz.* If he ſhall be employ'd in *Juſſione Regis*, or in Obedience to the King's Command. So that an Ambaſſador, according to the bare nominal Deſcription of him, is one who bears in Truſt, and executes the Commands of his Sovereign and Maſter.

But this Account does not ſufficiently give us an adequate Idea, or perfect Notion of an Ambaſſador. Wherefore I ſhall, in a large Senſe of the Word, define him to be a Perſon ſent Abroad by ſome Sovereign Prince or State, with a legal Commiſſion, and proper Inſtructions, for the Diſpatch of Buſineſs relating to the publick Weal of the Country from which he is ſent, to be tranſacted by him, in a peaceful and amicable Manner, with that Prince or State unto which he is ſent; *viz.* to conduct and manage the *Arcana imperii*, which cannot with Safety be committed to common Expreſſes, and Letters ſent by Couriers: And from hence the Uſe of Embaſſies and Legations firſt began, and ſeems to be neceſſary. I ſay, *a Perſon ſent Abroad by ſome Sovereign Prince or State*; becauſe Ambaſſadors are only ſent by ſuch as are veſted with Sovereign Power and Authority, and, by this Means, have the Right of Legation: The Power of ſending Ambaſſadors, entirely depending on the Right of Majeſty. 'Tis true, the Princes and Electors of *Germany* have of late obtain'd the Privilege of diſpatching and receiving Envoys, and other Miniſters of the like Nature; but then it is only by a *ſecondary* Right. And 'tis obſerv'd, That they who have the Power of ſending Envoys or Ambaſſadors by a *ſecondary* Right only, do not ſend them *pleno Jure*, with an univerſal or general Power, namely, with a Commiſſion to treat of, and conclude Matters relating to the whole *German* Empire *collectively*: But that Power is limited, and only reſpects ſuch Affairs as belong to their own peculiar Territories, and not to the State of the Empire. And the *Hanſe-Towns* may act in the ſame manner, by claiming the like Privileges; for they being Free Imperial Cities, do partake of the ſame Regalities, either by Preſcription, or by Grants from former Emperors, whoſe Neceſſities (perhaps) compelled them to part with thoſe Gems of the Imperial Crown. And, generally ſpeaking, for the moſt Part, they ſend two Perſons for their Deputies or Ambaſſadors; the one a Perſon of high Birth and Quality, who has been a Soldier, to maintain Reſpect and Decency; and the other a Perſon or Doctor well skill'd in the *Civil* Law, to manage the Affairs of the Embaſſy with Learning and Judgment.

Again: Ambaſſadors, properly ſpeaking, are only ſent to a foreign Prince or State, that is endued with the like Sovereign Power and Juriſdiction with themſelves, and is in nowiſe tributary to any Superior Authority: For if there be not this Parity of Power between the Perſon ſending, and the Prince or State unto which Ambaſſadors are ſent, the Embaſſy is entirely void, and of no Effect; ſince, in Propriety of Speech, they that are appointed by a Prince of an inferior Juriſdiction, are rather call'd *Agents* or *Reſidents*, than Ambaſſadors, by the *Civil* Law: tho' this Diſtinction does not much obtain at this Day, as I ſhall ſhew hereafter, in diſcourſing of the ſeveral modern Titles of foreign Miniſters. Wherefore, we never give that of an *Ambaſſador* to any of the Miniſters ſent by the aforeſaid *German* Electors, and the like Powers: For an Ambaſſador is a Perſon who repreſents the publick Character and Dignity of the Prince that ſends him Abroad; and he is, in ſome reſpects, like unto the Perſon whom

whom the *Civil* Law ſtiles a *Mandatary*; an Embaſſy being a *Species* of Commiſſion, in *Latin* termed *Mandatum* g. So that an Ambaſſador, Envoy, and the like, is a *Mandatary* ſolemnly ſent by his Prince or State, having the Power of making an Ambaſſador, and the like, for the Diſpatch of publick Buſineſs. For the Form of an Embaſſy conſiſts herein, *viz.* *1ſt.* That the Perſon be both *ſolemnly* and *juſtly* ſent; that is to ſay, he muſt be ſent by him who has the Right and Power of ſending Ambaſſadors: And, *2dly*, He muſt be ſent on the publick Buſineſs of the State. But herein an Ambaſſador differs from a Mandatary of *private Right*; becauſe this laſt is ſent by a private Perſon, and his Mandate or Commiſſion is for private Adminiſtration. And tho' an Ambaſſador, Envoy, Agent, and Reſident be the ſame; if we only conſider the Duty of their Functions and Employments in the general: yet in this they differ. For that an Ambaſſador repreſents the Greatneſs of his Maſter, and his Affairs; whereas an Agent or Reſident only repreſents the Charge of his Affairs. And as Agents are generally made uſe of, where and when there is ſome Suſpicion that the Envoy or Ambaſſador will not be honour'd as he ſhould be; and therefore, it has been uſual, of late Years, for the Kings of *France* to have no Ambaſſadors at the Emperor's Court, but only Agents, becauſe of the Competition for Precedency betwixt Him and *Spain:* So are Reſidents often ſubſtituted, upon an Envoy or Ambaſſador's leaving any Prince's Court, 'till either the ſame Envoy or Ambaſſador returns, or ſome other be appointed or ſent in his Stead.

g D. 17. 1. per tot.

But as, by the Law of Nations, no one under the Degree of a Sovereign Prince can name or ſend any Perſon in the Quality of an Ambaſſador: So, on the other hand, no Subject can ſend or receive an Ambaſſador, be he never ſo great and powerful, as juſt now remember'd and inferr'd from that Parity of Power which ought to be between the Perſon ſending, or the Prince or State unto which Ambaſſadors are ſent: And if a Viceroy ſhall preſume to do it, it is no leſs than High Treaſon in him. And thus it was declared, when the *Scots*, without conſulting their Prince, ſent *Lowden* and others ſecretly in the Quality of private Commiſſioners, to treat with the *French* King *Lewis* XIII. in the Name of the whole Nation, for his Aſſiſtance againſt the *Engliſh:* And the *French* King would not receive or admit them to an Audience. And thus did Queen *Elizabeth*, when *Chriſtopher Aſſonville* came into *England* in the Character of a foreign Miniſter of State, ſent from the Duke of *Alva* then Governor of the *Netherlands*, refuſe to admit him; becauſe he had no Commiſſion or Credentials from the King of *Spain*. And *Grimſton*, in his Hiſtory of *France*, aſſures us, That the Trumpeter, who brought Letters from the Maid of *Orleans* to the Earl of *Suffolk*, was burnt; becauſe he did not come from a lawful Prince, nor from one commiſſion'd and impower'd to ſend an Herauld or Trumpeter.

The *Roman* People, indeed, received Ambaſſadors from their Subjects, and from thoſe who paid them Tribute; which Miniſters were often diſtinguiſh'd under the Titles of *Municipal* and *Provincal* Legates. And in *Italy*, even at this Day, there are ſome Towns, which are in Subjection, that have the Power preſerv'd to them, of ſending Deputies, under the Character of Ambaſſadors, to Sovereign Princes unto whom they are ſubject, and yield Obedience: As for Inſtance; the Town of *Bologna* and that of *Ferrara* ſend Ambaſſadors to his pretended Holineſs the Pope; and the Town of *Meſſina* ſome Time ſince ſent Ambaſſadors to the King of *Spain*. There are alſo ſome Towns in the *Netherlands*, whilſt under the *Spaniſh* Dominion, which had this Pre-eminence continu'd to them by *Grace* alone. But then theſe pretended Ambaſſadors had only an honourable Name, and empty Title, without enjoying the Rights and Privileges appertaining to real Ambaſſadors, and the Envoys of Sovereign Princes and States.

And

And 'tis probable, that this Similitude of Name has given Occaſion of Error to many Lawyers, not thoroughly vers'd in the Prerogative of Sovereign Princes, in relation to Ambaſſadors, whereby they have confounded the Rights of Princes with what they find in the *Civil* Law; believing, that Ambaſſadors are ſubject to the Juriſdiction of that particular Country where they reſide, without conſidering the Difference there is or was between the Ambaſſadors which the *Romans* received from their Towns, Provinces, and Colonies paying them Tribute, and the Ambaſſadors of independent Princes and States, who repreſented their Principals in all the Countries unto which they are and were ſent. For here 'tis to be obſerv'd again;

That in all the *Roman* Law, thoſe Perſons that were ſent by *Hanſe* Towns and Cities, in Subjection to the *Roman* Commonwealth, were not properly ſtiled *Ambaſſadors*, but frequently known by the Name of *Commiſſioners*, *Deputies*, and *Syndicks*, as being at this Day diſpatch'd by them to explain and lay open the Requeſts of the Common-Council of ſuch Cities. And theſe Deputies and Syndicks were not always ſent to Princes or foreign States, but ſometimes even to private Perſons: And their Privileges were not of the ſame Stamp with thoſe of Princes Ambaſſadors; becauſe Towns and Cities have not a *Jus Publicum*, unleſs they be free and exempt from a ſuperiour Power and Juriſdiction. Yet theſe *Municipal* or *Provincial* Legats, being ſent to *Rome* to repreſent the Affairs of their Councils and Provinces, had many eminent Rights and Privileges allow'd them in common with Princes Ambaſſadors: As likewiſe had the Deputies and Syndicks of large and populous Cities, which I ſhall have a better Opportunity hereafter to enquire into in another Place under this Head. And therefore, becauſe there were many Perſons in theſe Towns and Cities, who ſolicited Legations of this Kind, more for the ſake of ambitious Ends and Purpoſes, and rather on the ſcore of ſerving themſelves, than bringing any Advantage to the Publick thereby, it was ordain'd and provided by an Imperial Conſtitution, [h] That Cities and Towns ſhould not ſend Ambaſſadors to Princes, unleſs they were ſent by the Conſent of the Common Council, and the intervening Authority of the ſuperior Magiſtrate in ſuch Town or City preſiding in Council [i]. And 'tis to be noted, That, in this Council, the Conſent of abſent Perſons was not held neceſſary, whether they were abſent on the account of Sickneſs, or hinder'd from coming thither by the means of ſome inexcuſable Exigency: But that Act was confirm'd, and look'd upon to be of ſolemn Authority, which had the Aſſent and Conſent of the greater Part preſent [k]. For avoiding all Occaſions of Ambitions among ſome Men, that in Towns and Cities conſult more their own private Advantage than the publick Good, a Law was enacted, That none ſhould be employ'd in Embaſſies, who were Candidates for this Employment only for the ſake of their own Advantage. Nor ought Perſons that are Debtors to the State or Commonwealth, and to whom Poſtulation is forbidden, to be choſen or ſent as *Provincial* or *Municipal* Ambaſſadors: But, notwithſtanding this Law, Fiſcal Debtors might be appointed Ambaſſadors [l]. In like manner, among theſe Towns and Cities, Perſons in their Abſence might be conſtituted Ambaſſadors, and their Commiſſions were ſent them by their Council. For the *Romans*, in the Choice and Creation of their Ambaſſadors, were, for the moſt Part, ſtrict Obſervers of Order; and no one was oblig'd to diſcharge this Office, unleſs he had been firſt choſen into the Office of a *Curialis*, and had firſt undergone the chief Office in ſome Ward. And he who took on himſelf the Office of a *Municipal* or *Provincial* Ambaſſador, and going to *Rome*, executed the ſame, was not to intermeddle in the Affairs of other Men, nor to buſy himſelf in his own Matters, as in commencing Law-ſuits [m], *&c.* But this Law does not ſeem

[h] C. 10.31.16.

[i] C. 10.63.6.

[k] C. 10.63.5.

[l] D. 50.7.4 pr. 1 & 2.

[m] D.50.7,8.2. D. 50.7.15.

to comprehend the Perſon, who gave his Advice *gratis*, and acted in Participation with his Friend, the *Prætor*.

They undertook their Embaſſies, either at their own Expence, and then
[n] D. 50. 7. 11. they aſſigned Vicars [n]; or elſe they received the Expences of their Journey from the Publick, which was called *Legativum*; and then they could aſſign
[o] D. 50. 7. 4 3. no other, but their own Children [o]. If ſuch a Perſon died in the Office of his Embaſſy, the *Legativum* was not refunded by his Heirs, but deſcended to
[p] D. 50. 7. 10. them [p]. As Debtors to the State, and infamous Perſons could not execute the Office of Ambaſſadors: ſo there ought not more than three Perſons to be employ'd as Ambaſſadors to any one Court, at the ſame Time, unleſs
[q] D. 50. 7. 4. 6. the Dignity of the Embaſſy requir'd it [q]. And as a *Municipal* or *Provincial* Ambaſſador at *Rome* could not implead another, as juſt hinted; ſo neither could he be impleaded himſelf, leſt the Suit ſhould be an Hin-
[r] D. 50 7. 3 & 12. drance to the Buſineſs of the State [r]. And thus much, touching theſe Kinds of Ambaſſadors peculiar to the *Romans*, who according to the *Civil* Law might be compelled to undertake this Office, eſpecially within the Bounds
[s] D. 50. 1. 24. 1. of the *Roman* Empire. See *Bartolus* on the *Digeſts* [s]. But the *Romans* had likewiſe other Kinds of Ambaſſadors, whom they ſent unto their Allies and other Foreign Courts, of which I ſhall next ſpeak.

There are two particular Times or Seaſons, which all States and Empires have to deal in: The firſt being called a Time of Peace, and the other a Time of War. So that whatſoever Matters are managed in a Commonwealth, may fitly enough be divided according to theſe Seaſons: There being ſome Things, which relate to the Buſineſs of Peace, and others that belong to the Offices of War. Now, according to this Diverſity of Affairs, there are two Kinds of Ambaſſadors; the one of them for tranſacting the Buſineſs of the State in Times of Peace, as the other does in Times of War. The *firſt* of theſe are properly ſtiled *Legates*, and do in a particular Manner reſerve unto themſelves the Name and Title of Ambaſſadors; and are admitted to all thoſe Offices, that may happen in Time of Peace. The others are thoſe that are ſent Abroad, either to denounce and declare War, or elſe to put an End to a War already declar'd by ſolemn Leagues and Treaties; or elſe, *thirdly*, to demand thoſe Things, which have been taken away from us by Force of Arms: And theſe were by a particular Name in *Latin*, termed *Feciales*; and in *Engliſh* ſtiled *Heraulds*; tho' the two laſt of theſe two Offices, *viz.* to put an End to a War by ſolemn Leagues and Treatiſes, *&c.* now come under the modern Appellation of *Plenipotentiary* Ambaſſadors.

Embaſſies in Time of Peace, in *Latin*, called *Togatæ Miſſiones*, may be made for ſeveral Ends and Purpoſes: Which yet we may reduce to theſe two chief Heads or Kinds, *viz.* they may be undertaken, either on the Account of ſome Buſineſs to be done; or elſe on the Account of ſome Honour or Compliment to be paid, as already related: The Word *Negotium*, which here ſignifies *Buſineſs*, is a *Civil* Law Term, and includes all thoſe Acts which are comprehended within the Verge of human Society. But here, in a ſtricter Senſe, it is taken for all thoſe Treaties and Tranſactions, which Ambaſſadors perform and do in their own Name, in the Behalf of the Commonwealth. As when ancient Leagues and Friendſhips are renewed between Princes and Kingdoms; when new Alliances and Marriages are made between Kings and Empires; when Aid and Confederacies are deſired againſt ſome more powerful Prince or State; when Methods are entred into, for adjuſting and defending the Limits of their Dominions againſt ſome Invader, and for propagating and extending the ſame; when Counſels and Deliberations are taken about Trade and Commerce; and, *laſtly*, about all ſuch Matters as tend to the Good of the Community. Embaſſies are alſo ſometimes undertaken, *Honoris Gratia*, *viz.* to exhibit only ſome friendly Compliment,

Compliment, or ſome honourable Piece of Reſpect to the Prince or State, unto whom ſuch an Embaſſy is ſent: As when Ambaſſadors are ſent to congratulate a Prince upon ſome Victory obtain'd; ſome new Marriage contracted; upon the ſafe and happy Delivery of ſome Lady of the Blood-royal; and the like. Thus *Choſroes* King of *Perſia* is ſaid to have ſent an Embaſſy of Congratulation unto the Emperor *Juſtinian*, on his Victory obtain'd in *Africa* *: And the *Carthaginians*, who were wont to congratulate the Conquerors on their Succeſs in the Wars, ſent the like Embaſſy to *Rome*, *Honoris Gratia*, on the Conqueſt of the *Samnites* †. Some Perſons called theſe Embaſſies by the Name of *Officions Embaſſies*, becauſe they were made *Officii Gratia*: But herein they were miſtaken, ſince an Embaſſy of *Office* ſeems to be one thing, and an Embaſſy of *Honour* ſeems to be another. For this laſt Thing is entirely ſpontaneous, and (as the Schoolmen ſay) an Act of meer Will: But the other is an Act *coactæ Voluntatis*, and is reſented if it be not perform'd. The laſt has nothing in it but a bare and naked Declaration of Friendſhip and Kindneſs, which may by ſome Kind of Right oblige the Perſon, who ſends ſuch an Embaſſy: But the former, *viz.* that of *Office*, has ſuch an Obligation going along with it, that it may be lawfully demanded and requir'd, if it ſhould be omitted. All our Annals and Hiſtories are full of theſe Kinds of Embaſſies: But, among the *Romans*, Embaſſies of *Office* were conſtantly ſent unto the Emperors, from the Provinces depending on the *Roman* Commonwealth, *to rejoice with them that rejoice*, and *to weep with them that weep*.

* Procop. Hiſt.

† Liv. Hiſt.

Now Ambaſſadors or Envoys ſolemnly ſent by oue Sovereign Prince or State, unto another of the ſame Quality or Condition, are in two Capacities, *viz.* either *Ordinary* or *Extraordinary*. Ambaſſadors in Ordinary, which are ſometimes ſtiled *Lieger* Ambaſſadors, are ſuch as are commanded to ſtay and reſide in the Place whereunto they are ſent, till ſuch Time as they receive Letters of Revocation from the Prince or State that ſent them: And as the Time of their Return is indefinite, ſo is their Buſineſs likewiſe uncertain, as ariſing from emergent Occaſions; and it commonly concerns the Protection and Affairs of Merchants, which, generally ſpeaking, is, and ought to be their greateſt Care. And becauſe ſuch Ambaſſadors are in ſome meaſure Perſons, whoſe Buſineſs it is alſo to explore, and with Diligence to enquire into the Affairs and Tranſactions, which are handled and treated of in the State or Kingdom whereunto they are ſent, they are therefore generally leſs acceptable to thoſe Princes and States to which they go as Envoys or Ambaſſadors, as *Alberie gentilis* well obſerves in his Treatiſe of Ambaſſadors [t]; as being looked upon as Spies.

[t] Lib. 2. c. 12.

Ambaſſadors or Envoys *Extraordinary* are thoſe, that are employ'd upon ſome particular great Affairs: As Condolements, Congratulations, Overtures for Marriage, *&c.* if I may be allow'd to repeat what I have already mention'd. And tho' they are of greater Honour and Dignity than others, yet their Office only laſts for a Time certain, that is to ſay, for the Diſpatch of that particular Buſineſs they are ſent about. Their Equipage is generally very pompous, ſplendid and magnificent: And as they are only for a Time, they may return Home without requeſting Leave, as ſoon as they have performed the Buſineſs of their Embaſſy, unleſs their Commiſſion contains ſome reſtraining Clauſe. I have before obſerved, theſe are ſometimes ſtiled Ambaſſadors of *Office*, and Ambaſſadors of *Honours*. For that the Prince is oblig'd to make the firſt, on the Account of ſome Duty to be perform'd by him, as an Embaſſy at this Day from the Emperor of *Germany* to the Pope, upon every new Creation or Succeſſion of an Emperor in reſpect of the Kingdom of *Naples*; and from the King of *Sicily* in reſpect of this Kingdom alſo: Both of theſe Kingdoms, according to *Guiccardin*'s Hiſtory, being held in Fief from the Pope. The Embaſſy on the Account

count of Honour, though it does not ſeem ſo entirely neceſſary: Yet it ought not to be omitted, leſt it ſhould adminiſter Grounds of Jealouſy, and a Foundation for a Difference between Princes and States. For ſuch an Embaſſy is a Kind of Teſtimony of mutual Amity and Friendſhip between them, eſpecially when it is uſed and practiſed to Princes on their Inauguration and new Acceſſion to the Throne. An Embaſſy *propter Negotium*, is that, which is undertaken for the Sake of a Marriage-contract, or to demand and pray Succours, and the like.

As to the perſonal Abilities and Qualifications of an Ambaſſador, Envoy, Agent, and the like, to be choſen and ſent Abroad; that Matter reſts entirely in the Judgment and Opinion of the Prince or State, that ſends him: whoſe proper and peculiar Intereſt it is, to make Choice of ſuch only for Ambaſſadors, Envoys, *&c.* as are conſpicuouſly renown'd for their Prudence, Probity and Fidelity, and well vers'd in the *Civil* Law, and in all Sorts of Hiſtory; weighing with Judgment all the Circumſtances of Action and other Affairs therein repreſented, and eſpecially ſuch as relate to the Countries whereunto they are reſpectively ſent: By which Means they make themſelves acquainted with the Conſtitution and Eſtabliſhment of Eſtates, the Limits and Bounds of that Kingdom where they are to reſide, the Genealogies of its Princes, and of others with whom it has to do. And, moreover, Ambaſſadors will hereby become better acquainted with the Pretenſions of ſeveral Kings and Princes made upon the Eſtates and Territories of others. Ambaſſadors ought alſo to know the Number of their Forces, the Extent of their Revenues, and the Strength of their Alliances with Foreign Potentates.

In Point of Prudence, an Ambaſſador ought to be reſolute and couragious in what he has once wiſely deliberated on, ſecret in Affairs of Importance, and diſcreet in his Speech and Behaviour; no Detractor or evil Speaker of any King or State whatſoever, but more-eſpecially of him or them, with whom he reſides: He muſt ſpeak freely of his Maſter's Pretenſions, if there be any Occaſion to aſſert and maintain the ſame. Furthermore, Prudence in an Ambaſſador conſiſts in an excellent *Genius* of Wit, whereby he may with Elegance and Subtilty propound and give an Anſwer to all Matters and Queſtions put to him, tranſacting them (as we ſay) *ſolerti Judicio.* An Ambaſſador ought alſo, in Point of Prudence, to be careful, that he be not in the leaſt guilty of any Exceſs, through Intemperance; becauſe the Sayings and Actions of Ambaſſadors are naked and expos'd to the Judgment and Cenſure of all Perſons, in the Country where they live and reſide.

Under *Probity*, I comprize Truth and Sincerity, by Reaſon of the Prince repreſented: So that an Ambaſſador ought to affirm nothing but what he has explor'd, and does certainly know to be true; in Oppoſition to that witty Definition of an Ambaſſador, made by Sir *Harry Wooton*, *viz.* that he is a Perſon ſent abroad, *mentiendi Cauſa*, for the ſake of telling Lyes, *&c.* This Kind of Probity gives Weight to his Adminiſtration, and makes him regarded in all Conferences with other Miniſters: But he is not hereby obliged to diſcover the whole Drift and Deſign of his Miſſion, but may artfully conceal the ſame. For, ſays *Octavius Mag.* [u]. It is the Office and Duty of an Ambaſſador to act *ex animo*, *viz.* with Integrity, and to do all Things with Sincerity: conſidering the Character of the Prince his Maſter, who commits all Things to him. Under *Probity*, we may reckon *Fidelity*, or the not betraying his Maſter's Intereſt and Secrets; for that brings Contempt and Ruin on the Prince that ſends him, and often endangers his own Head; for all Princes hate a Traitor, tho' they make uſe of him. By *Modeſty*, which is another good Ingredient in the Character of an Ambaſſador, he will more eaſily accompliſh his Wiſhes, and obtain his Demands, than by a rude and inſolent Behaviour.

[u] Lib. 1. c. 2.

Eloquence,

Eloquence, which has given the Name and Title of an Orator unto an Ambaſſador (as aforeſaid), is ſo neceſſary to him, that he cannot be an accompliſh'd Perſon in his Buſineſs without it. For all the other Ornaments of Learning, and the Force of *Genius*, lie buried and concealed, without the Light of Rhetorick, and a perſwaſive Eloquence, whereby we inſinuate ourſelves into the Minds and good Opinion of Men. For as there is no Uſe of a hidden Treaſure, or of concealed Muſick; ſo the moſt perfect Knowledge of Things is of no Advantage to Men, unleſs they can expreſs themſelves handſomely, and let the World ſee that they are Maſters of all that Knowledge they profeſs, by a ready and flowing Eloquence. Add hereunto, it is ſaid, That there is nothing that ſo powerfully Lords it over the whole World, as this Goddeſs, which we make uſe of as the *Delphick* Sword, to ſubdue and obtain all Things, which we undertake, with Succeſs.

By ancient Inſtitutions, the *Egyptians*, *Perſians* * and *Romans* made uſe of Interpreters in all their Embaſſies, and would never ſuffer any Ambaſſador to approach their Perſons, but by an Interpreter; for the State and Grandeur of their Dignity requir'd it †. This Office *Philotas* made uſe of, as we may read in *Quintus Curtius* ||, who was upbraided thereupon, for that being a *Macedonian* born, he was wont to give Audience unto Men, by an Interpreter of his own Language. An Ambaſſador ought to have Audience, and to publiſh his Embaſſy in the Language of the Country whoſe Ambaſſador he is.

* Herod. Lib. 6.

† Plin. de Trajan.

|| Lib. 6.

Thus, in like manner, an Ambaſſador ought to be a Perſon acceptable to the Prince or State unto which he is ſent, and in no wiſe hated or irkſome thereunto: For Affection has a powerful Influence and Command over every Perſon, and ſuch is the Force of Benevolence, eſpecially in reſpect of Ambaſſadors, that a Suitor, who has the Art of Pleaſing, has already obtain'd his Suit as ſoon as it is made evident: ſo that a Perſon, that is offenſive and grievous, ſeldom obtains thoſe Things that are juſt and reaſonable. And thus, as it is not adviſeable to ſet an odious Magiſtrate over a State or City, or a hateful General over an Army; ſo ſuch Perſons as go Ambaſſadors with an ill *Omen*, and are likely to prove offenſive or unacceptable to the Powers to which they are ſent, ſeldom obtain their Ends, or any Good to the State that ſends them. If the Perſon be diſpleaſing, his Speech, Opinions and every Thing elſe become ungrateful: For we are apt to think, that nothing can come friendly and in a profitable manner from the Hand of an Enemy, how kind and favourable ſoever it may appear to be at firſt View. Thus if a Prince makes Courtſhip to another State, on the Part of his Daughter, by an Ambaſſador advanced in Years; and by one, who by Imbecility, has loſt all the graceful Carriage of his Perſon, it is certain that the Nymph will not ſo much regard him, as if ſuch Perſon was of a florid Age, and mercurial Temper of Body and Mind, who thus repreſents and pleads the Cauſe of Love.

Tacitus aſſures us, by many Examples, that a Prince may often obtain that by Ambaſſadors, which he cannot obtain and procure in his own Perſon and by himſelf: And, therefore, it well becomes him to make choice of fit and proper Perſons for his Ambaſſadors; not ſuch as are moroſe and ſurly. For he that asks a Thing, which is Diſpleaſing, is not only not heard, but is often rejected with Scorn and Contempt, as being arrogant in his Demands; and can never ask again. Wherefore, let an Ambaſſador endeavour to render himſelf amiable and courteous, that he may gain upon the Affection of the Court which receives him, and do his Maſter's Buſineſs with Juſtice, Moderation and Temper.

Theſe Ambaſſadors are ſent to Princes in Amity and Friendſhip: But to Enemies, the *Romans* ſent ſuch Perſons as we in *Engliſh* ſtile *Heraulds*, and

the *Latins* called *Feciales* and ſometimes *Caduceatores*, as already remembred. And theſe were ſuch as were verſed in Craft, and well acquainted with military Affairs; and could thereby ſearch and penetrate into the Deſigns and Counſels of the Enemy. But, I think, Men of hot and fiery Tempers ought to be in nowiſe ſent on ſuch Errands as theſe; For ſuch Spirits will rather ſerve to renew the War, than compoſe and adjuſt Differences between Enemies. Some Stateſmen and Politicians have made it a Queſtion, Whether Foreigners can be ſent in Embaſſies, or not? And ſome ſay, even to thoſe Princes, in whoſe Dominions they were born. Cardinal *Pool* being declar'd a Traitor by the Government in *England*, did thereupon fly to *Rome* for Sanctuary and Protection; and leſt the Pope ſhould be obliged to ſend him Home, he ſent him as his *Nuncio* or Ambaſſador to the *French* King, of whom the King of *England* demanded his Subject: But he did not prevail becauſe he was there as an Ambaſſador [x]. But touching the Protection of Ambaſſadors, I ſhall have Occaſion to ſpeak by and by.

[x] Cok. 4. Inſt. fol. 153.

But tho' Foreigners may be ſent as Ambaſſadors; yet, ſurely, it is of far greater Prudence and Safety to ſend Natives, who have had their Education chiefly in their own Country, and who are not ſo eaſily perverted with Gifts and Promiſes, as Foreigners will be, againſt their own Country; being preſum'd to manage the Buſineſs thereof with greater Care, Fidelity and Affection to it, as having an Intereſt therein. But though it be entirely in the Power of the Prince, to chuſe his own Ambaſſadors; it being with him to judge, what Perſon is beſt qualify'd for this high Employment; yet 'tis fit, that all Ambaſſadors ſhould be Perſons of ſome Birth or Diſtinction in the World, at leaſt. For the Dignity of an Ambaſſador becomes Vile and Contemptible, unleſs it carries along with it the Splendor of a good Family or Education, at leaſt: Low Births and Beginnings producing Envy among thoſe of the Nobility, who will not eaſily bear to be poſtpon'd and overlooked. And Foreign Princes, moreover, think themſelves ſlighted and deſpiſed, if ſuch Perſons are ſent into their Dominions and to their Courts, as are of a mean Extraction. *Lewis* Eleventh, King of *France*, ſent one *Oliver*, his Barber, to *Gaunt*, as his Envoy or Ambaſſador, but he was not received and admitted: Yet *Mat. Palmerius*, an Apothecary of *Florence*, met with better Fortune than the *French* Barber. For he being ſent in the Quality of an Ambaſſador to *Alphonſo* King of *Naples*, and, having acquitted himſelf with much Elegancy and Generoſity at his firſt Audience, he gave the King an Occaſion to ſay, upon Information given, that this Man was an Apothecary, *Se tali ſono gli ſpeciali di Fiarenze, quali debbono eſſe re gli Medici*; meaning, If the Apothecaries of *Florence* are ſuch Men, what ought their Phyſicians to be *? There may be alſo a Cauſe aſſign'd by him, from whom Ambaſſadors are ſent, why they ought not to be received: As the *Roman* Senate refus'd to admit the *Carthaginian* Embaſſy; becauſe the *Carthaginian* Army was then in *Italy*. And thus the King of *Spain* would not receive the Ambaſſadors of *Holland*, nor the Pope the Ambaſſadors of *Henry* King of *England*, after the Murther of *Thomas Becket* Archbiſhop of *Canterbury*.

* Marſel. de Legat. lib. 1. cap. 24.

An Ambaſſador ought to carry along with him, Letters Credential, as well as Inſtructions, from the State that ſends him Abroad; becauſe Credit is not given to Ambaſſadors without ſuch Letters: And he ought likewiſe to have a Paſſport from the State or Prince to whom he is ſent, that he may travel with Safety to his Perſon. When he comes to the Place where the Court reſides, unto which he is ſent, he ought to notify his Arrival in proper Form, and pray an Audience that he may deliver his Credentials, and be heard as ſoon as poſſible. But Ambaſſadors ought not to be admitted to an Audience, or to give in their Credentials immediately on their Arrival; becauſe this does not conſiſt with the Dignity of him unto whom they

they are ſent. And Humanity itſelf requires, that ſuch Perſons as come from a great Diſtance, ſhould have ſome Time given them to compoſe themſelves, and (if I may uſe the Expreſſion) to wipe off the Duſt from their Feet. Thus we read *, that *Achilles* would not receive the Credentials, which *Ajax* and *Ulyſſes*, *Agamemnon*'s Ambaſſadors, brought with them, till they had reſted their weary Limbs, and refreſhed themſelves with Eating and Drinking. And the Goddeſs *Calypſo* exhilarated *Mercury* with *Ambroſia*, before ſhe asked him the Reaſon of his Errand. The Audience of Ambaſſadors is one of the moſt difficult Things that a Prince has to deal in. For it is not enough, that he hears them with Modeſty, Reſpect and Attention, but it behoves him alſo to anſwer them with Prudence and Conſtancy, as well to remember what he is himſelf, as what the Prince is that treats with him, and to manage the Ambaſſador ſo well, that of a publick Witneſs and a Spy (as moſt Ambaſſadors are) he may make him a Friend and a true Mediator between the two Courts. At *Rome*, the Month of *February* was allotted for giving Audience to Ambaſſadors †. The Ambaſſadors of Kings were there introduced by the ſuperior Magiſtrates, as by the *Conſuls* and *Prætors*; but the Ambaſſadors of Republicks were introduced by ſome Tribune of the People, on which Account the *Rhodian* Ambaſſadors were introduced by *Anthony*, who then bore that Office of Magiſtracy. With us and in other neighbouring Kingdoms, the modern Practice is ſomething-like hereunto, where Kingly Ambaſſadors are introduced by ſome great Officer of the Court. The Ambaſſadors, which are ſent by Kings, ought to take Place of ſuch as are ſent by inferior States and Cities; and ſo it was anciently in *Greece*, the politeſt People then in the World.

* Hom. Il.

† Roſ. Ant.

The Perſon, who is ſent in an Embaſſy, ought not to be a Man of an ill Name and Converſation, as *Theodorus* the Atheiſt was, unto whom *Lyſimachus*, for that very Reaſon, refus'd to give Audience. So, where the Cauſe of ſending Ambaſſadors adminiſters Suſpicion, as to diſturb the Mind of the People; and rather with an Intent to ſow Sedition than to conclude a Peace (if ſuch be their pretended Errand) or for the like diſhonourable Reaſons, an Ambaſſador may be refuſed Audience. For thoſe aſſiduous Embaſſies or Legations, which I have before ſtiled Embaſſies, *propter Negotia*, and which are ſo common now-a-Days, may (according to ſome Mens Opinions) be rejected upon a very good Foundation of Right and Law; becauſe (ſay theſe Men) there appears no Neceſſity for their Coming, and for that they are not warranted by the Practice of ancient Times, to which theſe Kinds of Embaſſies were wholly unknown: Which made *Henry* the Seventh of *England* (as my Lord *Bacon* obſerves in his Hiſtory of that Prince's Reign) to admit of none of them. The *Venetian* State, tho' they admitted the Ambaſſador of *Henry* the Fourth of *France*, yet interdicted him to come with the other Ambaſſadors to the Chapel, till the King was reconciled to the *Romiſh* Religion.

I have before hinted, that an Ambaſſador is not admitted to an Audience, till ſuch Time as he has, according to Cuſtom, produced and ſhewn his Prince's Letters, or the Letters of his Principals, commonly called his *Credentials*, or Letters of *Credence*; for that, generally ſpeaking, no Credit is given to Prince's Ambaſſadors, without theſe Letters, not even in thoſe Things which accrue *Jure ordinario Legationis* ‡. For ſuch Matters as are of publick Authority cannot be tranſacted and done, according to *Sichardus*, without a publick Inſtrument: But *Brunus* ſays, It is ſufficient and well enough, whatever the Means be, whereby his Mandate or Commiſſion appears. And the Lawyer *Scævola* ſeems to inſinuate the ſame Thing, ſaying, That if it does not appear whether he be an Ambaſſador, or not, *let the* Roman *Prætor have Cognizance thereof* ||. A *Quaſi*, or an improper Embaſſy, if it be denied, ought to be proved by Witneſſes, after the ſame manner

‡ C. 1. 15. 1. unic.

|| D. 50. 7. 5.

manner as a Man proves his Reſidence or Dwelling in ſuch a Place. But in *Popiſh* Countries, Credence is uſually given to the Pope's Cardinal Legate, by Reaſon of the Prerogative of his high Dignity, without any Letters *Credential* or other Proof of his being ſent, unleſs he extends his Power beyond the common Bounds of Law. And from hence, ſome would have this Point of Prerogative to be extended to Men of the firſt Rank of Nobility, and to Perſons ſtiled *Illuſtrious*, according to the *Civil* Law; whoſe Dignity, Honour and Integrity are ſo well known, that Credit ought to be given to them, without Letters *Credential*; but this is not practiſed or received any where. Yet in *Spain* and the *Netherlands*, before the Pope's *Legates* or *Nuncio*'s are received, their Power and Commiſſion is well examin'd, in Order to admoniſh and put them in Mind of the Power and Commiſſion they ought to execute or exerciſe, leſt any Detriment ſhould thereby happen to the Commonwealth. For as the Apoſtolical *Legates* are for the moſt Part Foreigners, and not ſufficiently acquainted with the Precautions to be uſed, they may eaſily be deceived by falſe Suggeſtions, and thus abuſe their Power. In the ſame Manner likewiſe, the Apoſtolick *Legate* or *Nuncio* has no Power to exerciſe his Commiſſion in *France*, but only from the Day on which the King receives and gives him publick Audience, and till he has promiſed not to uſurp or attempt any Thing againſt the Liberties of the *Gallican* Church, and that he will conform himſelf to the Limitations, which are wont to be made in the Court of Parliament.

If an Ambaſſador, on exhibiting his Credentials, be not admitted, and Reſpect ſhewn to his Character, the Law of Nations does hereby, in ſome meaſure, ſeem to be broken and violated, and the Prince, who ſends him, is contemptuouſly uſed: But then ſuch Ambaſſador muſt come in a decent Manner, and be ſent for juſt and honourable Reaſons of State; otherwiſe Audience may be denied him, as juſt now related: For if he be ſent as a Spy, or to embroil the State, *&c.* he may be refuſed. Thus the *Romans* deſervedly rejected the Ambaſſadors of *Pyrrhus*; becauſe they came with Gold to corrupt the Populacy of the Commonwealth. Yet ſome affirm, That Ambaſſadors may, with a *Salvo* and due Regard had to the Law of Nations, tempt and try the Fidelity of a Prince's Miniſters of State: And tho' ſuch Miniſters be ſworn unto Fidelity; yet the Ambaſſador may ſearch and fiſh out all the evil Deſigns and Machinations of other Princes (if poſſible) againſt his own Maſter. But from the Day of their Legation or Embaſſy committed to them, that is to ſay, from the Day of their Commiſſion, the Perſons of Ambaſſadors are accounted ſacred, and their Rights ought to be ſecur'd to them, as well by the Protection of human Laws, as by the Sanctions of divine Precepts: And therefore, to violate them, is not only unjuſt, but alſo ſavours of Impiety. For there is a Kind of Security, which is granted unto them by the Law of Nations, and no one may offend them with Impunity [z]. And as Protection is given to the Ambaſſadors of Sovereign Princes; ſo heretofore, by the *Civil* Law, Safeguard was provided and given unto *Provincial* Legates, Heralds, and Conſuls.

[z] D. 50. 7. 17. D. 1. 8. 8.

Sometimes Princes ſend Men learned and skilled in the *Civil* Law, along with their Ambaſſadors, and do often ſend them ſolely as Ambaſſadors; becauſe in Foreign Countries, and eſpecially among the *Romans*, they reckon'd *Civilians* (as they are Men of Learning) amongſt their Nobility; and all Advocates in Foreign Parts have the Title of *Illuſtrious* given them. Thus *Albert* Archduke of *Auſtria* and Prince of the *Netherlands* ſent certain Men, learned in the *Civil* Law, to the Kings of *England* and *France*. And it has been a juſt Obſervation among all good Stateſmen, that the Affairs of their Country never ſucceeded better, than when the Conduct and Management of them have been

been committed to the Care of Perſons, learned in the *Civil* Law. And this Advantage they have in Foreign Nations, where the *Civil* Law is more ſtudy'd and learn'd, that almoſt all their Gentry and Nobility are bred up in the Knowlege thereof, and it is no ſmall Reproach to their Education to be without it.

Livy informs us, that this Right of *Legation*, or ſending Ambaſſadors, was originally deſign'd for a Foreign State or Prince, and for a Citizen, or any Perſon of the ſame Commonwealth; though, in Civil Wars, Neceſſity ſometimes makes Room for this Right, *beſides* or *contrary* to a general Rule of Law: As when the People are ſo divided into equal Parts, that it becomes doubtful on which Side the Right of Empire lies, or at a Time when two Perſons of equal Force and Strength contend for the Right of Succeſſion to a Crown or Kingdom. For, in theſe and the like Caſes, one Nation is reckon'd as two: And ſuch was the State of *England*, when the two Houſes of *York* and *Lancaſter* contended for the Crown. But then theſe Perſons are properly ſtiled Commiſſioners, and not Ambaſſadors. But Kings conquer'd in a ſolemn War, and deprived of their Kingdoms, with other Royalties, loſe the Right of ſending Ambaſſadors: As *Pub. Æmilius* detained the Heraulds of *Perſeus*, whom he had conquer'd in Battle and deprived of his Kingdom.

And as Ambaſſadors are protected in their Rights and Privileges, of which more largely by and by; ſo (as I have already hinted) they ought to be religiouſly ſecur'd in their Perſons againſt all Affronts and Injuries which may be committed by that Nation unto which they are ſent. Their Perſons are ſo ſacred both at Home and Abroad, that no Man may lay violent Hands on them, without Breach of the Law of Nations [a]. Nay, the Perſon of an Ambaſſador is ſo ſacred, that, in a foreign Country, it is more inviolable than even that of the Prince himſelf who ſends him wou'd be, were he in the Places where his Ambaſſador repreſents him. For a Prince, that is in another's Territories or Dominions, is only ſecur'd by the Laws of Hoſpitality, which make but a Part of the Law of Nations: But his Ambaſſador is under the Protection of the Laws of Nations themſelves, taken in the utmoſt Latitude of their Signification, and of their Privileges; provided he be not out of his Buſineſs in a ſtrange Country; nor there for his Pleaſure, nor for his private Affairs, but for the Common Good of the two States. The Ambaſſadors of Enemies are alſo inviolable, and ought not to be treated injuriouſly: For, (ſays *Cicero*, in his firſt Oration againſt *Verres*) "Ought not Ambaſſadors, even among Enemies, to "be protected in their Perſons?" And the Reaſon why Ambaſſadors are in Safety in the Country of an Enemy, is not ſo much on their own Account, or their Maſters, but becauſe, without them, Hoſtilities often will have no End. And the Lawyer *Pomponius* declares, That if any one ſhould aſſault or offer Violence to an Enemy's Ambaſſador, this would be thought a Crime committed againſt the Law of Nations; becauſe all Ambaſſadors are accounted ſacred in their Perſons [b]. And therefore, when War is declared with any Nation that has Ambaſſadors reſiding there, thoſe Ambaſſadors ought to remain free and exempt from all Violence: This being agreeable to the Law of Nations. But then it is not lawful for an Ambaſſador to take up Arms againſt Thoſe with whom he reſides and diſcharges the Office of an Ambaſſador; as the three *Fabii* did, on their being ſent Ambaſſadors into *Gaul*. For as *Livy* and *Pliny* both write, this is a Violation of the Law of Nations. Wherefore *Quintus Fabius* gave them a Day to anſwer the ſame. See *Cujacius*. But what if they conſpire and enter into evil Counſel againſt thoſe to whom they are ſent? In this Caſe, the Law of Nations ſometimes prevails, *Livy* tells us [c]; and ſometimes,

[a] D. 50. 7. 17.

[b] D. 50. 7. 17.

[c] Lib. 2.

[d] Lib. 2. times, not according to *Thucydides* [d], ſpeaking of the *Lacedemonian* Ambaſſadors that were ſent unto the King of *Perſia*, and intercepted by the *Athenians*. So ſee *Livy*, in his 3d *Decad* [e], who ſays, that the *Romans* intercepted the *Carthaginian* Ambaſſadors going to the King of *Macedonia*.

[e] Lib. 3.

This leads me to conſider next, Whether an Ambaſſador may be retain'd by thoſe Perſons unto whom he is ſent? And, if this be admitted, Whether the Ambaſſadors of thoſe Perſons, to whom the Injury is offer'd, may be retain'd by way of Hoſtage or Repriſal? Now 'tis certain, that Ambaſſadors may be retain'd for great and weighty Cauſes, *pro re natâ*: As when they privily attempt by any Acts of Hoſtility, or have manifeſtly promoted or enter'd into any treaſonable Deſign againſt the State; or when our Ambaſſadors are firſt detain'd. In the Senate of *Carthage* a Debate happen'd about detaining of *Scipio*'s Ambaſſadors, 'till ſuch Time as thoſe that were ſent from *Carthage* to *Rome* had made their Return in Safety. The *Spartan* Ambaſſadors were detain'd at *Athens*, and were therefore impriſon'd 'till the Return of *Themiſtocles*, who was Ambaſſador for the *Athenians* unto the *Lacedemonians* [f]. Nor did *Beliſarius* diſmiſs the Ambaſſadors of the *Goths*, until the Ambaſſadors, which *Juſtinian* had ſent, were honourably diſmiſſed [g].

[f] Diod. Sic. lib. 11.

[g] Procop. l. 2. de Bell. Goth.

Quintilian obſerves, That if a Citizen, namely, a Subject of the ſame State, be injuriouſly treated, an Action of *Injury* will lie againſt the Offender. If he be a Magiſtrate that is injured, then an Action *Violatæ Majeſtatis* will lie: But if the Perſon offended be an Ambaſſador, then the Law, or War, muſt give Relief therein, and redreſs the ſame. Nay, this Right of ſending Ambaſſadors, has been accounted ſo very ſacred among ſome States, that the Meſſengers even of Rebels have been protected; as were thoſe of *Holland*, by *Philip* King of *Spain*, upon the Revolt of the *Netherlanders*. And ſo great a Reſpect have Nations had in all Times to ſuch Men, that even Traitors, Pirates and Robbers, who being no Society of Men, have not any Protection from the Law of Nations, nor ought any Faith or an Oath to kept with them, (as ſome conceive) do obtain a Kind of Right of Legation, as once the Fugitives in the *Pyrrhenean* Foreſt did. But (notwithſtanding what has been ſaid) Ambaſſadors may be warned, by way of Precaution, not to come within a Prince's Territories; which if they ſhall preſume to do, they may be taken and treated as Enemies: But if they have been once admitted, tho' with Enemies in Arms, much more with Enemies not in actual Hoſtility, they ought to have Safeguard and Protection, according to the Law of Nations. And therefore, their Quality being admitted by Paſſports and Safe-conduct, they ought to be defended, and preſerved from Violence, as the Sovereign Prince himſelf: And thus it was declared in Parliament, wherein the killing of *John Imperial*, Envoy or Ambaſſador from the States of *Genoa*, was adjudged High Treaſon [h]. So likewiſe of *A. de Walton* the King's Ambaſſador, who was murder'd by one *John Hill*, in *Edward* the Third's Reign. Whereupon, this Offence was adjudged High Treaſon; and accordingly *Hill* was drawn, hang'd, and quarter'd [i]. For the Prince's Ambaſſador ſuſtains and repreſents the Perſon of the Prince from whom he is ſent; and therefore ought to be honour'd and treated as him whoſe Perſon he bears. *Note*, This Caſe of *Hill* was three Years before the making of the Statute of the 25th of *Edward* the Third: Therefore, *Quære*, if ſuch a *Proceſs* may be conſtru'd and underſtood to be within the View of that Statute at this Day?

[h] Rot. Parl. 3. Ric. 3. n. 18.

[i] 22. Aſſiz. Pl. 49.

[k] D. 48. 6. 7. By the *Julian* Law [k], He who violates Ambaſſadors, is guilty of a publick Act of Violence, becauſe he has proſtituted and broken the Faith of the Law of Nations. And, by the Papal *Canon* Law, ſuch Violence admits of no leſs Puniſhment than a *Piaculum*, and the being interdicted the Benefit of holy Things. *Philomela* ſung a fatal *Requiem*, for the bloody

bloody Entertainment which ſhe gave to the Ambaſſadors of *Frederick Barbaroſſa*, who were ſent by that Emperor to treat of a Peace: For they, inſtead of treating of a Peace, avow'd the bloody Action of thoſe who murder'd his Ambaſſadors. Whereupon, the offended Emperor, after he had taken the City, razed it to the Ground, and executed all the People therein as Rebels and Traitors againſt the Law of Nations. But by the Law of Nations only, an unjuſt Force and Violence is kept off from the Bodies of Ambaſſadors: For if an Ambaſſador himſelf breaks the Laws of Nations, he is ſubject to Puniſhment, according to ſome Mens Opinions, in the Place where he tranſgreſſes. Yet this Point has been diſputed by all Nations and Men eminent for Wiſdom and Knowledge in theſe Affairs; and Precedents have been alledg'd and avouched on both Sides, as I have already obſerved. And there is one, which ſeems to refute this Poſition or Opinion of ſuch Miniſters of State, *viz.* the Ambaſſadors of *Tarquin*, who had committed Treaſon at *Rome*, and (as *Livy* obſerves) were in the State of Enemies, were (notwithſtanding) preſerv'd inviolable, by a Right of Nations, (as he himſelf terms it), tho' in a Caſe of actual Hoſtility. On the other hand, *Salluſt* remarks, That *Bomilcar*, one of the *Carthaginian* Ambaſſadors, who came to *Rome* on the publick Faith, was adjudged guilty of Treaſon, rather (ſays he) by the Rules of Equity, than by the Law of Nations: For Equity, which is the meer Law of Nature, ſuffers Puniſhment to be exacted, where and whenſoever there is found a Delinquent that cannot otherwiſe be puniſh'd: But the Law of Nations excepts the Perſons of Ambaſſadors; becauſe their Security does ſurely overbalance the Profit ariſing from any Puniſhment which may be inflicted by the Prince who ſent him, if he be willing to puniſh him. But if that Prince be unwilling, it may be exacted of him as an Approver of the Crime. Again, *Livy* obſerves, That the Privileges given to Ambaſſadors by the Law of Nations, do not oblige thoſe Princes through whoſe Lands or Territories they paſs without Leave: For if they go or come from their Enemies, or make any hoſtile Attempt therein, they may be put to Death.

Moreover, as Ambaſſadors are not regularly to render any Account of their Actions to any other Perſon than to him by whom they are ſent; ſo 'tis impoſſible they ſhou'd (by reaſon of the various Intereſts, and other Secrets of State, which paſs through their Hands) be entirely free from all manner of Suſpicion: For ſomething may be ſaid againſt them (peradventure) which bears the Shew and Face of a Crime, tho' without any Reality (perhaps); and the examining into the Truth thereof, may be of dangerous Conſequence. And therefore, if the Offence be ſuch as it may be contemn'd, 'tis uſual to diſſemble and connive at the ſame; or elſe the Ambaſſador muſt be commanded to depart the Realm within a limited Time. And if the Crime be grievous, and publickly miſchievous, the Ambaſſador may be ſent Home with Letters of *Requeſt* to his Principal or Maſter, in order to have Puniſhment inflicted on him according to his Demerits. So likewiſe, for the Prevention of any great Miſchief, and (eſpecially) a publick one, if there be no other Remedy, Ambaſſadors may be apprehended and executed too, as juſt now ſaid; and if they make Reſiſtance by Force of Arms, they may be ſlain. *Charles* the Fifth, Emperor of *Germany*, commanded the Duke of *Milain*'s Envoy or Ambaſſador, as being in ſome meaſure a Subject, not to go out of his Diſtrict or Country. In the Biſhop of *Roſſe*'s Caſe [1], there was a Queſtion put, *viz.* Whether an Ambaſſador, who ſtirs up a Rebellion againſt the Prince to whom he is ſent, ſhould enjoy the Privileges of an Ambaſſador, and not be ſubject to Puniſhment as an Enemy? And it was reſolved, That he had loſt the Privilege of an Ambaſſador, and was liable to Puniſhment.

[1] An. 13 Reg. Eliz.

I have

I have ſaid before, That the Law of Nations does not extend to ſuch Ambaſſadors as paſs through a Prince's Territories without his Leave, going to the Enemy of ſuch Prince; or if they make any hoſtile Attempt, *&c.* they may be intercepted, and put to Death. For the Name and Perſon of an Ambaſſador is not ſo inviolable, either in Peace, or Time of War, but that there may be a convenient and good Time and Occaſion offer for puniſhing them. And thus the *Athenians* uſed and treated the Ambaſſadors that paſſed between the *Perſians* and *Spartans:* And the *Illyrians* ſerved the Ambaſſadors, that went between the *Eſſeans* and the *Romans*, in like manner, as we may read in the Hiſtory of *Thucydides* [m], already quoted. And the *Romans* themſelves ſeized *Hannibal's* Ambaſſadors, as they were going to the King of *Macedonia.* But of this before. Which Examples plainly ſhew, That Princes may intercept the Ambaſſadors of Enemies carrying a Commiſſion with ſuch Inſtructions as are prejudicial to the Country of ſuch Princes, and detain them in Cuſtody: For in an Enemy, the Right of a free Paſſage, which Ambaſſadors otherwiſe enjoy, entirely ceaſes, and their Perſons cannot be accounted ſacred [n].

[m] Lib. 2.

[n] D. 50. 7. 17. D. 48. 7. 7.

It has been remember'd already, That an Ambaſſador bears a publick Office; and that Perſons deputed thereunto, may, according to the *Civil* Law, be compelled to undergo the ſame [o]. Hence the Doctors infer, That whatever Damage an Ambaſſador ſuffers in his Embaſſy, the State which ſends him is bound to make good unto him; provided he does not carry ſuch Effects along with him which are not neceſſary to his Embaſſy. But then an Ambaſſador ought to take the common Rout, and not to travel through dangerous Roads, and ought to render himſelf unblameable in his Journey. If an Ambaſſador be detain'd by Sickneſs, his Expences ought to be defray'd by the State that ſends him, 'till ſuch time as he makes his Return home. But if he delays his Return home, and wanders up and down in the Country to ſatisfy his Curioſity, and the like, he loſes the Privilege of an Ambaſſador: And if he ſhall ſuſtain Damage by ſuch Delay, the State is not obliged to repair the ſame, (according to *Bortolus* [p]). An Ambaſſador, among the *Romans*, had an Immunity from all publick Offices and Services, not only during the Time of his Embaſſy, but alſo for two Years after his Return [q]. An Ambaſſador alſo has a further Privilege, *viz.* That he cannot be convened or ſued in the Place of his Embaſſy, unleſs it be for ſuch Things as he has purchaſed and acquir'd in the Time of his Embaſſy [r]. For thoſe Perſons who are ſent unto any Place in the Buſineſs of the State, if they are convened or ſued, have an Exception *Revocandi Domum*; that is to ſay, they may pray that the Cauſe may be remitted to the Judge of the Place where they have their Reſidence and Dwelling; leſt that, in the mean time, they ſhould be hinder'd and divided from their publick Employment [s]; and this Exception is granted unto Ambaſſadors. But this Right *Revocandi Domum*, or of demanding a Suit to be transferr'd to the proper Place of their Dwelling, ceaſes, if they ſhall have made any Contract in the Place or Country to which they are ſent, during the Time of their Embaſſy, or in any other peculiar Place. For *Julian* adds, They may be compelled to receive Judgment in that Place where they make the Contract; leſt they ſhould otherwiſe, under this Pretence, be enabled to transfer thoſe Things, which belong to another Perſon, to the Place of their own Country or Habitation [t]. And *Julian* rightly adds thoſe Words, *viz. During the Time of their Embaſſy:* For Ambaſſadors have a Right of being ſued in their own Country, for Contracts made before the Time of their Ambaſſadorſhips [u]. And this is true; becauſe they ſhould not be hinder'd in the Execution of their publick Office: Which Reaſon obtains and has Force, when they have

[o] D. 50. 4. 1. 1. D. 50. 6.

[p] In L. 4. C. 4. 63.

[q] D. 50. 7. 7. 8.

[r] Bart. in L. 24. D. 5. 1. 1.

[s] D. 5. 1. 2. 3.

[t] D. 5. 1. 25.

[u] D. 50. 7. 3 & 4.

have contracted at *Rome*, or have agreed to perform the Contract there [x]. But as Ambaſſadors, that have contracted at *Rome* during the Time of their Embaſſy, ought to be convened and ſued there; ſo, for a better Reaſon, a Perſon that is not an Ambaſſador, contracting there as a Stranger, may be convened and ſued there; becauſe *Rome* was the Habitation and Common City of the *Roman* Empire, and the whole World: Nor ſhall ſuch a Perſon have the Right and Power of carrying his whole Cauſe of Action to his own proper Country [y]. See *Covarruvia's Practical Queſtions* [z].

[x] D. 5. 1. 8.

[y] D. 50. 1. 33.

[z] Cap. fin.

If an Ambaſſador, during the Time of his Embaſſy, takes upon himſelf the Buſineſs of an Executorſhip, or an Heir (as called in the *Civil* Law), an Action does not lie againſt him, according to *Celſus*, though he ſhall have taken the Heirſhip or Executorſhip on himſelf at *Rome*, or ſhall have made a *quaſi*, or an improper Contract, upon ſuch Account: Becauſe this Affair is a Matter of much Fatigue and Trouble; and by ſuch an Action, his Function of an Ambaſſador would be much hindred and incommoded [a]. Yet (notwithſtanding his Function) the Legataries and Hereditary Creditors ſhall be admitted into the Poſſeſſion of the Inheritance, unleſs ſuch Ambaſſador ſhall give them ſufficient Caution and Security, to pay the Debts and Legacies bequeath'd [b]. In the like manner, Agents, who are in the Place of Ambaſſadors, are in the ſame Condition and Circumſtances, in a Cauſe of the ſame or the like Nature; tho' this be not eaſily granted to them, *viz.* that they ſhould be re-conven'd in that Place, as if they were reſident, or ſubſiſting there, tho' their Embaſſy or Legation be at an End; for the Reaſon of this Impediment ceaſes [c]. But Perſons, proſecuting any Injury or Damage done them, do not prejudice their Right of bringing their Action in their own Country, leſt (as *Julian* obſerves) they ſhould otherwiſe be treated with Affronts and Contumelies, and be injuriouſly damnify'd (with Impunity) by ſuch Ambaſſadors. Nor ſhall it be in the Power of any Perſon that ſtrikes an Ambaſſador, to ſubject him to the Juriſdiction of the Place where the Blow was given, when he would revenge and puniſh the Affront offer'd him [d]: For he may return home, and demand Satisfaction, by the Means of his Principal, who ought to write to the Prince of the offending Party, either to puniſh the Offence, according to the Law of Nations, or elſe to deliver up the Offender to the Principal of ſuch Ambaſſador, to be dealt with according to the ſaid Law.

[a] D. 5. 1. 26.

[b] D. 5. 1. 26.

[c] D. 5. 1. 21.

[d] D. 5. 1. 2. 5.

I ſhall next conſider, whether Ambaſſadors, or Perſons named to be ſuch, may excuſe themſelves from undertaking that Office? And it is held by ſome, that they cannot; eſpecially (ſay they) according to the *Roman* Law, if they be Perſons fitly qualify'd for ſuch an Employment. *Cicero* in his Offices, ſays [e], that *Servius Sulpitius* undertook the Office of an Ambaſſador, under a ſevere Fit of Sickneſs, which brought him almoſt to his laſt End: And the Republick of *Venice* has made an Ordinance againſt ſuch Perſons, as refuſe the Office of an Embaſſy, if they ſhall be judged fit Perſons for this Employment by the Senate. Wherefore, *Ulpian* rightly ſays, that Perſons may be compelled hereunto, if they ſhall refuſe the ſame, by proper Remedies at Law, as Tutors or Guardians may be compelled to undergo the Office of Tutelage or Guardianſhip, impos'd upon them [f]. And this is true, on the Account of that Damage which they do the Commonwealth, by ſuch a Refuſal [g], and their Prince, whom they ought to ſerve, and yield lawful Obedience unto. But, I think, this is otherwiſe by the Common Law of *England*, which does not oblige Perſons to undergo this Office, but they may refuſe it, tho' not with good Manners, if they are qualify'd, and their Affairs will permit them.

[e] Lib. 2.

[f] D. 50. 4. 9.

[g] D. 50. 1. 21.

Hereunto we add, that Ambaſſadors do ſuſtain an honourable and Authoritative Office, repreſenting the Majeſty of their Prince, and enjoying all the Privileges above-recited, if they rightly perform the Duty enjoin'd them:

them: Which Office, therefore, they cannot ſeem rightly to refuſe, without an Inconvenience to the Commonwealth, and a Contempt of their Prince. But even by the *Civil* Law (in my Opinion) the Prince cannot compel a Perſon againſt his Will and Inclination, to undergo an Embaſſy, if he can lawfully excuſe himſelf from thence: For oftentimes a Perſon, that is ſent againſt his Will, proves perfidious; and rather wiſhes to ſee his Employment at an End, than conſiders the Profit and Advantage thereof to his Principal. And it ſhall be adjudged a lawful Excuſe to a Perſon, if he knows himſelf unfit for the Office enjoin'd him; or if he be deterred from it, by Dangers and great Fatigues threatning him; or he be not very acceptable to the Prince, unto whom he is ſent; becauſe he has either in a publick Manner accuſed, or elſe affronted one of his Domeſticks
[h] D. 50. 7. 4. and Friends [h]: and laſtly, if he be in no wiſe fit on the Account of a bad State of Health, or on the Score of Age, and a large Family of Children. And for this Reaſon the Emperors *Valerian* and *Gallienus*, by an imperial Conſtitution, ordain'd, That the Father of three Children, that were all
[i] C. 10. 63. 1. living, ſhould be exempt from all publick Embaſſies [i]. But he was not diſcharged from other Offices in the State, but was liable to them, unleſs he has a greater Number of Children. For it was Neceſſary, that a Father ſhould be relieved herein, and not be oblig'd to undergo the Function of an Ambaſſador, upon the Account of that Service, which in other Reſpects he does unto the Commonwealth; and on the Account of the Damage, which he and his Family may ſuſtain from thence, in his Eſtate and his own proper Affairs, during the Time of his Embaſſy. For during that Time he ought not to intereſt himſelf in his own Affairs, nor intermeddle in the Buſineſs of other Men; devoting himſelf to no
[k] D. 50. 7. 8. 2. other Mandates or Commiſſions, beſides thoſe of his Prince [k]. And hereunto an Ambaſſador is ſo far oblig'd, that he ought not to do any Thing contrary to the Duty of his Office, tho' it might ſeem more for his Advantage to act otherwiſe by the Proſperity of ſome caſual Event; nay, not if it ſhould be for the Advantage of the Prince himſelf that ſent him.

Beſides the Privileges already mentioned, Ambaſſadors had formerly all Rights of Superiority in their own Houſes, and over their own Domeſticks; and to puniſh and deal with them according to their Demerits, and not the Prince or Laws of that State, unto which they are ſent. But at this Day this Sovereignty or Superiority rather depends on the Conceſſion of him with whom an Ambaſſador has to deal: Becauſe, regularly ſpeaking, the Authority of a Prince, and the Badges of Sovereignty, do not extend themſelves out of the Province or Territory of the Prince. The Actions of Ambaſſadors are not ſubject to the Examination and Enquiry of any one, and their Perſons ought to be entirely ſafe and free in their own Houſes, not only in that which they have made their own by Purchaſe and Property, but even in that which they have hired for their Dwelling and Habitation. So that a Right of *Aſylum* or Sanctuary accrues to their Domeſticks, and to all other Perſons flying thereunto: Provided ſuch Perſons thus betaking themſelves (as aforeſaid) have not oppoſed the Laws of the State or Commonwealth where they are reſident, or violated and impugned the publick Peace and Tranquillity thereof. For this is a Prerogative not comprized under the Rights of Ambaſſadors; nor does it extend itſelf to all Ruffians and diſorderly Perſons, but only to ſuch unhappy Wretches as are the Objects of human Pity and Compaſſion. And therefore, the Protection of Ambaſſadors reaches not to the more atrocious and heinous Crimes, but to ſuch only, as are of a light and inferior Nature, and to ſuch as are committed through any Imprudence or Miſhap: And therefore, this Protection does not exclude Debtors, unleſs they have ſpent their Eſtates, and are become

Bankrupts,

Bankrupts, thro' Fraud or Prodigality. But Ambaſſadors give no Protection in their Houſes to ſuch as fight Duels, Rencounters, and the like. Touching the Protection given to or by Ambaſſadors here in *Great Britain*, ſee a late Statute in Queen *Anne*'s Reign.

It has been a Queſtion among ſome Perſons, whether the Security which accrues to Ambaſſadors themſelves, be of ſo ſacred a Nature, as not only to guard them againſt all unjuſt Force and Violence, but even againſt a judicial Force, in Caſe they ſhall commit any Crime or Offence againſt the State? And herein ſome Perſons make a Diſtinction, *viz.* between common Crimes and ſuch as are committed againſt the State of him unto whom they are ſent. Others think that Ambaſſadors are indiſtinctly exempt from the Juriſdiction of him unto whom they are ſent; and ought, in reſpect of every Crime whatſoever, to be ſent home to their Principal or Maſter, with an Accuſation or Remonſtrance of their Crime; and that Satisfaction ought to be demanded of him, in order to have the Crime puniſh'd, leſt otherwiſe the Prince, to whom they are ſent, ſhould become a Judge in his own Cauſe, and by this Means be both Judge and Plaintiff therein: which Opinion, tho' founded on Equity, yet (I think) conſidering the Reaſon of the Law, ought not to be admitted and allow'd of. Becauſe, in Crimes and Offences, there is no Preſcription or Favour allowed: But every one ought to be convened on the Account of Puniſhment, to which he has made himſelf obnoxious by his Delinquency, in the Place where he committed the Offence, and is found reſident [l]. For the Dignity of an Embaſſy, from which they have excluded themſelves by their Guilt, does not exempt Ambaſſadors from a Charge or Accuſation made againſt them [m], leſt the Benefit granted to them, ſhould be found to be unjuſt, as tending to the Detriment of the Prince and People, unto whom they are ſent. *Theodatus* rightly obſerves, as we read in *Procopius*, touching the *Gothick* War, That Ambaſſadors ought to be ſafe, ſo long as they themſelves ſhall obſerve the Office and Duty of their Embaſſy. Wherefore, Ambaſſadors reſiding at *Rome* ſhall be compelled to undergo a Judgment there, for Offences committed in their Embaſſage, leſt they or their Domeſticks ſhould otherwiſe offend with Impunity, by their Departure and Going from thence, having (perhaps) no Reaſon to fear Puniſhment in their own or another Prince's Dominions. And it will be more lawful to intercept the Enemy's Ambaſſadors going to other Kings, than to procure their Friendſhip, by praying Aid and Aſſiſtance from them, as we are taught by ſeveral *Roman* and *Athenian* Inſtances, already related. For the *Athenians* intercepted the *Lacedemonian* Ambaſſadors going to the King of *Perſia*, in order to beg his Alliance and Confederacy with the *Lacedemonians* [n]: And *Livy* aſſures us, that the *Romans* ſeized *Hannibal*'s Ambaſſadors, going to the King of *Macedonia* [o], as before remembred.

[l] D. 5. 1. 20.

[m] C. 3. 24. 1. un.

[n] Thucyd. lib. 2.

[o] Liv. lib. 3 dec. 3.

But it is not in any wiſe lawful for a Prince to ſeize the Papers and Writings of an Ambaſſador, under the Pretence of a treaſonable Intercourſe and Correſpondence, unleſs they are ſealed up with the Ambaſſador's Seal, as well as his own, and kept under ſtrong Guard, until ſuch Time, as Notice is given to ſuch Ambaſſador's Maſter, that he may ſend over Perſons to be preſent at the Examination of ſuch Writings, if he pleaſes: For, under ſuch a Pretext and Colour, a Prince may pry into the ſecret Tranſactions of all Courts and Nations, and become injurious to the Prince with whom he ſeems to cultivate Friendſhip; which is contrary to the Laws of Humanity.

It has been already hinted; that, by the *Civil* Law [p], as well as by the Law of Nations, it ſeems to be Treaſon to offer Force and Violence to the Ambaſſadors of any Prince or State; becauſe this Crime is committed againſt the publick Safety of the State and Prince that have the

[p] D. 48. 4. 1.

Power

Power of ſending Ambaſſadors. And the *Julian* Law, touching Force [q], (as before related) ſeems to countenance this Opinion, whereby he is anſwerable, who violates Ambaſſadors or Envoys, and injuriouſly treats them, or any of their Retinue. And *Egeſippus* aſſures us [r], that among the *Greeks* and *Barbarians* it was accounted a very unjuſt Thing ſo to do. The Right of Embaſſy, even among Enemies, is (as *Cicero* remarks in his third Oration againſt *Verres*) protected by the Law of God and Man. And *Pliny* informs us [s]; that heretofore there was no Deſignation or Appointment of Ambaſſadors, without conſecrated and holy Ceremonies, whether they were ſent as Heraulds, to declare War, or as Plenipotentiaries to treat of Peace; and hence alſo they were deemed to be *ſancti* [t]. And this Act of Religion, in the Choice and Sending of Ambaſſadors, was practis'd anciently among the *Franks*, as *Gregory* of *Tours* obſerves in his Hiſtory of the *Franks* [u]; where he ſays, that *Gundebald*, who ſtiled himſelf the Son of *Clotaire* deceas'd, ſent two Ambaſſadors unto *Gunthran*, *viz.* with conſecrated Rods, according to the Cuſtom of the *Franks*, to the End that they might not be detained by him, but return with his Anſwer at the End of their Embaſſy.

[q] D.48.6.7.
[r] Lib.1.c.32.
[s] Lib.22.c.2.
[t] D.1.8.8.
[u] Lib.7.c.32.

And as the Law of Nations deems it to be a Matter of Religion, not to violate Ambaſſadors, whilſt they are employed in a publick Embaſſy [x]: So it is a juſt Cauſe of War, if Ambaſſadors are treated with Violence. And, according hereunto, King *Philip* wrote to the Senate of *Athens*, as *Demoſthenes* relates the Matter, in an Epiſtle ſent by *Philip* to the Senate, that he had juſtly commenced a War againſt them, becauſe *Diopithes* had impriſoned his Ambaſſador *Ampholochus*, and had taken nine Talents for his Ranſom or Enlargement. And the *Athenians* themſelves were ſo inflamed with Reſentment, that the People of *Megara* had hanged or offer'd Violence to their Ambaſſador *Anthemocritus*, that the *Athenians* forbad them their Myſteries, and erected a Statue before the Gate, as a Monument of this Injury.

[x] D.50.7.17.

An Ambaſſador repreſents the Majeſty of the Prince that ſent him: And therefore, a Contempt of him, is an Affront offer'd unto the Prince himſelf, and a heavy Puniſhment ought to be inflicted thereon. Yea, an Ambaſſador is not exempt from a Crime, if he behaves himſelf with more Submiſſion unto the Prince unto whom he is ſent, than his Prince himſelf would do. Wherefore the *Athenians* put *Evagoras* to Death, who going in an Embaſſy unto *Alexander*, fell down on his Knees to him. See *Athenæus* [y]. By the *Civil* Law, thoſe who violated the Perſon of an Ambaſſador, ſent even by the Enemy, were deliver'd up to the Enemy, whoſe Ambaſſador he was, to be puniſhed according to their Diſcretion [z]. See an Example hereof in *Florus*'s Abridgment of the *Roman* Hiſtory. And therefore, much more ought he to be puniſhed, who kills or puts an Ambaſſador to Death; becauſe, as *Polybius* obſerves [a], this is doubtleſs a juſt Cauſe of declaring War. Hereupon the *Romans* commenced a bloody War againſt the *Fidenates*, becauſe they had, for a ſlight Offence offer'd them, put the *Roman* Ambaſſadors to Death, as *Livy* [b] and *Diodorus Siculus* [c] do both teſtify. The *Sybarites* were deſtroy'd Root and Branch by the *Crotoniatæ*, becauſe the firſt had ſlain the Ambaſſadors of the latter People. See *Athenæus* again [d]. And *Egeſippus* informs us [e]; that the *Arabians* were all put to the Sword, for deſtroying *Herod*'s Ambaſſadors. And the whole *Athenian* Territory, together with the City itſelf, was laid Waſte, becauſe they had injuriouſly treated the Ambaſſadors which *Darius* had ſent thither to fetch Water and Earth, by putting thoſe Ambaſſadors into a Dungeon and Well. This Account we read in the Hiſtory of *Herodotus* [f]. So that, from theſe Examples, we find what was the Reſentment of ancient Times, when Ambaſſadors were ill dealt withal, if the *Civil* Law was ſilent herein. By the

[y] Lib. 6. c. 6.
[z] D. 50. 7. 17.
[a] Lib. 1 & 2.
[b] Lib. 4.
[c] Lib. 12.
[d] Lib. 12. c. 6.
[e] Lib. 1. c. 32.
[f] Lib. 7.

the *Canon* Law, thoſe, who moleſt or infringe the Rights of Ambaſſadors, are to be excommunicated [g]. [g] Diſt. 94. c. *Siquis.*

But Ambaſſadors themſelves ought to be very careful of their own Behaviour, in the Country whereunto they are ſent, and not flatter themſelves too much with their high Station, Character and Honour, which often puffeth up, ſo as to render them immoderately inſolent thereupon: For it is one Thing to perform the Office of an Ambaſſador as Men ought to do, and another Thing to betray and abuſe that great Truſt of Power. For the Right of not Violating Ambaſſadors only remains ſo long to them, as they themſelves obſerve the Laws of an Embaſſy, and preſerve a decent Behaviour in the Country where they reſide, as *Theoda* has told us in the Hiſtory of *Procopius*, touching the *Gothick* War [h], when he addreſſed himſelf to the Ambaſſadors of *Conſtantinople*, who had behaved themſelves amiſs. For Guilt and evil Manners diveſt even the higheſt Perſons of all Honour, Dignity and Reſpect otherwiſe due to them. [h] Lib. 7.

Not only an Ambaſſador's Family and Retinue, but even the Ambaſſador himſelf is liable to Civil Actions; yet this is to be underſtood under ſome Diſtinctions and Limitations, as the Lawyers ſtile them; which, I think, may be conſider'd in one View, in this manner, *viz.* Ambaſſadors may be convened and impleaded on the Account of ſuch Contracts as they have made during the Time of their Embaſſy, leſt they ſhould, under the Colour and Pretext of an Embaſſy, be impower'd to carry off other Mens Goods into their own Country, as aforeſaid [i]. But in reſpect of other Matters, for which they contracted before they entred on their Embaſſy; an Ambaſſador ought in no wiſe to be impleaded in the Country unto which he is ſent, unleſs it be thus agreed, that a Debt ſhould be paid, contracted during the Time of his Embaſſy. For if this be expreſly ſaid in the Libel or Declaration, wherein Ambaſſadors have contracted before their Embaſſy, they have a Right *revocandi Domum*, *viz.* of remitting the Cauſe to their own Country, tho' they have contracted in the Place where they reſide, provided they made ſuch Contracts before the Commencement of their Embaſſy; becauſe Ambaſſadors are deemed in Law to be never abſent from their own Country. Nor are they compelled to defend themſelves in foreign Juriſdictions, ſo long as they ſtay abroad on the Account of their Embaſſy. But if Ambaſſadors continue there after the Determination of their Embaſſy, they may be convened in a Foreign Court of Law. On the other hand, they may try a Cauſe there for any ſuch Damage as they have ſuffer'd, during the Time of their Embaſſy: For it would be unjuſt, that an Ambaſſador ſhould be compelled to ſuffer thoſe Things, which tend to his Damage, or are deſigned for his Injury, without having ſome Redreſs. See a Statute made in Queen *Anne*'s Reign, touching Ambaſſadors and their Retinue, on the Arreſt of the *Ruſſian* Ambaſſador in *London* [k], which privileges Ambaſſadors from Arreſts in their own Perſons: But then this Statute does not extend to their Servants, unleſs their Names are firſt enter'd with one of the Secretaries of State, and tranſmitted to the Sheriffs of *London* and *Middleſex*. Nor does this Law give Privilege to Traders and Merchants of *Great Britain*, *&c.* that become Inſolvent, and enter into an Ambaſſador's Family with a Purpoſe of defrauding their Creditors. [i] D. 5. 1. 25. [k] 7 *Anne* c. 12.

TIT. XLIII.

Of Innholders, *and other Perſons of common Truſt, as Carriers by Land and Water,* &c. *how they are bound, by Law, to reſtore ſuch Things as they have taken in Charge to keep,* &c.

IT being oftentimes neceſſary to put a Truſt in Innholders, and ſuch as keep Publick-houſes, for the Reception and Entertainment of Strangers travelling from Place to Place, the Law has made them liable to anſwer for the Goods of ſuch Perſons as commit them to their Care and Cuſtody, and which they have receiv'd from their Gueſts: And the Reaſon of this, is, leſt they ſhould have Commerce and Dealing with Thieves in a ſecret manner, and, by this Means, injure thoſe Perſons whom they
[p] D. 4. 9. 1. 1. receive into their Houſes [p]. For the *Prætor* has given an Action againſt Innholders, and all ſuch other Perſons as have the Charge of Mens Goods, whether it be by Land or Water; as Waggoners, Carriers, Maſters of Ships, *&c.* compelling them to reſtore whatever they have receiv'd into
[q] D. 4. 9. 1. pr. their Cuſtody, or to anſwer the Loſs thereof [q]. And Things are ſaid to be thus receiv'd, tho' they they are not preciſely and in an expreſs manner deliver'd to their Cuſtody, but only brought into the Houſe, or put on Board, with the Knowledge of the Maſter of the Houſe, or the Owner of
[r] D. 4. 9. 1. fin. the Veſſel [r]; for they ought to be made acquainted with it. And ſuch publick Maſters of Houſes, or Owners of Ships, are not only anſwerable
[s] D. ut ſupra, & l. 2 & 3. for themſelves, but likewiſe for their Miniſters and Servants [s]; becauſe they ought to employ none in their Buſineſs but careful and honeſt Men.
[t] D. 4. 9. 5. pr. Wherefore they are obliged *Nomine Cuſtodiæ* [t], even tho' they are not guilty of any Fraud or Negligence in their own Perſon; unleſs ſome-
[u] D. 4. 9. 3. 1. thing ſhall happen which cannot be foreſeen by human Prudence [u]; or have before-hand proteſted and given Notice, that each Gueſt or Paſſenger ſhould take Care of their own Effects, and that they will not ſtand to the Loſs and Damage; and the Gueſts or Paſſengers have conſented unto ſuch
[x] D. 4. 9. 7. Notice [x].

For there is a *tacit* Contract or Agreement made between an Innkeeper and a Traveller, by which the Innkeeper obliges himſelf to the Traveller to find him Lodging, and to keep his Goods in ſafe Cuſtody, *viz.* his Horſes, and other Equipage: And the Traveller, in like manner, obliges himſelf, on his Departure, to pay and ſatisfy all his Expences. For this Obligation or Engagement is not uſually made by an *expreſs* Agreement, but by a *tacit* Conſent of the Parties, at the Time when the Traveller enters into the Inn, and by committing his Goods and other Things either to the Hands of the Innkeeper himſelf, or elſe to the Care of thoſe whom he intruſts and charges with the Care of the Inn, for the Safe-cuſtody thereof.

The Innkeeper is obliged, by the Act and Deed of ſuch Perſons as are of his Family, and of him who is his menial Servant, purſuant to the Offices and Duties which are committed to them. Thus, when a Traveller gives to a Servant, or any of the Family who has the Keys of the Chamber, his Cloak-bag, Portmantua, or other Goods, or when he puts his Horſe into the Stable, and commits him to the Care and Keeping of the Hoſtler

or

or Groom of the Stable, the Maſter of the Inn is anſwerable for the ſame *y*. But if a Traveller, upon diſmounting his Horſe, ſhall, out of the Maſter or Miſtreſs's Sight, deliver a Bag of Money to an Infant or Child, or to a Kitchen-drudge about the Houſe, the Maſter ſhall not, in Conſequence hereof, be bound to make Good the Loſs of ſuch Bag of Money depoſited and truſted in ſuch a looſe and idle manner: For, doubtleſs, had the Maſter or Miſtreſs ſeen him committing the ſame to the Hands of ſuch Perſons, they wou'd, by a proper Intervention, have taken Care thereof. [y] I. 4. 5. 3.

An Innkeeper is not diſcharged from a fortuitous Caſe, which may happen, if his Care and Vigilance might have prevented the ſame. No Innkeepers are to be paid in Particular for the Safe-cuſtody of ſuch Things as are committed to their Truſt in an Inn [z], but only for Lodging, and ſuch other Things which they ought to provide and furniſh Travellers withal: But, I think, they are not obliged to take the ſame Care, as when they are expreſly paid for the Safe-keeping thereof. According to the *Gloſs* [a] on the *Law*, an Innholder, who has deliver'd the Keys of a Room or Chamber unto his Gueſt, is not thereby diſcharged from the Perſon's Goods; for he may have other Keys or Ways of getting at them. If any of the Domeſticks of the Innkeeper's Family ſhall cauſe any Loſs or Damage unto a Traveller, that he be robbed thereby, even of that which he has not given to be ſafely kept in the Inn, or to be any otherwiſe damnify'd in his Goods, the Innholder ſhall be obliged to make good the Value loſt, and ſhall repair the Damage which ſhall happen thereby: As when his Servants or Domeſticks ſhall give Intelligence unto Highwaymen, and ſuch-like Robbers, of what Goods the Traveller lodged in the Houſe. But the Obligation of an Innkeeper for the Act of his Domeſticks, is limited to ſuch Things which paſs in the Inn, and are brought thereinto: And if any of his Domeſticks rob or do any Damage in another Place, he is not bound thereby. And what is here ſaid of an Innholder, alſo holds good in reſpect to a Waggoner, Carrier, Maſter of Ship, *&c. Mutatis mutandis.* [z] D. 4. 9. 5. [a] In L. 7. D. 4. 9.

Tho' a Perſon be not obiged *ab Initio* to keep an Inn, or to receive Gueſts; yet after he has once begun to act as an Innholder, and to receive Strangers, he ſhall be compelled thereunto [b]: For this is an acceſſary Incident to their Trade and Buſineſs; and it is the Intereſt of the Publick, that, in ſuch a Neceſſity, there ſhould be Publick Houſes for the Reception of Travellers. And thus Innholders, after they have once open'd a Publick Houſe of Entertainment, and have taken on themſelves the Buſineſs of Hoſts, may regularly be oblig'd (according to *Bartolus* [c]) to entertain ſuch as come to their Houſes. And in the ſame manner, a Bargemaſter, or a Perſon that keeps a Boat for the Carriage of Goods, *&c.* is obliged to carry Goods for Perſons requeſting the ſame. If Goods are ſtollen in an Inn, a Preſumption of Theft lies againſt the Innholder; becauſe he ought not to keep any other than honeſt Servants about him, and only to entertain honeſt People: And in the Caſe of ſuch Robbery, Credit is given to the Oath of the Perſon robbed. [b] D. 47. 5. 1. [c] In l. 1. D. 4. 9. 1.

It is to be obſerv'd, That a threefold Action accrues to a Perſon who lodges Goods in a Ship, Inn, or publick Stable, if his Goods are taken away; and if he chuſes either of theſe Actions, he ought to be contented with it; for he can only implead the Defendant in one of them. The firſt is ſtiled a *Prætorian* or *Honorary* Action on the Caſe *de Recepto*: And this is given, unleſs Reſtitution be made [d]; which, as it contains a Claim or Proſecution of the Thing, is perpetual, and not limited by any Space of Time; and it lies as well for the Heir, as againſt the Heir [e]. Beſides this Action, thoſe Perſons are alſo liable to an Action on the Caſe *in Duplum*, if they, or either of them, whoſe Aſſiſtance they make uſe of in their Buſineſs, ſhall commit Theft, or do any Damage to the Perſon that intruſted his [d] D. 4. 9. 3. fin. [e] D. 4. 9. 3. pen.

[f] D.4.9.6 & 7. his Goods with them [f]. It is given upon the Account of an *improper* Offence, or a *Quaſi maleficium*, as the *Civilians* term it: For it is a Fault [g] D.4.9.7.4. in a Maſter to employ diſhoneſt Servants [g]. Tho' this Action is not cut off or barr'd by any Limitation of Time; yet it does not lie againſt an Heir, [h] D.4.9.7.6. becauſe it is a penal Action [h]. And it lies againſt the Maſter, though the Mariners ſhould give Warning to thoſe Paſſengers which are in the Ship to take Care of their own Effects, unleſs ſuch Paſſengers comply with ſuch [i] D.4.9.7.pr. Notice [i]. By the Law of *England*, if a Man be lodged in any Inn, and any of his Goods be taken or ſtollen from thence by a Stranger, he ſhall have an Action upon the Caſe againſt the Innkeeper. See *Fitzherbert's* [k] Pag. 208. *Natura Brevium* [k].

As common Inns are inſtituted for Paſſengers and Wayfairing Men, (for the *Latin* Word for an Inn is *Diverſorium*, he that lodges there *eſt quaſi divertens ſe à viâ*): And therefore, if a Neighbour that is not a Traveller, as a Friend, at the Requeſt of the Innkeeper, lodges [l] Rep. 8. fol. 32. there, and his Goods are ſtollen, he ſhall not (according to *Coke* [l]) have an Action: For the Writ runs, *Ad Hoſpitandos homines per partes,* [m] Ibid. *ubi hoſpitia exiſtunt, tranſeuntes, & in eiſdem hoſpitantes.* See *Caley's* Caſe [m]. The Innkeeper ſhall anſwer for nothing that is out of his Inn, but only for thoſe Things which are *infra Hoſpitium*: For the Words of the Writ are, *Eorum bona & catalla infra hoſpitia illa exiſtentia.* And therefore, the Horſe which, at the Requeſt of the Owner, is put to Paſture, being not *infra Hoſpitium*, the Innkeeper is not bound by the Law to anſwer for him, if he be ſtollen: But if the Owner requires not this, but the Innkeeper of his own accord puts the Horſe of his Gueſt to Paſture, he ſhall anſwer for him, if he be ſtollen. *Hoſpes eſt, quaſi hoſpitium petens.* The Hoſt requires his Gueſt, or *Hoſpes*, to put his Goods in ſuch a Chamber, under Lock and Key, and then he will warrant them, otherwiſe not: The Gueſt ſuffers them to be in the outward Court, where they be ſtollen. In this [n] Ibid. Caſe, the Hoſt ſhall not be charged for the Fault that is in the Gueſt [n]. And herein the *Civil* and our *Engliſh* Law do both agree.

I have already noted, That the Hoſt ſhall not be charged, except there be ſome Default in him, or his Servants. Therefore, if one brings a Bag or Cheſt of Evidences or Obligations into an Inn, and they are ſtollen, through the Default of the Hoſt, the Innkeeper ſhall anſwer for them; otherwiſe not: For the Words of the Writ are, *Ita quod per defectum hoſpitatorum, ſeu ſervientium ſuorum, hoſpitibus hujuſmodi damnum non eveniat.* And if the Gueſt delivers not the Goods to the Hoſt to keep, nor acquaints him with them; yet if they be ſtollen, the Hoſt ſhall be charged. But if the Servant of the Gueſt, or he that comes with him, or he who deſires to be lodged with him, ſteals his Goods, the Hoſt ſhall not be charged; for it was the Fault of the Gueſt to have ſuch a Companion or Servant: But if the Hoſt appoints one to lodge with another, he ſhall anſwer for him. If a Man lodges with any one that is not an Innkeeper, upon Requeſt, and he be robbed in his Houſe by his Servants, the Perſon lodging him ſhall not be liable; for the Words of the Writ are, *Hoſpitatores qui communia hoſpitia tenent.*

An Innholder, Maſter of a Ship, *&c.* do not *principally* receive a Reward or Hire for the Cuſtody of Goods. The Maſter of a Ship receives Freight-money, for the tranſporting of Goods or Paſſengers; an Innholder, for the lodging or abode of Travellers in the Inn; and a *Stabularius*, for ſuffering Beaſts to ſtable with him: And yet all theſe Perſons are liable to an Action [o] D.4.9.5. on the Account of Cuſtody [o].

TIT.

TIT. XLIV.

Of Abſence, *and the ſeveral Kinds thereof; when it affects a Man, and when not; and when a Perſon may be ſaid to be Preſent*, &c.

A Perſon may be ſaid to be Abſent, ſeveral ways: As, when he is not to be found at his uſual Place of Reſidence or Dwelling; or, is out of the Territory or Juriſdiction where he is legally ſought. For it is not always neceſſary that a Man ſhould be beyond Sea, to give him the Denomination of an abſent Perſon: For if he be not in that Place where he is legally enquir'd after, he may be ſtiled an abſent Perſon [o]; and thus, if he be not within the Confines of the Town or City of which he is an Inhabitant, he is ſaid to be an abſent Member [p]. Again: If a Perſon be in Court, and ſculks or hides himſelf behind the Pillars, and the like, he ſeems to be abſent; becauſe he is not effectually preſent: But a Perſon taken and detain'd by the Enemy, does not ſeem to be abſent, as a Perſon detain'd by Highwaymen and Freebooters does [q]. A Perſon who has not a local Dwelling or Habitation, at which he may be cited, is not *ad hoc* ſaid to be abſent, though he be not corporally preſent there. A Perſon abſent or baniſh'd from the City or Country where he had his wonted Dwelling, is preſum'd to be ignorant of thoſe Things which are then done in the City, *&c.* And thus a Perſon abſent at the Time of a Proclamation, is not preſumed to have Notice of ſuch Proclamation; and, in a doubtful Caſe, Abſence is preſum'd, unleſs the contrary be proved.

[o] D. 50. 16. 199.

[p] D. 50. 16. 173.

[q] D. 50. 16. 199.

Now there are five Kinds of Abſence, which the Law takes Notice of. The firſt is ſtiled a *neceſſary* and *probable* Abſence *conjunctively* conſider'd: As when a Perſon is abſent on Account of the State or Commonwealth; and thus Ambaſſadors in their Embaſſy, and Soldiers in the War, are ſaid to be abſent [r]. The ſecond is termed a *probable Abſence only*, but is not ſo *neceſſary*: As thoſe that travel and go abroad on Account of their Studies, and the like. And here, by *probable* Abſence, I mean, ſuch as the Law permits and approves of. The third Kind is *neceſſary only*, and not *probable*: As in the Caſe of Perſons who ſuffer Baniſhment or Relegation, and thoſe that abſent themſelves through Fear of being puniſh'd for ſome Crime committed by them. The fourth Kind, is a *voluntary* Abſence *without Contumacy*: As in Merchants and others that are abſent on the Account of ſome Profit accruing to them thereby. And the fifth is a *voluntary* Abſence *with Contumacy*, which may be called a *malicious* Abſence. Under a *neceſſary* and *probable* Abſence, we may alſo reckon Captivity, great Sickneſs and Indiſpoſition of Body, *&c.* Abſence on Account of the State, (as aforeſaid), is in our Books ſometimes ſtiled a *laudable* Kind of Abſence. A Cauſe of Abſence, is not reputed to be colluſive and malicious, when a Perſon is bound to reſide in ſome certain Place, and thereupon abſents himſelf: For if a Man, who is thus bound to reſide, be abſent, his Abſence is preſum'd to be juſt and lawful, and not to be *ex malitia*, or from a fraudulent Purpoſe; as a Perſon that is abſent on Account of the State, or on his own neceſſary Avocations, ſince no Man is preſumed to be a Delinquent. And a Perſon that is abſent on a juſt Account, ſhall be reſtored *in Integrum*, if

[r] D. 4. 1. 8.

if he has not been defended according to Law. A Perſon that is abſent on the Account of the State, is more favour'd in Law than a Minor. Abſence, in a doubtful Caſe, ought to be underſtood and interpreted in a good Senſe.

A Perſon abſent, whether he be ſo before or after Conteſtation of Suit, [s] D.48.19.5. cannot be condemned in Crimes of a capital Nature [s]; tho' he may, in his Abſence, be condemned in Civil Cauſes, after Suit is conteſted or Iſſue [t] D.3.1.13.1. join'd in the Cauſe [t]. But if a Criminal be preſent at the Time of his Accuſation, and the Crime be then well proved againſt him, he may be condemn'd, tho' he ſhould afterwards abſent himſelf at the Time of Sentence. For in Crimes wherein the Puniſhment extends not to Baniſhment or Relegation, or to that of a higher Nature or Kind, it may be proceeded to a Sentence of Condemnation after Conteſtation of Suit againſt a Perſon contumaciouſly abſenting himſelf, and likewiſe to a Sentence of Confiſcation of Goods for Contumacy even before Conteſtation of Suit; becauſe this laſt is an *Interlocutory* Sentence, as a firſt Decree is, which puniſhes Contumacy in Civil Actions. By Confiſcation of Goods, here, I mean, what our *Engliſh* Lawyers ſtile an *Outlawry*; tho' ſuch Confiſcation may be taken for a total and abſolute Forfeiture, without any Proſpect of having the Goods reſtor'd by a Reverſal thereof. When a Criminal Proceſs is carry'd on againſt an abſent Perſon to a definitive Sentence, there ought to be an evident *Conſtat* of the Crime by legal Proofs, as in Civil Cauſes when the [u] Nov.112. c.3. C.7.43. Auth. *Qui ſemel.* Proceſs is to ſuch a Sentence [u]: For Flight or Contumacy is not full Proof, unleſs it be in ſuch Cauſes where there is a vehement Suſpicion, and other Proof cannot be had. And this is true, according to the Common Law: But, by the Statute Law, a Perſon may be taken *pro Confeſſo*, on the Account of Contumacy alone; and Contumacy, by that Law, is deemed a legal Proof: And where there are Statutes, they ought, according to [x] In L.5. D.48.19. *Bartolus* [x], to be preferr'd to the Common Law. But an Abſentee perſonally cited, cannot be taken by the Judge *pro Confeſſo*: For no one can be fined by a Judge, unleſs his Contumacy be *real*, and not ſo by a Fiction of Law. But a Perſon guilty of *real* Contumacy, tho' abſent, is deemed as a Perſon preſent.

A Perſon abſent for five Years together, is not preſumed to have *animum redeundi*; as in the Caſe where a Man goes away from his Wife, and leaves her for five Years; for then, according to the *Civil* Law, ſhe may marry * Nov.22.c.7. again, if ſhe has no Knowledge of his being alive *; yet the *Canoniſts* and *Divines* diſſent to this Doctrine. That Perſon ſeems to ceaſe to be abſent, when he returns or might return to his Home or Dwelling, after he has finiſh'd his Buſineſs, for which he was thus abſent; for then every one is ſaid *deſinere abeſſe*, unleſs he ſhall be hinder'd from returning Home on the Account of ſome juſtifiable Cauſe. And twenty Miles a Day are allow'd for returning Home, which are to be reckon'd from the Time his Buſineſs ended.

When a Proceſs is awarded againſt an abſent Perſon, the Judge ought not to proceed *ex mero motu*, but only at the Motion and Petition of the adverſe Party: And this proceeds even in ſuch criminal Cauſes wherein an abſent Perſon may be condemn'd. Tho' an abſent Perſon has been cited, and a Return of the Proceſs has been made by the Meſſenger or Apparitor that executed the Citation; yet he is not ſaid to be contumacious, unleſs ſuch his Contumacy be accuſed by the adverſe Party, as I ſhall ſhew under the Title of *Contumacy*.

A Perſon abſent, and not appearing, is not ſaid to conſent and agree in a Thing that is done againſt him in his Abſence: And therefore, if the Judge be an incompetent Judge, and proceeds againſt an abſent Perſon, even tho' he has been cited; yet an Exception always lies againſt him

on

on the Account of his Incompetency. 'Tis the common Opinion of the Doctors, that a Perſon, propounding Cauſes of Abſence in the Name of another, ought to be heard *abſque mandato*, that is to ſay, though he has no Warrant or Authority in Writing for ſo doing: Yet, I think, the Perſon thus propounding, ought to ſwear to the Truth of ſuch Cauſes. For it is not ſufficient to alledge a Cauſe of Abſence, unleſs ſuch Cauſe of Abſence be proved. He that alledges Abſence, is not only bound to prove the ſame, but alſo that he was ſo far remote by Reaſon of the Diſtance of Places, that he could not eaſily appear within the Time. A Libel may be given in againſt an abſent Perſon, if he has once appear'd in Court: For a Libel is not given in to proceed againſt him to Sentence directly, but in order to compel his future Appearance.

Preſence is directly contrary to Abſence: And, therefore, if one be known, the other is known; becauſe, *contrariorum eadem eſt Ratio & Diſciplina.* Thus a Perſon preſent, is preſum'd to be knowing and acquainted with what is then done in his Preſence, contrary to what an abſent Perſon is. Preſence may be had *ſine viſu,* if the Perſon underſtands what is done: For there is a Bodily and Mental Preſence; and without this laſt, a Perſon cannot be ſaid to be preſent at any Act. If *Caius* be commanded to do any Thing in the Preſence of *Titius*, he does not ſeem to have done it in his Preſence, unleſs *Titius* had Underſtanding and Knowledge thereof: Wherefore, if *Titius* be a Madman, Idiot, Infant, or aſleep, and the like, the Party thus commanded, does not ſeem to have done it in his Preſence; ſince *Titius* ought to have Knowledge of what is done. And it matters not, whether he conſents or not; ſince that which is commanded may be rightly effected, without his Will or Conſent had thereunto. A Perſon preſent, and ſilent, ſeems to diſſent, when he cannot prevent and hinder the doing of an Act, which concerns himſelf, by contradicting and oppoſing the ſame: And a Perſon preſent, and ſilent, ſeems alſo to diſſent, when the Matter in Agitation is very much to his Prejudice and Diſadvantage *y*.

y D. 24. 3. 33.

The Words *Coram* and *in Præſentia* have the ſelf-ſame Signification; and relate to a corporal Preſence. Wherefore, if a Witneſs ſhould ſay, that ſomething was done *coram Titio*; yet ſuch Witneſs would not be deemed from thence a Liar or falſe Witneſs, tho' *Titius* does not underſtand it, provided, *Titius* was corporally preſent. And thus the Law, which requires that the Solemnities of a Will ſhould be executed in the Preſence of Witneſſes, does not hereby require that they ſhould know the Contents of ſuch a Will, but only that they ſhould know the Matter or Cauſe for which they are made Uſe of. But yet it often happens from the Nature of Things, that a Thing does not ſeem to be done before any one, who has not a right Knowledge or Underſtanding thereof; as in the Caſe of *Caius* and *Titius*, abovementioned: For what Occaſion have we of the Preſence of him who does not know what is done? For, as the Philoſopher *Epicharmus*, heretofore, ſaid, *It is the Mind here that ſees, and not the Eye of the Body*: Wherefore, he that is not preſent in Mind, ſeems to be abſent in ſuch a Caſe. And, therefore, if a Notary, who ought to make Inſtruments according to the Underſtanding of the Witneſſes, *ſimply* writes thus, *viz.* that ſuch a Matter was acted before this or that Perſon, he may be puniſh'd as a *Falſarius*, if they were not admitted to an Underſtanding thereof. For when it is Neceſſary, that the Witneſſes ſhould underſtand the Buſineſs thereof, this Word *coram* ought to be underſtood according to the Nature of the Act or Thing, that the Witneſſes be not preſent in Body only, but alſo in Mind: And if it be found otherwiſe, the Notary himſelf may be impleaded and puniſhed. Wherefore, when an Advocate, in the Preſence of his Client, makes an Anſwer to any Libel or Petition in the *Latin* Tongue, the Notary ought not to declare and ſay in the Acts of Court, that he made this

Anſwer

Anſwer *coram Cliente*, unleſs he be ſure that the ſaid Client had ſuch Skill in the *Latin* Tongue, as to underſtand his Advocate.

A Perſon may be ſaid to be preſent ſeveral Ways, and in divers Reſpects. For he is ſaid to be preſent in the Place, if he has his Dwelling in the Place where the Action is brought, though he be abſent with his Perſon [z]. In reſpect of convening Perſons to a Council, they ought to be preſent in the Province or Territory where ſuch Council is held. Where a Citizen has a Dwelling at *Piſa* or *Placentia*, and lives more frequently there than at other Places, he is rather preſent there, than at other Places: And in this Senſe Preſence is the ſame as Reſidence. There are ſome Acts, which may be done in the Abſence of the Party, and in theſe he ſhall be looked upon as a Perſon preſent: I mean ſuch Acts, as conſiſt in the Mind and Intention of a Man, as an Act of Ratification, accepting of the Heirſhip, and the like. Thus a Promiſe made by Letters, is valid to an abſent Creditor. Improper Contracts do not require the actual Preſence of Parties, as Contracts; and they are, therefore, of Advantage, and do aid abſent Perſons in the Abſence of the Fact. And thus much of the Preſence and Abſence of Perſons: Only in a doubtful Caſe, a Perſon is preſum'd to be preſent and reſident in the Place where he is a Citizen, or an Inhabitant; unleſs he be proved to be abſent.

[z] Bald. Conſ. 488. lib. 1.

In reſpect of Things that may be ſaid to be *Res præſens*, which a Man may eaſily have and obtain upon Search thereof. And thus the Senſe and Meaning of the Law is ſaid to be *preſent* with us, when we may readily obtain the ſame after an eaſy Search thereof. And in this Senſe, Money is alſo ſaid to be *preſent*, when it lies ready for Payment, and may be eaſily had, tho' we have not actually received one Farthing thereof: For in this Senſe, Perſons, that are Men of Wealth and Riches, are ſaid to have *preſent* or ready Money. Hence it happens, that if any one buys with ready Money, ſaying, *I will pay you* ready *Money*, he may be ſaid to buy with ready Money, tho' he does not actually pay down the Money, or has not actually the ſame by him, becauſe he may eaſily have it; and ſuch a Perſon is rightly ſaid to have ſatisfied his Contract on a ſpeedy and voluntary Payment of the Money.

A Grant made to a Perſon, abſent and preſent, is valid *in Solidum*, for the Advantage of the Perſon preſent, *in Cauſa oneroſa*: As, when I purchaſe an Eſtate for myſelf and *Titius* in his Abſence, the Perſon of *Titius* is in this Caſe taken *pro Supervacua*: And, the Purchaſe of the whole Eſtate appertains to me [a]; becauſe the Buyer purchaſes the whole Eſtate, and cannot compel *Titius*, his Partner, being abſent at the Time of the Purchaſe, to ratify and accept of the Purchaſe of an Eſtate, that carries an Incumbrance along with it, if he refuſes ſo to do [b]. But if a Grant of this Kind be made upon a *lucrative* Conſideration, it is valid, and confirm'd for one Moiety, not only in reſpect of the Perſon preſent, but the Perſon abſent may alſo have his Moiety, if he pleaſes [c]. See further touching the Buſineſs of *Abſence*, in my *Parergon Juris Canonici.*

[a] D. 18. 1. 64.

[b] D. 12. 6. 26. 4.

[c] D. 45. 1. 110.

The End of the SECOND BOOK.

BOOK

BOOK III.

Of THINGS, the ſecond Object of the Law.

TIT. I.

Of the Quality and Diviſion of Things: Firſt, *into ſuch as are in a Man's Patrimony, and ſuch as are not; and into Things Common, Publick, and Private:* Secondly, *into ſuch as are Sacred and Religious, and what the Lawyers term* Res Sanctæ: Thirdly, *into Things Corporeal and Incorporeal:* Fourthly, *into Things Lawful and Unlawful: And* fifthly, *into Things Ordinary and Extraordinary.*

IT has been already remembred, That all the Right which Men make uſe of, has either a reſpect to Perſons, Things, or Actions: And having in the two foregoing Books diſcourſed of Laws, Perſons, and Human Acts; I ſhall here, in this Book, treat of Things, the ſecond Object [a] and Diviſion of Law, and conſider their Differences, and after what manner the Dominion and Property of them may be acquired, either by an univerſal or particular Title, as founded either on the Law of Nations, or elſe on the Civil Law.

[a] I. 2. 1. pr.

Now though the *Latin* word *Res*, which we in *Engliſh* render by the Name of *Things*, be a generical Term [b], comprehending both corporeal and incorporeal Things, as Services and other Rights; yet here it denotes whatever is foreign to Perſons and Actions, the other two Objects of the Law. The word *Res* appertains alſo to every Obligation, Contract, and to Things in Action, with *Civilians* ſtiled *nomina Debitorum*. Hence, if I give or bind all my Eſtate unto you under the Phraſe of *omnes Res meas*, Rights and Things in Action are underſtood to be given and bound over to you. But I ſhall only here ſpeak of Things as they are the ſecond Object of the Law [c], and of their Diviſion and Quality. And,

[b] D. 12. 1. 1.

[c] I. 2. 1. pr.

Firſt, It is to be obſerved, that Things are either ſuch as are in, or out of our Patrimony [d]. Things, which are in our Patrimony, or, which is the ſame thing, that are reckoned among a Man's Eſtate and Goods, are all thoſe Things which may be either demanded by an Action, or retained by an Exception [e]: And, therefore, Obligations [f], Services [g], and other incorporeal Rights may come under this Head. I have here uſed the word *Patrimony* in the general and extended Senſe thereof, and not in its ſtrict

[d] I. 2. 1. pr.

[e] D. 41. 1. 52.

[f] D. 50. 16. 49.

[g] D. 39. 1. 5. 9.

and proper Acceptation, when it ſignifies that Eſtate only which was derived *à Patre:* For *Paulus* ſays, that all Actions and Inheritances are [h] D.50.16.91. couched under the Appellation of *Meum* and *Tuum* [h]. But in a proper and particular Senſe of the Word, a Patrimony only includes that Eſtate, which a Perſon has by Deſcent from his Father, as juſt now hinted; and which he poſſeſſes by a certain kind of Property, as being Heir to it; and then the *nomina Debitorum*, or Things in Action, are not comprehended. Where- [i] D. 46. 6. 9. fore, *Pomponius* ſays [i], there are ſome Things in our Patrimony, and ſome Things which conſiſt *in nominibus*, or in Action. This firſt Diviſion of Things is explained by another, *viz.* that Things are either common or publick, or Things belonging to a Body Politick, or particular Perſons, [k] I. 2. 1. pr. or to no one [k].

Things *common* are thoſe, which in reſpect of their Property are the D.41.1.14. Goods of no Man, but as to the uſe of them are the Goods of all Men [l]; [m] I.2.1.1.&5. as the Air, Sea, Running-Water [m], and the Sea-ſhore, *&c.* For as the Sea cannot be occupied, it cannot be reduced to any Man's Property, unleſs (perhaps) a ſmall Portion of it be let in on a Man's Land, or Moles are [n] D.41.2.1. built on the Sea [n], and the like. The Sea-ſhore (I ſay) may alſo be D.43.8.2.8. reckoned as a Thing common, ſo far as the high Water-Mark runs, *viz.* [o] I.2.1.3. as far as the greateſt Wave extends itſelf in the Winter-time [o]. Things *pub-* D.50.16.96. *lick* are ſaid to be thoſe, which as to their Property do belong unto ſome Peo- & 112. ple, or private Man, but in reſpect of their Uſe they belong unto all Men equally, who do belong unto that State or People where they are; as pub- [p] I.2.1.2.&4. lick Rivers, Ports, Banks, and the like [p]. And theſe Things are entirely different from Things common, though, in the general Senſe of Things *publick*, Things *common* may alſo be ſaid to be Things *publick*, and ſometimes [q] D.41.1.14. are ſo called [q]. Thus Banks are ſaid to be Things *publick*, though the Property of them belongs to thoſe Perſons, that have Eſtates adjoining to [r] I.2.1.4. them [r]. A *Bank* is that, which contains the River within its due Bounds from over-flowing the Land, when it is at the fulleſt, reſtraining the natu- [s] D.43.12.15. ral Force of its Current on each, ſide [s]. A *Port* is an incloſed Place in the Sea, or in ſome River, where Merchandizes are imported, and alſo exported from thence; and we in *Engliſh* ſometimes call it a *Dock* or *Quay*. Thus a *Haven* is a Place where Ships may ſafely ride or remain at Anchor [t], [t] D. 43. 12. 1. in *Latin* called *Statio navium*: And if this be incloſed and fortify'd, it 13. differs not from a Port.

Things belonging to a Body Politick, or Corporation, are ſuch as belong to the Corporation or Body Politick, in reſpect of the Property of them; but as to their uſe, they appertain to all thoſe Perſons that are of the Corpo- [u] I.2.1.6. ration or Body Politick, as Theatres, Market-Houſes, and the like [u]. A Corporation, College, or Body Politick, is a collective Body of Men, which is neither a Family, nor a Free State or Commonwealth, but is diſtinct from the Method of its firſt Creation and Exiſtence: And to conſtitute ſuch a [w] D.50.16.85. Body, three Perſons are (at leaſt) required [w], though one be ſufficient to [x] D.3.4.7.1. conſerve the ſame [x]; as may be ſeen under the Title of *Corporations*, to which I refer the Reader.

Things are ſaid to be the *Goods of no one*, ſeveral ways: *Firſt*, by [y] I.2.1.12. Nature [y], as that Right which is common unto all Men; for no one can call & 22. that his own. *Secondly*, by Cenſure: And theſe Things are the Goods of no Man in ſuch a manner, that they cannot become the Goods of any Man; [z] D. 1. 8. 1. and hence they are alſo ſaid to be of *divine Right* [z]; ſuch are Things ſacred, religious, and what our Books ſtile *Res ſanctæ*. Things *ſacred* are thoſe Things which are in a ſolemn manner conſecrated unto God by the means of the Prieſthood; as Churches and Temples which are ſolemnly dedicated to the Ser- [a] D.1.8.6.3. vice of God [a]. And theſe Things cannot be alienated, unleſs it be for the [b] I.2.1.8. Redemption of Captives [b], or for paying the Debts of the Church in caſe of neceſſity;

neceſſity [a]; or for the Maintenance of the Poor [b]. Things *religious* were ſo called by the Ancients, by reaſon of ſome Sanctity ſuppos'd to be in them, as being removed and ſeparated from common uſe: And hence we ſay, that that is *quid Religioſum*, which, being exempted from common uſe, ought to be reverenced on the ſcore of ſome Sanctity in it, as *Cicero* calls the Heathen Temples *Religioſa Delubra*, being full of Majeſty and Veneration. But as there is no Religion ſo holy, but that at ſome time or other it is traduced and vilify'd by ſome vain Error of Superſtition, and which does not deviate from the right Way and Truth, it happens, that ſometimes Religion is taken for Superſtition, and he is by the Ancients called a religious Man, who is engaged, and binds himſelf down in a ſuperſtitious Religion, and who pretends to a great Zeal for Religion. From this Text, therefore, it is to be obſerved, that that is called a *religious* Place into which the Corpſe of a dead Man is brought to be bury'd, whether it be the whole Body, or only the principal Part thereof [c], which is the Head. For tho' no Place was accounted *ſacred*, unleſs it was appointed and made ſuch by publick Authority; yet heretofore every Perſon was ſuffer'd to make a Place *religious* by his own private Authority [d], by bringing a Corpſe thereinto. But it is at this day otherwiſe, by reaſon of the Papal Law publiſhed about the Conſecration of Church-yards: By which Law no Place becomes *religious* without the Pope's or Prieſt's Conſecration of it [e]. That Place alſo was formerly ſubject to *religious* Uſes, where the Body of any Perſon was burnt, and a Turff thrown over it. But the whole Place, which was purpoſely ſet aſide for Sepulture, did not become *religious*, but only that Place (as *Celſus* obſerves) where the Body itſelf was bury'd. But by the *Civil* Law a Place does not become *religious* by Conſecration, or a ſolemn Form of Words [f]. *Thirdly*, *Res ſanctæ*, or Things holy are thoſe, which are guarded or defended by ſome Sanction of Law, againſt the Violation of Men, as the Walls and Gates of a City [g], *&c.* And the Puniſhment inflicted on ſuch as ſcaled, or committed any Offence againſt the Walls of a City, was capital [h]. A *Sanction* is that part of a Law, which inflicts a Puniſhment, on ſuch as violate a Law: For the word *Sanctum* is ſo called from *Sagmen*, Vervain, a ſort of an Herb which the Ambaſſadors of the *Romans* were wont to carry to preſerve their Perſons from Violence by this diſtinction [i]. There were other ways whereby Things become the Goods or Property of no one, *viz.* by Fact [k], Time [l], and Chance [m], as Derelicts, hidden Treaſure, and the like; of which I ſhall treat in the Sequel of this Work moreat large.

[a] Nov. 120. c. 10.
[b] C. 1. 2. 21.
[c] D. 11. 7. 44.
[d] I. 2. 1. 9.
[e] X. 3. 40.
[f] D. 11. 7. 2. 5.
[g] I. 2. 1. 10. D. 1. 8. 8. pr.
[h] D. 1. 8. 11.
[i] D. 1. 8. 8. 1.
[k] I. 2. 1. 39.
[l] I. 2. 1. 46.
[m] D. 1. 8. 1.

It has been ſaid, that Things *ſacred*, *religious*, and what we term *Res ſanctæ*, (for we have no Word in *Engliſh* to expreſs theſe laſt by well) are Things of *divine Right* [n]; and ſuch Things as are of *divine Right* are not to be reckoned among Things of human Property: Wherefore, the Law forbids them to be alienated or plighted by way of Pawn or Mortgage, except it be for the Redemption of Captives, and in ſome other Caſes [o], as before remarked. Thoſe Things which adhere to Things *religious*, as Stones to a Monument, are deemed as Things *religious*: Wherefore, if ſuch Stones are removed or taken away, they cannot be recovered by a real Action, but muſt be ſued for by an Action on the Caſe [p], becauſe they are not Things of a profane Nature, when they are thus apply'd.

[n] D. 1. 8. 1. I. 2. 1. 7.
[o] I. 2. 1. 8.
[p] D. 6. 1. 43.

Another Diviſion of Things, is, that there are ſome Things which are ſtiled *corporeal*, and others that are called *incorporeal* [q]. *Corporeal* are thoſe, which may of their own Nature be ſeen, touched, *&c.* as Gold, Silver, a Garment, a Man, and the like [r]. All corporeal Things are Dividuals according to their Nature, ſince they may be divided. Hence Artificers have ſeveral Names given them, as Maſons, Carpenters, Joiners, and the like. The ſame Things alſo by an Interpretation of Law admit of a Diviſion either into integral Parts, or *Quota's*, or into diſcreet Parts, or *Quota's*. *Incorporeal* Things

[q] I. 2. 2. pr.
[r] I. 2. 2. 1.

Things are thoſe, which cannot be ſeen, or touched, *&c.* being ſuch Things as conſiſt only in Right; as an Inheritance, an Uſe, Uſufruct, and
[r] I. 2. 2. pr. all Obligations however contracted, Services [r], *&c.* Nor does this belong to the Matter, ſo as to hinder an Inheritance from being deemed an *incorporeal* Thing, becauſe Succeſſion conſiſts in Things corporeal: For even the Fruits and Profits which are received from an Eſtate, are Things corporeal, and that which is due to us from any Obligation, is very often reputed to be a corporeal Thing, as a Bondman, Money, *&c.* But the
[r] I. 2. 2. 2. Right itſelf of an Inheritance, and of an Obligation, is an incorporeal Thing [r]; and ſo likewiſe is the Right of an Uſufruct. And among *incorporeal* Things we may likewiſe reckon the Right of the *Prædia Urbana* and *Ruſtica*;
[s] I. 2. 2. 3. that is to ſay, City and Country Eſtates, which are Services [s]. A *corporeal* Thing (I ſay) is that, which has a viſible Body, and a limited Form, in ſuch a manner that it may be ſeen with our Eyes, and touched with our Hands: And though there are corporeal Things which cannot always be *actually* ſeen or handled, as Things in the Abyſs of the Earth, and Depth of the Sea, *&c.* yet they may be ſeen or touched *potentially.* Among corporeal Things we reckon Moveables and Immoveables, which ſome will have to be a third *Genus.*

Again, there is another Diviſion of Things, whereby they are diſtinguiſhed into Things *lawful* and *unlawful.* Now all thoſe Things are ſaid to be *lawful*, againſt which there lies no legal Penalty or Action; that is to ſay, ſuch as are not forbidden under a legal Penalty or Action. But tho' all Things are lawful, which are not expreſſly forbidden by ſome Law; yet every Thing is not ſaid to be honeſt and decent. Some Things are ſaid not to be lawful before they are done, which afterwards ſhall be lawful: And ſo *vice verſâ.* And a Thing is ſaid in reſpect of the Place where it is done to be lawful, which otherwiſe would not be lawful. If it be lawful to do that, which is greater, it is much more ſo to do that, which is leſs. Things expreſſed are ſometimes lawful; which being not expreſſed, but only tacitly implied, are unlawful. But this is not univerſally true: For there are ſome Things, which being expreſſed, are prejudicial, and hurt the Party, but being tacitly imply'd, do not hurt him: As for example, a Legacy given at the Will of another Perſon, is not valid; as when I deviſe an Eſtate unto *Seius*, if *Titius* will have it ſo. But yet if it be not expreſſly given at the Will of another, but only tacitly, ſuch Legacy ſhall be valid: As when it is ſaid, *I give to* Titius *ſuch an Eſtate, if* Sempronius *ſhall come*
[t] D. 35. 1. 52. *to* Rome [t], *&c.* Some Things are found to be lawful from their Quality and Difference, which otherwiſe would not be ſo: And ſome Things are found to be lawful for lack of proof, which otherwiſe would be unlawful. A Thing is ſometimes lawful by reaſon of a Pact or Promiſe, which otherwiſe would not be lawful. 'Tis ſometimes lawful for me to do that by another, which is not lawful for me to do in my own Perſon. And 'tis ſometimes lawful for a Man to do that in particular, which it is not lawful for him to do in general; as in the Caſe of a ſpecial Proxy. An unlawful Thing ought not to be committed for the ſake, or under the pretence of doing that which is lawful. Every Thing is unlawful that is either contrary to expreſs Law, or good Manners. By *good Manners* I here mean vertuous Actions; contrary to which are ill Manners, which are found in many Perſons. And *firſt*, in reſpect of young Men, there are commonly reckoned to be ſix *Species* of them: For *firſt*, young Men uſually follow their impetuous Paſſions, and care not what they do. *Secondly*, they are light and unſtable in all their ways. *Thirdly*, they are often cruel, and have little regard to Humanity. *Fourthly*, they are verboſe, noiſy, and contumelious in their Diſcourſe. *Fifthly*, they are, for the moſt part, Lyars, and love romantick Tales. And *ſixthly*, they have little or no Moderation

in their Actions [s]. But the evil Manners of old Men do commonly conſiſt herein, *viz. Firſt*, they are too fearful and ſuſpicious, having went thro' many Perils and Dangers of Life. *Secondly*, they are greedy and covetous through fear of Want before they die. And *thirdly*, they are too cenſorious of other Mens Actions [t].

[s] Terent. Com.

[t] Ter. ut ſup.

The fifth Diviſion of Things, is, that there are ſome, which are ſtiled *ordinary*, and theſe are ſuch as are ordained by the Law itſelf, according to the limited Senſe of the word *Lex* in the *Roman* Civil Law; or elſe ſuch as are ordained by ſome Plebiſcite, Decree of the Senate, Edict of the *Prætors*, or by ſome general imperial Conſtitution; and laſtly, whatever is enjoined by any written Law, the ſame becomes a certain, general, and uniform Law, and may be termed Things ordinary; as all ordinary Proceedings and Proceſs at Law, Puniſhments, *&c.* Things contrary hereunto are ſtiled *extraordinary*, as being determin'd by no certain Law, but left to the Diſcretion of the Judge in many caſes; as the extraordinary Cognizance of Cauſes [u], *&c* [v].

[u] D. 50. 13.

[v] D. 47. 11.

The laſt Diviſion of Things, is, that there are ſome Things which are ſaid to be Matters of *Law*, and ſome which are ſaid to be Matters of *Fact*. Thoſe Things which are founded on the *Civil* Law in reſpect of their Origine or Approbation, are, according to *Alciatus* [w], ſtiled Maters of *Law*: But thoſe that are founded on the Law of Nature, or of Nations, and are not aided in any reſpect by the Civil Law, he will have to be Matters of *Fact*; as natural Poſſeſſion is a Matter of *Fact*, but civil Poſſeſſion is a Matter of *Law* [x], as I ſhall ſhow hereafter under the Title of *Poſſeſſion*. Thus juſt Pacts, meaning ſuch as are cloathed with a Conſideration, or which the civil Law has approved, are alſo Matters of *Law* [y], as I think: And upon this account *nominate* Contracts are ſaid to be Matters of Law [z], tho' they may be ſaid to be Matters of *Fact* in reſpect of their Origine, as being founded on the Law of Nations [a]. For though the Law ſays, that a Sale has more of *Fact* in it, than of *Law*; yet this is to be underſtood of the Fact, which conſiſts in the making of ſuch Contract: For thoſe Contracts are *Facts* in reſpect of the making them; but when they are made, they become Matters of *Law* and *Right*, and produce the Effects of Law.

[w] In l. 1. D. 45. 1.

[x] D. 41. 2. 49.

[y] D. 46. 3. 95. 4.

[z] I. 3. 18. 1.

[a] D. 46. 4. 8. fin.

We ſay, that Things are *common*, which do of their own Nature and Original afford equal advantage to Man and other Animals: And they are, therefore, ſaid to be *common*, becauſe they are in common according to the natural Uſe of them; as I have before obſerved of the Air, Sea, and the like. Hence 'tis inferr'd, that every Perſon may not only have acceſs unto the Sea-ſhore, if this may happen without any Detriment to the Publick, or Inconvenience to the private Right of another Man; but may alſo fiſh in the Sea, and have an Action of *Injury* againſt him who ſhall hinder him ſo doing [b], unleſs (perhaps) another ſhall be in the *Quaſi* Poſſeſſion of the Right of fiſhing there alone: For then he may prohibit another that has a mind to fiſh there, and have an Action againſt him by an Interdict of *Uti Poſſidetis*. But the Property of the Sea, and of the publick Sea-Coaſts, may be preſcribed unto by immemorial Cuſtom [c], (as I ſhall hereafter prove) though it cannot be acquired by a Preſcription of thirty Years [d]. But to diſtinguiſh between Things *common* and *publick*, 'tis to be obſerved, that thoſe Things are ſaid to be *common*, which are of a promiſcuous Uſe unto other Animals, as well as unto Men, of their own Nature: But thoſe Things are ſaid to be *publick*, which are only for the publick Uſe and Service of Men. For the word *Publicum* is, in ſome meaſure, the ſame as *Populicolum*, from the word *Populus*. Hence, if we conſider the natural Advantage which accrues from a Thing, we ſay that ſuch a Thing is common: But if we conſider the Uſe of it among Men, as it ariſes from Induſtry, we call it a Thing *publick*, if it extends to publick Uſe. And, therefore, a Thing may be ſaid to be *common* by Nature, and *publick* by Uſe and Induſtry.

[b] D. 47. 10. 7.

[c] C. 11. 42. 4.

[d] D. 41. 3. 45.

TIT. II.

Of Goods; *what is to be underſtood by this Term, according to the* Civil *Law; and of moveable and immoveable Goods, what they are, and what is comprized under them; whether Rents, Things in Action, ſtiled* Nomina Debitorum, *&c.*

UNDER the Appellation of *Goods*, in *Latin* ſtiled *Bona*, we comprehend both *moveable* and *immoveable* Goods, according to the *Civil* and *Canon* Law: And though Rights and Actions do not come under
[e] D.28.6.15. the Name of *moveable* or *immoveable* Goods [e], but make a third *Species* of Effects diſtinct from thoſe; yet under the Name of *Goods* ſimply expreſſed without this Addition, *viz.* of *moveable* or *immoveable*, all Rights, Titles,
[f] D.7.2.74. C.8.17. Specialties and Actions are included in a large Senſe [f]. Thus the Prince, by a Grant of *Goods*, ſeems to grant all Obligations and Actions [g]. The
[g] D.50.16.21. word *Bona* or Goods may be underſtood either *naturally* or *civilly*. Thoſe
[h] D.50.16.49. are ſaid to be *Goods* in the natural Senſe of the Word, *quia beant* [h]; that is to ſay, becauſe they make Men happy, or (at leaſt) ought ſo to do: And thus the word *Beare* imports the ſame as *Prodeſſe*. But in a civil Senſe, not only thoſe Things are reckoned among our Goods, which are of our Property, but even thoſe which we are poſſeſſed of *bonâ fide*, and claim by a lawful Title: And in ſuch a Senſe all Actions, Demands, and Proſecutions are comprehended. But the words *Bona* and *Res* do admit
[i] D.7.2.74. Bart. ib. of a Diſtinction and Difference, according to the Law here quoted [i]. Debts to be demanded, or ſued for, do alſo come under the Appellation of *Goods*,
[k] D.35.2.82. but the Expences of the Suit ought then to be deducted [k]: But, I think, future Debts do not come under this general Appellation, unleſs it be in
[l] C.10.1.4. ſome particular Caſes. See *Bartolus* on the Law here cited [l]. *Adventitious* Goods are ſaid to be thoſe, which are acquired by the Labour and Induſtry of a Son. Thoſe Things are ſaid to be the Goods and Chattels of a
[m] D.37.6.2.1. Perſon, which remain to him after all Debts are paid and diſcharged [m]. Though the words *Bona moventia*, or Things moving themſelves, have a reſpect unto an *active* Signification, as the words *Bona mobilia* are taken *paſſively*; yet theſe words *Moventia* and *Mobilia* are oftentimes uſed for the ſame thing, unleſs the Mind of the Perſon appears to be otherwiſe:
[n] D.42.1.15.2. As in the *Prætor's* Edict [n], wherein it is ſaid, That Execution of a Sentence ought not to be made on Things *moving* themſelves, as Horſes, Mules, Aſſes, Oxen, *&c.* until it has been firſt ſerved on Things *moveable*; provided this be more for the Debtor's Advantage. But neither *Moveables* nor *Immoveables* are couched under the word *Rights*; for *Rights* make a third ſeparate *Species* of Things, as juſt now hinted: Yet, by an Interpretation of Law, or an Impropriety of Speech, even *Rights* are reckoned among *Immoveables*. Perpetual Rents, Penſions, and laſting Revenues are alſo reckon'd among *Immoveables*: But if Rents or Revenues are only to laſt for a ſhort ſpace of time, they are then reckoned among *Moveables*. But ſome will have it, that, by reaſon of the word (*All*) put in any Law or Deed, both *Rights* and *Actions* are comprehended under the Stile of *moveable* and

immoveable

immoveable Goods, if, according to the Subject of the Obligation, they depend on the Will of the Diſpoſer, and may and ought to be preſumed ſo to do: And though this Opinion does not pleaſe *Tiraquellus*, who has ſaid much for the Proof of both ſides of this Queſtion; yet it ſufficiently pleaſes me, by reaſon of the vulgar and common way of Speech, according to which this Clauſe of, *all my Goods moveable and immoveable*, ought to be extended to *Rights* and *Actions*, according to the Mind and Intent of the Parties contracting. And *Oldradus* thinks [o], that *Rights* and *Actions* are included under the Name of *moveable* and *immoveable* Goods, by reaſon of the common way of ſpeaking, where ſuch Uſage of Speech has obtained.

[o] Conſ. 219.

Under a general Hypotheque or Mortgage of all a Man's Goods, even *Rights* and *Actions* are couched; and ſo likewiſe are all Fines and Specialties in our Books ſtiled *Nomina Debitorum:* But, under the Appellation of *moveable* and *immoveable* Goods, *Rights*, *Actions*, and *Specialties* are not contained, even in the Buſineſs and of an Hypotheque or Mortgage. Thus if all my *moveable* and *immoveable* Goods ſhall be engaged by way of Pawn or Pledge, *Bartolus*, *Decius*, and others think, that only Goods ſtrictly ſo called are engaged, and not *Rights* and *Actions*. But it has been a great Queſtion among the Lawyers, whether the *Nomina Debitorum* or Debtor's Accounts may be reckoned among *moveable* or *immoveable* Goods? The Gloſs on the Law ſays, that when *Immoveables* come in Action; that is to ſay, if an Action be brought for them, then the *Nomina Debitorum* ought to be reckoned among *immoveable* Goods: But if *moveable* Goods come in Action, then they ought to be reckoned among *Moveables*. Others will have it, that theſe Debtors Accounts are a third *Species* (as before related) in their own Nature: For they are not circumſcribed in Place, as corporeal Goods are; whereas both *moveable* and *immoveable* Goods are circumſcribed to Place. And this, I think, to be true; when it is not neceſſary that the *Nomina Debitorum* ſhould neceſſarily give place to another *Species*. But when it is neceſſary that they ſhould give place, as when the Queſtion is about the Alienation of a Thing, which is permitted or forbidden, according to the *Civil* Law touching the Goods of Minors, then the ſaid Diſtinction has place. As when a *moveable* Thing is contained in an Action, they are among *Moveables*; but if an *immoveable* Thing, then among *Immoveables*.

It has been ſaid, that yearly Rents and Penſions are reckoned among *Immoveables*, when they have a reſpect to length of time: But *Federicus de Senis* [p] limits this Rule and Concluſion in Law. For if yearly Rents or Penſions of ſix or eight Years Continuance are bequeathed to any one, they are not reckoned among *Immoveables:* But the Rents of Poſſeſſions, that is to ſay, of real Eſtates, are equivalent unto *Immoveables*, when the Diſpoſition of the Grantor has a relation to length of time, as thirty or forty Years Continuance. *Laſtly*, in a general Senſe of the word *Goods*, is contained every kind of Profit and Emolument, accruing to a Man from a real and perſonal Eſtate, and even from his Labour and Induſtry.

[p] Conſ. jur.

Goods found in the Husband's Houſe are preſumed in Law to be the Goods of the Husband, by reaſon of that Preheminence which is in the Husband. Hence it is, that when a Feme-Covert avers Goods to be hers, (for by the *Civil* Law the Husband and Wife had formerly diſtinct Properties) ſhe ought to prove the ſame, otherwiſe ſhe ſhall not be admitted thereunto [q]. And *firſt*, the Woman in this caſe muſt prove the Goods to be hers by ſome private Writing or Contract of the Husband [r]: And if this cannot be clearly proved, Proof had by Conjectures and Preſumptions is ſufficient, according to *Socinus* in his *Conſilia Juris* [s]. But Goods thus found are not preſumed to be the Husband's, when a Preſumption ariſes in favour of the Wife from the Nature and Quality of the Goods, as in the caſe of Womens Apparel,

[q] Mat. Math. in l. 1. C. 7. 73.
[r] D. 23. 3. 9. 2. Imol. in l. 41. D. 41. 2.
[s] Conſ. 128. vol. 1. Arg. C. 5. 17. 8.

Apparel, and ſuch other Goods as are ſuitable unto a Woman's Eſtate and Condition, as her Toilet and dreſſing Implements: For in this Caſe, he that [s] D. 32. 1. denies them to belong to her, ought to prove his Intention [s]. *Secondly*, this Concluſion holds good in reſpect of the Wife's *Paraphernalia*, which of *common Right* belong unto the Woman, unleſs the contrary be proved; [t] D. 10. 2. 1. becauſe as they are uſed by her alone, they are preſumed to be hers [t]. The D. 28. 7. 27. *Bona Paraphernalia* are ſaid to be thoſe Goods which the Wife has *extra dotem*, viz. becauſe the Wife does not deliver them to her Husband by way of Dowry, but reſerves them to herſelf, not only in reſpect of their Property, but alſo in reſpect of the Uſufruct and Adminiſtration of them. And of this kind we may reckon not only thoſe which the Wife reſerves to her ſelf upon a Contract of Matrimony, but alſo thoſe which ſhe has acquired after ſuch Contract, by Donation, Legacy, or other ways; and even thoſe which the Wife has acquired by her own Labour and Induſtry, after a Deduction of the Work and Service, which ſhe owes to her Family. Thoſe Goods are ſtiled *Bona Dotalia*, and not *Paraphernalia*, which a Woman has not at the time of her Marriage, either expreſſly or tacitly reſerved unto herſelf; becauſe a Woman at the time of her Marriage is deemed to aſſign all Goods unto her Husband by way of Dowry, unleſs it appears otherwiſe either by Words or probable Conjectures. Thus there is a manifeſt difference between the Dowry and the *Paraphernalia*: For the Dower remains in the Power and Diſpoſal of the Wife in reſpect to the Property of it; but, in reſpect of the Uſufruct and Adminiſtration of it, it belongs to the Husband, as I ſhall conſider hereafter under the Title *Dower*: But this is ſaid of a *Dos inæſtimata*, which cannot be alienated by the Husband: But a *Dos æſtimata* belongs to the Husband in reſpect of the Property, Uſufruct and Adminiſtration of it; the Eſtimation making it ſaleable, whereas the other cannot be ſold.

A Father that has the *adventitious* Goods of his Son under his Care and Adminiſtration, and pays a Sum of Money for him, is in a doubtful Caſe preſumed to make ſuch Payment out of his Son's Goods, and not out of his [u] D. 5. 3. 58. own Effects [u]: yet if a Father has any of his Son's or Daughter's Goods in his poſſeſſion, and gives or promiſes a Wedding-Portion, he is preſumed to do [v] C. 5. 11. 7. it out of his own Eſtate, and not out of his Daughter's Goods [v]: And the reaſon is, becauſe he cannot diſpoſe of the *adventitious* Goods of his Son [w] D. 6 61. 8. 4. or Daughter [w]; and, moreover, is bound to endow his Daughter. Hence the Father cannot give them by way of Dowry, but the Daughter may ſo give them, and then it is the Father's Buſineſs to conſent to ſuch a Giſt, [x] C. 6. 60. 1. which is his Intereſt to do, as having only the Uſufruct of them [x]. And this Concluſion holds true, even though the Father ſhall *à principio* ſay, that he has already endowed his Daughter. The Goods of the Mother do belong to the Son of the Mother deceaſed, in reſpect of the Property of them; but in reſpect to the Uſufruct of them, they belong to the Father.

Bona Superficiaria are the Goods and Poſſeſſions of him, who poſſeſſes an Edifice built on another's Soil or Ground, which we call the Ground-[y] D. 43. 18. 2. Rent, unto which the *Superficiarius* has an *Utilis Actio* in the realty [y]: And he differs from an *Emphyteuta*, becauſe this laſt both holds the Soil and his own Improvements from the Lord, and pays a certain Penſion or Quit-Rent upon this account. But a *Superficiarius* oftentimes pays nothing at all; nor is he ſaid to hold this Improvement from the Lord, unleſs he ſhall rent the *Superficies*, and become a Ground-Tenant. The *Super-*[z] D. 43. 18. 1. *ficies* here ſignifies that which is built on the Soil [z].

There are alſo ſome Goods that are ſtiled *Bona Reſidua*; and theſe are ſuch Goods as are not ſpecify'd by the Teſtator in his Laſt Will and Teſtament, but paſs under a general Clauſe. And with ſuch a Reſidue as this, the Ordinary ought not to intermeddle: For the Office of the Ordinary,

according to the common Opinion of the Lawyers, does not extend itſelf to thoſe, but only to ſuch Goods and Chattels as are left to Legacies and charitable Uſes.

The *Fiſcus* or publick Treaſury is often increaſed by the Acceſſion of Things, which were the Properties of private Men; and this may happen ſeveral ways: As *firſt*, when their Goods and Effects are without an Owner to aſſert and claim the ſame; becauſe (perhaps) the Owner died without an Heir [a]; or becauſe no one will accept of the Heirſhip or Inheritance, and the like: And theſe Goods we call *vacant* or *eſcheated* Goods. The *Greeks* term them *Adeſpota*, becauſe they have no Owner. By the *Julian* Law it was provided, that theſe Goods ſhould be forfeited to the Exchequer, as being deſerted; and *Juſtinian* afterwards confirmed this Right, and ſettled ſome Methods for eſtabliſhing the Forfeiture of them. At this day, in ſeveral Places *eſcheated* Goods do not belong to the Exchequer, but are granted out to Lords of Manors, together with full Juriſdiction, and other kinds of Royalty: But by the *Roman* Law, no one could ſeize them but by the Prince's Indulgence, and that for the Uſe of the Exchequer too. Among *Eſcheats*, we may reckon the Goods of Baſtards born out of lawful Wedlock, if they die without Children, or making a Laſt Will and Teſtament: And theſe are alſo in many Countries granted out unto Lords of Manors. But then, in order to give theſe Lords a Succeſſion unto the Goods of Baſtards, it is neceſſary that ſuch Baſtards be born within the Lord's Territory or Juriſdiction, and dwelling there, die without Children: For if they leave Children, or make a Will, they exclude ſuch Lords of Manors. See *Peregrin. de Jure Fiſci* [b]. In *France*, the King ſucceeds to the Goods of Foreigners dying there, by the Right of *Albinage*, unleſs they are naturalized; and the like Law we have in the *Netherlands*: But at *Hanover*, the Exchequer ſucceeds thereunto. But whoever ſucceeds to *eſcheated* Goods, they ought to make an Inventory of them, to pay all Creditors their juſt Demands, and to ſatisfy all *ſimple* Legacies, and Legacies in Truſts [c]; becauſe theſe Goods paſs *cum ſuo onere* [d]. If the Exchequer, or any other Perſon, ſhall neglect to ſeize *eſcheated* Goods for twenty Years, or ſhall not be apprized thereof for the ſaid Term, it ſhall loſe its Right, if ſuch Goods conſiſt in Actions [e], but if in real Goods, it is otherwiſe; for no Preſcription or Limitation of Time ſhall bar the Prince in reſpect of ſuch Goods [f].

[a] C. 10. 10. 1. & 4.
[b] Lib. 4. Tit. 3.
[c] D. 30. 1. 96. 1.
[d] D. 35. 1. 60. 1.
[e] D. 44. 3. 13.
[f] I. 2. 6. 9.

The Goods of thoſe Perſons alſo are forfeited to the Exchequer, who, through a Conſciouſneſs of their Guilt and Crimes, make away with themſelves before any Judgment or Sentence is paſſed upon them, being looked upon as Perſons convict and guilty [g]: And ſo likewiſe are the Goods of Men, who ſtop the Mouths of their Adverſaries with Bribes, that they ſhould not follow the Law againſt them [h]. But in both theſe Caſes, the Criminal ought to ſtand charged with ſuch a Crime, whereby he loſes his Goods. If the Heirs of a Perſon, that thus lays violent hands on himſelf, will undertake to defend the Cauſe, they ſhall be heard; and if they prove that this Self-murder was committed upon ſome other account, as through Impatience of Pain, Irkſomneſs of Life, *&c.* or that the Deceaſed was an innocent Perſon, his Goods ſhall not be forfeited [i].

[g] D. 48. 21. 3.
[h] D. 48. 21. 2.
[i] D. 48. 21. 3. 4. & fin.

The Law having paſſed Sentence upon an Offender, in ſuch a manner as that he ſhould loſe his Life, Liberty, or Country, his Goods become immediately forfeited to the Prince [k]; ſuch Goods (I mean) as are of value: But as for the other, the Law allows them to the Priſoner for his Maintenance during the Time of his Impriſonment, and for ſatisfying ſuch Fees as are due to the Officers thereof: which has place, when the Offender has no Children, otherwiſe one Moiety of his Goods come to his Children [l], unleſs it be in caſe of Treaſon, where all is confiſcated. But only the Goods of

[k] D. 48. 20. 1.
[l] D. 48. 20. 1. & 7.

the Perſon condemned are forfeited, and not the Effects of other Perſons, as of his Wife, *&c.* For ſhe ſhall have her Dower and her *Paraphernalia* [m]. Nor are the *Peculia* or Properties of Children under the Power of the Father, or of Servants, forfeited through the Offence of the Father or Maſter [n]. The wearing Apparel of the Perſon condemned, when he is carry'd to Execution, is not confiſcated, but the Sheriff or Officer of the Law ought to have it as a Fee of his Office [o]. But *Juſtinian* has by a *Novel* Conſtitution provided, that the Exchequer ſhall not claim the Goods of Perſons proſcribed, if the Criminal has any Deſcendants *in infinitum*, or Aſcendants to the third degree, as in the Caſe of Perſons that kill themſelves [p]. Neither the Goods of Perſons condemned, nor of ſuch as lay violent hands on themſelves, do come under the Name of *eſcheated*, but of *Felons* Goods.

[m] C. 9. 49. 11.
Nov. 134. c. ult.
[n] C. 9. 49. 1. & 3.
[o] D. 48. 20. 6.
[p] Nov. 134. c. ult.

Laſtly, Under the Notion of *Goods*, we may comprehend all that which belongs to a Thing ſold. So that in the Sale of a Houſe, every thing fixed to it is contained [q], though not particularly expreſſed; and alſo the Locks and Keys which are neceſſary thereunto. In the Sale of Lands, the Trees and the Mines paſs, but not the Cattle upon it, or the Fiſhes in the Ponds. In the Sale of an Horſe, the Bridle and Saddle is not ſold [r], for they are only for Ornament: But *Cuſtom* oftentimes determines what ſhall be comprehended in ſuch a Sale.

[q] D. 19. 1. 13. 31. 32. &c.
[r] D. 21. 1. 38.

TIT. III.

Of Dominion *or* Property; *how it is diſtinguiſhed, and the ſeveral Methods of acquiring it, both by the Law of Nations and the* Civil *Law*; *as by* Occupancy, Acceſſion, Specification, Confuſion, Delivery, Receiving of Fruits, *&c. Theſe, with many other ways of acquiring, are, according to the Law of Nations, and ſhall be the Subject of the enſuing Title.*

HAVING already, in a foregoing Title, *touching the Diviſion of Things*, briefly diſcourſed of Things common, publick, and of Things belonging to a Corporation or Body-Politick, and alſo of Things in the Property of no one; I ſhall here principally ſpeak of Things as they may be in the Property of particular Perſons, commonly called *private Property*; and conſider how this kind of Property may be acquired according to the Law of Nations, and in other ſubſequent Titles enquire into the ways of acquiring it, according to the *Roman* Civil Law; as by Succeſſion, Legacy, Donation, *Fidei-Commiſſum*, &c. For all kind of Property is either owing to the Law of Nations, or elſe to the civil and municipal Law of every particular State [s]: And by the Law of Nations, and the *Roman* Civil Law, it is to be obſerved, that Property may be acquired by no leſs than three and twenty ſeveral ways.

[s] D. 41. 1. pr.

Now *Property*, in *Latin* ſtiled *Dominium*, is a Right, whereby any Thing becomes a Man's in ſuch a manner, that he may alienate and diſpoſe of the ſame, according to his own Will and Pleaſure [t], unleſs he be prohibited

[t] C. 4. 35. 21.

to do the ſame, either by ſome Law, Covenant, or Laſt Will and Teſtament. The *Latin* word *Dominium* is derived from the *Greek* Verb Δομάω, and not from the word *Domus*, a Houſe, as ſome would have it: There being no Analogy between *Dominion* and *Building*; becauſe he that builds a Houſe is not, therefore, ſaid to have the Dominion or Owner-ſhip thereof. Yea, a Thing built on another Man's Ground or Soil, rather gives place to the Soil, and becomes the Property of him who is Lord and Owner of the Soil, as I ſhall obſerve hereafter. Wherefore, Dominion or Property is ſaid to be a Power or Faculty, whereby a Man has the ſole Command and Authority over a Thing, in order to diſpoſe of it at pleaſure, as aforeſaid: And, in this Senſe, the Lawyer *Paulus* calls the Power which the *Romans* had over the Perſons of their Bondmen and Vaſſals, by the Name of *Dominium*, and the Power which any one had over the Perſons of Freemen, by the *Latin* word *Imperium*. According to *Paulus*, and ſome others, Property had its beginning from Poſſeſſion: And, therefore, the Right of Property and Ownerſhip comes under the Name and Title of *Poſſeſſion*, and among them the Right of Property, and of corporeal Poſſeſſion, is one and the ſame thing; the *Latin* word *Dominium*, with them often ſignifying Poſſeſſion. But, properly ſpeaking, this word *Dominium* only denotes the Property of any Thing; and the word *Poſſeſſion* points out the Uſe of a Thing. Indeed, Dominion and Property had its beginning from *natural* Poſſeſſion; and may in ſome certain Caſes be transferr'd without Poſſeſſion: I ſay, *natural Poſſeſſion*, becauſe by the Law of Nature, every Man made that his own, of which he was poſſeſſed: For the Properties of Goods and Eſtates are diſtinguiſhed either according to the Law of Nature, the Law of Nations, or the Law of God. By the Law of Nature Men have a Right unto all the Goods of this World, ſo far as they tend to their neceſſary Subſiſtence. By the Law of Nations this Right or Property accrues to them by human Compact and Agreement. And by the Law of God it is confirmed to them by the eighth Commandment of the Decalogue delivered unto *Moſes*, viz. *Thou ſhalt not ſteal.*

Again, Property is diſtinguiſhed into what we call *Plenum* and *non Plenum Dominium*. The firſt, is, when we have the Property and Poſſeſſion of a Thing, with the Emoluments thereof: And the ſecond, is, when the Property is ſeparated from the Poſſeſſion and the Emoluments of it [t]. But this is commonly divided into *Dominium Directum* and *Dominium Utile*. A Man is ſaid to have the *Dominium Directum*, or the *direct* Property of a Thing, when the Property of it is veſted in him without the Fruits and Emoluments thereof: And thus the Lord of a *Fief*, and an *Emphyteuſis*, has the *direct* Property of thoſe Eſtates. And he is ſaid to have the *Dominium Utile*, or Uſufruct, who has the Poſſeſſion of the Thing, with the Fruits and Emoluments, but not by a Right of Property: And ſuch a Perſon is a Vaſſal and an *Emphyteuta*, according to *Bartolus* [u]. There is one kind of Property, which is ſtiled *civil*, and another which is termed *natural* Property: For the Woman has the *natural* Property of her Dower, but the Husband the *civil* Property thereof [v].

[t] Weſemb. in D. 41. 1.

[u] In l. 17. D. 41. 2. 1.

[v] C. 5. 12. 30.

Now the Properties of ſuch Things as conſiſt in Commerce, are acquir'd either by the Law of Nations, or by the Civil Law [w], and not by the Law of Nature, which is common to all Animals; becauſe the diſtinction of Property, as here underſtood, was introduced by the Law of Nations [x]: And as this kind of Property was more ancient than that which is founded on the *Civil* Law, I ſhall firſt diſcourſe of Property, as introduced by that Law. The ways of acquiring Property by the Law of Nations, are ſix, principally ſpeaking, *viz. Occupancy*, *Acceſſion*, *Specification*, *Confuſion*, *Delivery*, and *Receiving of the Fruits of an Eſtate*: which Methods, though they may be well enough reduced to three, *viz.* to *Occupancy*, *Acceſſion*,

[w] D. 41. 1. 1.

[x] D. 1. 1. 6.

Acceſſion, and *Delivery*; yet I ſhall follow the Order and Number of them as they are marked out to us by the *Juſtinian* Inſtitutes[y].

[y] I. 2. 1.

Now *Occupancy* is a ſeizing or poſſeſſing ourſelves of thoſe Things which belong to no particular Perſon or Body of Men, and thus making them our own[z]. For, by the words *Res nullius* in the Law[a], we mean thoſe Things which are not the Goods of any Perſon by natural Right, or in reſpect of Time. The *Species* of Occupancy are three, *viz. Hunting*, *Finding*, and *Seizing* of Things in time of War belonging to the Enemy. Again, *Hunting* may be ſubdivided into a threefold manner; and it includes Hunting, properly ſo called: *ſecondly*, *Fowling*; and *thirdly*, *Fiſhing*: All of which I ſhall handle more largely hereafter. *Occupancy* founded upon the Right of War[b], we may call *Captivity*: For there are ſome Things which we make our own by the Right of a juſt War, as being taken from the Enemy[c]. And there are others which become our Property by a *ſpecial* Occupancy, as juſt now hinted: being ſuch Things as are in the Property of no one, but may become the Property of any one; and theſe Things are granted to the firſt Occupant by the Law of Nature, or right Reaſon[d].

[z] D. 41. 2. 3. 3.
[a] I. 2. 1. 12.
[b] D. 41. 1. 6.
[c] D. 41. 1. 7.
[d] D. 41. 1. 3.

I have before, under the Title of *the Diviſion of Things*, obſerved, that Things are ſaid to be the Property of a Perſon, either by Nature, or elſe by ſome Fact; or *thirdly*, by Time itſelf. Among thoſe Things which are of no Man's Property by Nature, and yet become ſo, we may reckon Things animate and inanimate. The firſt of theſe we make our own by the *Occupancy* of Hunting, Fiſhing, and Fowling, as already ſaid: And the others become ſo by *Invention* or Finding of them. Therefore, all wild Beaſts, Birds, and Fiſhes, which are bred upon the Land, ſeen in the Air, or found in the Sea, as ſoon as they are taken by any one, do immediately become the Property of that Perſon, who ſeizes or takes them, by the Law of Nations. For that, which was the perſonal Property of no particular Man before, is now granted by natural Reaſon to the *Occupant*, or Perſon that firſt ſeizes it[e]. And the Law diſtinguiſhes not, whether the Perſon takes them on his own, or on the Eſtate of another Perſon[f]; provided they are not in Parks, Fiſh-Ponds, or other Incloſures[g]. But the Proprietor of the Land may forbid another from coming thereon[h], and if any one ſhall contravene ſuch Prohibition, he may have an Action of Injury or Treſpaſs againſt him[i]. By *wild Beaſts*, I mean not only ſuch Animals as are of a fierce and ſavage kind, but even ſuch as are of a wandring Nature, and are not kept within any certain Incloſures[k]. But theſe Things, though they are incloſed, and rendred tame by Art and Nature, do yet become the Property of the firſt Occupant, if they recover their ancient Liberty, and not otherwiſe, unleſs they are accounted Derelicts, or are otherwiſe transferred by the Proprietor unto another Perſon[l]. Princes have at this day taken away theſe Rights of Hunting from their Subjects, and reſerved them to themſelves, how warrantably I ſhall not here determine.

[e] I. 2. 1. 12.
[f] D. 41. 1. 3. 1.
[g] D. 41. 1. 3. 14.
[h] I. 2. 1. 12.
[i] D. 47. 10. 13.
[k] I. 2. 1. 12.
[l] I. 2. 1. 16.

Wounding of wild Beaſts or Animals in Hunting, is not ſufficient to give a Man a Right thereunto[m], but occupying or ſeizing the ſame is alſo neceſſary thereto, whether it be done with a Man's Hand, or with an Inſtrument, as with Nets, Toils[n], *&c.* Nor is it enough once to have occupy'd and ſeized them, if they afterwards make their eſcape, and the Purſuit of them is different[o]. But it is lawful to ſeize wild Beaſts in this manner, and not ſuch as have been made tame, if they go away with a purpoſe of not returning again[p]. It is not lawful to ſeize by *Occupancy* ſuch tame Animals as are, for the moſt part, in a Man's Property, as Hens, Geeſe, Turkeys, *&c.* For if any one ſhall ſeize theſe with a *Lucrative* Intention, he commits Theft[q].

[m] I. 2. 1. 13.
[n] D. 41. 1. 55.
[o] D. 41. 1. 32.
[p] I. 2. 1. 15.
[q] D. 41. 1. 44. I. 2. 1. 16.

That,

That, which a wild Beaſt takes away by force from us, ſtill remains in our Property as long as we can purſue it. *Martius* delivered his Sheep or Hogs to a Shepherd or Swineherd to drive to Paſture; and as he was driving them along, a Wolf ſeized a Sheep or Hog, and carried it away by force. A certain Countryman being near, followed the Wolf with his Dogs, and recovered the Beaſt out of the Jaws of the Wolf. *Quære*, Whether the Sheep or Hog belongs to the Countryman that reſcued it, or to *Martius?* Some have thought, that it belongs to the Countryman. As when a Perſon has taken a wild Beaſt, and afterwards it makes its Eſcape, in this Caſe it becomes the Property of him who then ſeizes it: But in the former Caſe, certainly the Sheep or Hog ought to be reſtored to *Martius* the Owner. As when I have loſt a Thing by Shipwreck, and another ſeizes it, the *Occupant* ought to reſtore it to me, otherwiſe he ſhall be liable in two-fold according to the antient Law: ſo that the Caſe of tame and wild Beaſts differs. If the Perſon, who reſcued the Sheep or Hog, refuſes to reſtore it, he ſhall be liable to an Action of Theft, and to an Action *ad exhibendum* on a Claim of the Sheep or Hog [r]; for the Property thereof ſtill remains with the Owner, ſo long as they may be recovered.

[r] D. 41. 1. 44.

By *wild Beaſts*, we mean ſuch as live at random, and not in Herds, and which on their Eſcape return not to their Owners. And the ſame may be ſaid of other Animals; as of Fiſhes in a River, and of Birds not cooped up and made tame. As to wild *Beaſts* and *Birds*, they belong to the Perſon that firſt ſeizes them, as before related, by Hunting or Fowling, whether it be in his own or another's Ground: But Fiſh are the *Occupant's*, if taken in the Sea, or publick Rivers only; for if they are taken in private Rivers or Ponds, they belong to the Owners of the Water [t].

[t] D. 47. 10. 7.

Titius laid a Snare or Toils for the ſake of taking a wild Boar: into which a wild Boar fell, and could not get out. *Seius* paſſing by, ſaw the Boar therein, and took him from thence. *Quære*, Whether *Seius* be obliged to reſtore the Boar unto *Titius?* And it was held, that he is not; becauſe as *Titius* did not take him out of the Snare, he could have no Property in him. But if *Titius* had ſeized and taken him out of the Toils, by this means it would have been his, and then he may have an Action on the Caſe againſt *Seius*, if *Seius* by receiving him, or taking him away from *Titius*, ſuffers him to make his eſcape; though the Boar by ſuch Eſcape ceaſes to be the Property of *Titius*. But in this Caſe, I think, it ought to be conſidered, whether the Snare was laid in a publick or private Place; if in a private Place, whether in a Place belonging to me or another Perſon; whether I had his Conſent or not; whether the Beaſt was ſo hamper'd, that it was improbable he could get looſe by ſtruggling: If it was in my Ground, or if the Snare was laid in another's Ground by his Conſent; and if it were unlikely that the Beaſt could eſcape, an Action then lies for taking them away, or for letting them looſe.

Under the Appellation of *wild* Creatures or Animals, we may reckon *Bees*, which are of a *wild* Nature, (though *Pliny* in his natural [s] Hiſtory will have them neither to be of a tame, nor of a wild Nature:) And, therefore, Bees that ſwarm and ſettle themſelves on a Tree of yours, are no more underſtood to be yours, before you have hived them, than Birds in their Neſts on your Trees [t]. Wherefore, if another Perſon ſhall hive them before you [u], he ſhall be the Proprietor of them. But if you ſhall ſee a Perſon entring on your Ground or Land, you may, before he has taken the Bees, by Law forbid him entring thereon [v]. Moreover, it is held, that the Swarm which flew out of your Hive, is ſo far underſtood to be yours, as long as you can have ſight of them, and the Purſuit is not difficult:

[s] Lib. 11. c. 5.

[t] I. 2. 1. 14.

[u] D. 41. 1. 5. 2.

[v] D. 41. 1. 5 2.

But otherwiſe it becomes the Property of the firſt *Occupant*. By a *Swarm*, I here mean a new Offspring of Bees, which their Parents or Stock have forced out of their Hives to ſeek a new Habitation. Therefore, it is to be obſerved, That though the Nature of Bees be wild, yet their Swarm is ſo far yours, ſo long as it retains a Purpoſe or Cuſtom of returning to you, or you do not deſpair of having them again. For why ſhould another occupy thoſe Bees which are in your Poſſeſſion, and are wont to go and return again? But if any one ſhould forbid or hinder you from hiving them, you may commence a real Action againſt him[w]. But in this Caſe we ought to conſider what is the cuſtomary Law in every Place. In ſome Places this diſtinction is made, *viz.* whether the Proprietor of the Bees did well obſerve and mark the Tree, on which Bees ſettled, or not; and whether he kept ſight of them all the way from the Hive, or not[x]. The Philoſophers heretofore doubted, whether Bees were *feræ naturæ*; ſome thinking, they ought rather to be reckoned among Inſects than among wild Creatures: For Inſects are ſuch Animals as have Inciſures ſometimes on their Necks, and ſometimes on their Backs, Breaſts, or Bellies, as the Earwig, Bee, and the like. And ſome of theſe creep only on the Ground, and are called *Reptiles*; others fly in the Air, and are ſtiled *Volatils*; as Bees, Waſps, *&c.* and others both crawl and fly, as Piſmires, *&c.* And there are Inſects which are without Feet and Wings, as the *Tineæ*, which are bred in Men. The Lawyer *Paulus* gave this Anſwer touching Bees, *viz.* if they ſwarm on a Tree in your Ground or Eſtate, and any one has a mind to hive them, or take their Honey-combs, an Action of Theft will not lie in your Behalf, becauſe they were not your Bees, and alſo for that they were in the Number of ſuch Bees as are without a Hive[y]: But if it appears that thoſe Bees flew out of my Hive or Stock, and, according to Cuſtom, are wont to return, they are no longer in a State of natural Liberty, but are of my Poſſeſſion after the ſame manner as other volucrous Animals are, which we keep pent up in Cages, and the like[z]. And thus Bees remain a Man's Property ſo long as a Cuſtom of returning home, or (as we ſay in other Words) *animum revertendi*, remains with them.

[w] D. 6. 1. 5. 3.

[x] D. 41. 1. 5. 2.

[y] D. 47. 2. 26.

[z] D. 41. 2. 3.

Peacocks and *Pidgeons* are alſo of a *wild* Nature[a]: Nor is it to the purpoſe to urge, that they are wont to fly out and return again according to Cuſtom; for *Bees* alſo do the ſame thing, which are evidently of a *wild* Nature. Thus Perſons have Stags of ſo gentle and tame a kind, that are wont to go into the Woods, and return again; and yet no one will deny, but that they are of a *wild* Nature. Hereof we have a remarkable Example in the ſeventh Æneid of *Virgil*, touching *Sertorius*'s Stag. But, in ſuch Animals as are accuſtom'd to go and return again, this is an approved Rule, *viz.* That they are yours, ſo long as they retain the Purpoſe of returning: For if they ceaſe to have this Cuſtom, they ceaſe to be yours, and become the *Occupant's*. And they ſeem to ceaſe to have this *animum revertendi*, when they have forſaken the Cuſtom of returning home[b]. Some of the Doctors think, that if they fail twice together of returning, it is ſufficient to determine the Cuſtom: But, I think, this matter is better left to the Diſcretion of a good and upright Judge, who ought to pronounce according to Circumſtances. If a Hawk may be known by his Bells, or a Stag by ſomething which he uſually wears about his Neck, they ought to be ſent back to the Owners, as it is agreed among Men.

[a] D. 47. 2. 37.

[b] I. 2. 1. 15.

Yet *Geeſe* and *Hens* are not of a *wild* Nature, but are properly Domeſticks, though there are ſome Geeſe and Hens too that are wild. And, therefore, if your Geeſe or Hens, being diſturbed, ſhall fly away, they are underſtood to be yours, in what Place ſoever they are, though they get out of your ſight; and he, who detains ſuch Animals with a *lucrative* Intent, is adjudged guilty of committing Theft[c]. And this may alſo

[c] I. 2. 1. 16. D. 44. 1. 44.

be

be ſaid of Hogs and all other Animals, which are accuſtomed to be of a gentle Nature, though there are ſome Hogs that are wild, and live altogether in the Woods. I ſhall next ſpeak of *Captivity*, or of Things taken in War, which is by another kind of *Occupancy*.

For thoſe Things which we take from the Enemy in a juſt War, do by the Law of Nations become our own, whether ſuch Seizure be made of Perſons, or of Things[d]: ſo that even Perſons of a free Condition are, by the Right of *Captivity*, (which we now make uſe of inſtead of *Servitude*) obliged *ſub pœnâ nominis & famæ*; that is to ſay, on Parole of Honour. But here it may be asked, whence it is that *Captivity* is derived, and how it comes to be founded on the Law of Nations? To which I anſwer, that if private Defence be a Matter of natural Right, *à majori*, publick Defence is much more ſo. Hence it is, that he who thus offends, and commits publick Force by diſturbing the Peace of human Society, is to be ſubdued by a defenſive War undertaken againſt him, and brought to Reaſon; and as by his turbulent Spirit he renders himſelf unworthy of Society, he is not to be ſpared, either in his Goods or Perſon, by him whom he thus annoys; for even his Perſon ſhall not be ſpared. Therefore, as Perſons taken in War do become the Property of thoſe that take them; ſo likewiſe ought their Eſtates to become ſubject to Property[e]. But yet this ought to be reſtrained by the Laws, which dictate it to extend only to Things moveable, and to ſuch Things as are in the Enemies Dominion and Property. For 'tis to be obſerved, that, by the Law of Nations, Things immoveable, as Cities, Towns, Caſtles, Houſes and Lands do not become the Property of the Captors, as moveable Things immediately, from their being taken by the Enemy; becauſe all ſuch immoveable Goods and Eſtates are either applied to the Prince's Exchequer towards the Maintenance of the War, or elſe are given to the General of the Army. Yet theſe Eſtates, if they are again re-taken from the Enemy, do return to the former Lords and Proprietors of them[f]. By the *Civil* Law, the whole Subſtance taken is left to the Diſcretion of the General or Commander, who ought to diſtribute the Plunder among the Soldiers, according to the Merits of each Man; and this ſeems to have been the Foundation of the *Feudal* Law. If particular Perſons ſeize any Thing, upon a Party ſent out to forage or annoy the Enemy, they acquire it unto themſelves as Booty or Plunder: But if they take Things in a publick Act of War, they only act as Miniſters, and they go to him, under whoſe Banner they fight as to the General. If Plunder becomes a publick Spoil in War, and is confiſcated to the Prince, they who take ſuch Plunder away without the Conſent of the Publick, are guilty of *Peculate*[g].

[d] D.49.15.28. I.2.1.17.

[e] D.41.1.7.

[f] D.49.15.20.

[g] D.48.13.13.

This *Species* of Occupancy is entirely juſt and lawful, if the War be juſt and lawful. And a juſt War is ſaid to be that, which any free State rightly wages againſt us, or we ſolemnly declare againſt them[h], as ſhall be ſhewn hereafter under the Title of *War*: For only thoſe were ſtiled Enemies (*Hoſtes*) againſt whom the *Romans* publickly declared War, or thoſe who publickly denounced War againſt the *Romans*; others were rather termed Pyrates or Robbers[i]. By the ancient *Civil* Law, Freemen taken Priſoners in War were brought into Bondage, as above hinted; and this was properly called *Captivity*, (for *Captivity*, ſtrictly ſpeaking, had a reſpect unto Perſons, and *Seizure* unto Things.) But, by a general Cuſtom and Uſage at this day among all Chriſtians, Captives are not reduced to the Condition of Bondmen or Slaves, but may be ranſomed by Exchange, or by a Sum of Money, purſuant to the Chartels and Agreements on both ſides. Yet Priſoners taken between *Chriſtians* and *Mahometans* are generally ſent and ſold into Slavery; the latter forcing the others to ſuch Methods

[h] D. 50. 16. 118.

[i] D. ut ſupr.

Methods by a barbarous Uſage of Chriſtian Priſoners. See the Conſtitution of *Charles* the Vth, publiſhed at *Spires* [k].

[k] A. D. 1542.

The next general Method of acquiring Things by the Law of Nations, we ſtile *Acceſſion* [l]: And this is that Metbod whereby we acquire a Thing by the Force and Power of another Thing, which is our own already; and it is either *natural*, *artificial*, or *mixt*. *Natural* is that which happens without the Act of Man, by the Operation of Nature alone, as by Procreation or Fœture of Animals, and the Benefit of a River, and the like. For whatever is produced, or ariſes from Animals that are ſubject to our Property, belongs to us [m]: As when my Handmaid or Bondwoman is delivered of a Birth [n], or my Cow brings forth a Calf, *&c.* By the Benefit of a publick River, we are ſaid to acquire the Property of a Thing, *firſt*, by Alluvion; *ſecondly*, by the Force of the River, and the Avulſion thereof; *thirdly*, by an Iſland ariſing or made in ſuch River; and, *fourthly*, by the River changing its Bed or Channel [o].

[l] I. 2. 1. 19. 20. 21. 22. &c.

[m] I. 2. 1. 19.

[n] C. 3. 32. 7.

[o] I. 2. 1. 20. 21. 22. & 23.

Now *Alluvion* is, when a River has by its Inundation or Overflowing ſecretly added any Thing to my Land: And that ſeems to be added by *Alluvion*, which is ſo added by little, that we cannot perceive how much is added in a Moment of Time [p]. For though you ſhould fix your Sight upon it for a whole Day, the Weakneſs of a Man's Sight is ſuch, that it cannot perceive the minute and great Increaſes thereof: ſo that it may be called a *latent* Increaſe of Soil, by the Force of a River [q]. But if the Force of a River apparently takes away any Thing from your Eſtate, and brings it to mine, it is plain that it ſtill remains to be yours [r]. But if it ſhall continue on my Land for ſo long a time, that it cements and cleaves to my Soil, and brings Trees along with it, which take root in my Ground, from that time I ſeem to have acquired the Property of it, and of the Trees themſelves [s]. In private Lakes and Ponds, the Right of *Alluvion* ceaſes, though a Lake or Pond ſometimes increaſes, and ſometimes grows dry and decreaſes [s]. A *Lake* is that which has a perpetual Water in it: And a *Pond* is that, which has Water in it only ſome time of the Year; and in *Latin* is called *Stagnum*. The Right of *Alluvion* has not place in Lands aſſigned unto Soldiers [t], ſtiled *March-Lands*. I ſay, if the Effects of any Perſon be by *Alluvion*, or the Inundation of a River carry'd on another Man's Ground, they ſtill remain the Property of the Owner: And, therefore, if Reſtitution be denied him, he may, according to *Baldus* [u], have an Action to recover the ſame; for Things exported by an Inundation do not change their Owner. And the Owner may alſo have Relief by an Interdict of the *Prætor* [v], called a Remedy in Equity; provided the Perſon gives caution *de damno infecto*. But what if the Proprietor does not take care to carry his Effects off of the Land, and the Poſſeſſor of the Soil ſuffers Damage in the *Interim?* Why, in this Caſe, he may be conven'd either to carry them away, or elſe to give them up as a Derelict [w].

[p] D. 41. 1. 7. 1.

[q] I. 2. 1. 20.

[r] I. 2. 1. 21.

[s] D. 41. 1. 7. 1.

[s] D. 41. 1. 12.

[t] D. 41. 1. 16.

[u] In Rub. D. 1. 8.

[v] D. 39. 2. 9. 1.

[w] D. 7. 1. 9. fin.

An Iſland either riſes up in the Sea, (which ſeldom happens by reaſon of the great Depth thereof, or the Ebbing and Flowing of the Tides) or elſe it appears in a River. An Iſland ariſing in the Sea is the Property of no one; and, therefore, it belongs to the firſt *Occupant* [x]. But an Iſland may ariſe in a River four ſeveral ways: For, *firſt*, either ſome Place in the middle of the River may be left dry by accident; or, *ſecondly*, ſomething may by little and little increaſe by the way of a Mole or Hillock of Earth under the River, in ſuch a manner that it may afterwards begin to appear above the Surface of the River [y]. In both which Caſes, if it be in the middle of the River, it is common to thoſe who have Eſtates near the Bank of the River on each ſide, according to the Length and Breadth of each Perſon's Land that is neareſt the Bank [z]. *Note*, an Iſland is deemed to be part of the Channel, and the Channel is part of the neighbouring Eſtates.

[x] I. 2. 1. 22. D. 41. 1. 7. 3.

[y] D. 41. 1. 30. 2.

[z] I. 2. 1. 22. D. 41. 1. 7. 3.

Eſtates. But if the whole Iſland is nearer to one Inheritance than the other, the neareſt Eſtate ſhall claim the whole. This is to be underſtood, where the Lands on each ſide have not any certain Bounds and Limits; for if they have, there can be no Claim or Title made to ſuch an Iſland, but it belongs to the *Occupant* [a]. *Thirdly*, if the River ſhall divide its Courſe or Stream, and make an Iſland of Land by uniting its Streams afterwards, or ſhall overflow a Ground, ſuch Iſland ſhall not belong to any Occupier, or to the neighbouring Eſtates, but is ſtill ſubject to its firſt Owner [b]. *Fourthly*, an Iſland may ariſe from the Mud of the River, in ſuch a manner cleaving to Ruſhes and Twigs growing in the River, that it may float on the River, and not reach the Bottom of the Channel [c]. See *Mela de Situ Orbis* [d], and *Pliny* in the ſecond Book of his Epiſtles [e]: In which caſe it becomes the Right of that Perſon, unto whom the River belongs, *viz.* the Publick [f]. An Iſland riſing in private Rivers and Lakes, wholly belongs to ſuch private Perſons as claim ſuch Lakes or Rivers. But if a River changes and forſakes its natural Channel, the Channel which it leaves becomes the Property of thoſe who have Eſtates next adjoining thereunto, and the new Channel begins again to be publick [g]: And if the River forſakes its new Channel, it does in the like manner become the Property of thoſe that have Eſtates next it; but in Equity and Reaſon, it ought to be reſtored to the Owner, if the River ſhall by its new Courſe occupy the Land of any one [h]. But it has been a Moot-Point among ſome, though without any Colour of Reaſon, if the Courſe of a River is changed, which is the Boundary of an Empire, whether the Limits of the adjacent Territories be not alſo chang'd.

[a] D.43.12.1. 6.
[b] I. 2. 1. 22. D. 41. 1. 7. 4.
[c] D. 41. 1. 65. 2.
[d] Lib. 1. c. 9.
[e] Ep. 20.
[f] D. 41. 1. 65. 3.
[g] I. 2. 1. 23. D. 41. 1. 7. 5.
[h] D 41. 1. 7. 5.

The Law ſeparates and diſtinguiſhes *Alluvion* from *Inundation*. Now *Inundation* is, when a River being encreaſed by Snow, Rain, or the like, overflows the neighbouring Fields in ſuch a manner, that it does not forſake and change its ancient Channel, or its Banks [i]. And if the whole Field of any Perſon ſhall be thus flooded or overflow'd, ſuch an Inundation does not change the *Species* of the Land, when the Water goes off from thence: And, therefore, the Property thereof is not loſt by an Inundation [k], though it be otherwiſe in reſpect of the Poſſeſſion [l].

[i] D. 43. 12. 1. 5.
[k] I. 2. 1. 2.
[l] D. 41. 2. 3. 17.

Artificial Acceſſion, is, when we acquire another Thing by virtue of that which is our own already, by the Act and Induſtry of Man alone: And of this there are ſeveral *Species* or Kinds: As *firſt*, *Specification*; and *ſecondly*, *Adjunction*, &c. *Specification* is, when a Perſon does *bonâ fide*, out of his own and another Perſon's Matter or Materials make a new *Species* [m]. But the word *Matter* is here determin'd not to be that which is without a Form, but that unto which a new Form is added or given; and, therefore, I call it *Materials*. Several of the old Lawyers have adminiſtred Reaſons for doubting, touching the Poſition of this Title in the Law-Books; and their Opinions are diametrically oppoſite to each other. For *Maſſurius Sabinus* and *Caſſius Longinus* have, by way of Anſwer, declared, That if any one had in his own Name made a new *Species* of any Matter belonging to another Man, he ſhould not remain Proprietor of the *Species* which he had made, but he unto whom the Matter did belong; and that for two particular Reaſons. *Firſt*, becauſe it being the Property of another Perſon, it ought not to be transferr'd to another without the Act of him, unto whom the Matter did belong [n]. For example, if *Titius* has the Property in a Piece of Cloth, and *Caius* turns the ſame into a new *Species*, ſuch new *Species* ought to be the Property of *Titius*; becauſe it cannot be transferr'd without the Act of *Titius*. *Secondly*, becauſe there can be no *Species* or Work effected without Matter [o]: Therefore, the Proprietor of the Matter or Materials ought rightly to be preferr'd to the Property of the Thing. I here call that by the Name of Matter, from whence any Thing is wrought or made up into ſome Form; as the Metal in a Cup, Conſent

[m] I. 2. 1. 25. D. 41. 1. 7. 7.
[n] D. 50. 17. 11. D. 10. 4. 12.
[o] D. 50. 17. 11. D. 41. 1. 7. 7.

in a Contract, and the like. And it differs from the Form and Subſtance of the Cup, or Contract: For the Subſtance is that, whereby the Matter is deduced and brought into a certain *Species*, as the Workmanſhip in Veſſels and Garments; and in a Contract of Bargain and Sale, the Price is ſtiled the Subſtance of the Contract. But the Form of the Matter is that, which gives a Name to that *Species*; yet 'tis otherwiſe in reſpect of the *Civil* Law itſelf: For that is neceſſary to give it the Appellation of a Form, in reſpect of Law, which has a reſpect unto Order. As in a Stipulation it is neceſſary, that a Queſtion be previouſly put, and that an Anſwer do immediately enſue thereupon. But to return to the Buſineſs of this Title. *Nerva* and *Proculus* were of a different Opinion from *Sabinus* and *Longinus*, thinking him to be the Proprietor of the *Species*, who had wrought and worked it up; and that for this Reaſon, *viz.* becauſe that which is wrought and made up, was before no one's Property, it being a new *Species*. Therefore, he
[p] D. 41. 1. 3. that works it up, ought to be deemed the Proprietor [p]. The Form gives the Eſſence to a Thing: But he that has wrought or made a Thing, has added a new Form; and, therefore, the Eſſence and Property of the Thing belongs to him. Many of the Ancients have reconciled this Diſagreement of the Lawyers, by the Help of a Diſtinction, which Diſtinction *Juſtinian*
[q] D. 10. 4. 9. approves [q], *viz.* ſuch *Species* may either be reduced to its former rude State and Matter, or not. If it may be thus reduced, then the Opinion of *Sabinus* holds true; becauſe the *Species* then does not ſeem to have taken on itſelf a new Form, when it may be ſo eaſily reduced to its rude and priſtine Matter, or elſe it cannot be ſo reduced; and in this caſe the Opinion of *Proculus* is good, *viz.* That he ſeems to be the Proprietor, who has made a new *Species*. For when a *Species* cannot be reduced to its former Matter, the Matter is looked upon as loſt and deſtroyed: And when the Matter is deſtroyed, the Property is deemed to be taken away. As for inſtance, when a Cup is made of another Man's Silver, which after it is made and faſhioned, may be reduced to the rude Matter of Silver, and then it does not become the *Specificant's*, becauſe a Thing, which may be ſo eaſily reduced to its former Matter, does not ſeem to have taken on itſelf a new Form; or elſe ſuch *Species* cannot be reduced to its former rude Matter, as Wine, Oil, a Garment, *&c.* cannot be reduced to Grapes, Olives, or Wool, *&c.* And then the Opinion of *Proculus* prevails, *viz.* that it becomes the Property of the *Specificant*, and the Matter is looked upon as loſt. In the firſt Caſe, where the Matter cannot be brought to its firſt
[r] D. 6. 1. 23. 4. State, a juſt Payment muſt be made for the Grapes, Olives, or Wool [r]; and in the other, a reaſonable Allowance for the Workmanſhip. But this Deciſion only takes place in favour of the Workman, where the Work was deſigned for his own uſe, and where he erroneouſly, and by miſtake, thought the Matter was his own. For if it was intended for the Uſe of any other,
[s] D. 41. 1. 25. & 27. 1. it is upon the ſame Terms, for whoſe Uſe it was working [s]; and if it is known that the Grapes and Wool are another's, and yet thereof he proceeds to make his Wine or Garment, he ſhall loſe his Labour and Work-
[t] D. 10. 4. 3. manſhip [t]; the whole ſhall accrue to the Uſe of the Owner, and an Action may be maintained againſt him. The ſame Diſtinctions are to be obſerved, if the Matter is *partly* the Workman's, and *partly* a Stranger's, where the
[u] D. 6. 1. 5. 1. Thing made cannot be caſt into its firſt Matter [u]. If it can be, each ſhall
[w] D. 41. 1. 27. 2. have his ſhare [w], or both may poſſeſs proportionally in common, according to that which is contributed.

Adjunction is, when ſomething is added to the Subject itſelf more than was in it, or it had before; as Interweaving or Embroidery to a Garment, building on another Man's Soil, writing on another Perſon's Paper or Vellum, *&c.* And thus we have many *Species* of Adjunction. Now as to theſe things in general, it is to be obſerved, that the *Acceſſory* follows

its

its *Principal*[v], though the Acceſſory be of greater Value than the Principal: For by *Acceſſion*, the Acceſſory ſeems to be merged or extinguiſhed[w]. Therefore, if any one ſhall interweave or embroider another Perſon's Purple in his Garment, though it be done *malâ fide*, yet by *Acceſſion* it goes along with the Garment[x]: But the Owner of the Purple, though by this means he loſes the Property thereof, had an Action *ad exhibendum*, and that even againſt a Poſſeſſor *bonâ fide*[y], or a Condiction *ſine causâ*, as he ſhall think fit[z]: But againſt a Poſſeſſor *malâ fide*, he has an Action of Theft, and a *Condictio furtiva*[a], and likewiſe an Action *ad exhibendum*; and a real Action to claim the Thing, as againſt a Perſon who ceaſes to poſſeſs a Thing by ſome knaviſh Act or other[b]. In Adjunction, which is nothing elſe but the joining of one thing to another, as a golden Head to a Cane, and the like, we muſt conſider which is the *principal* Thing, and which is the *acceſſory*: And Conjectures may be made thereof from the Intention of the Agent. And though the *Acceſſory* ſhould be of moſt Value, yet it does not loſe the Denomination of an *Acceſſory*[c]: As Purple is the Acceſſory in reſpect of a coarſe Garment, a Jewel to a Gold Ring, *&c.* But Gold may be an Acceſſory to a Jewel; as when that is made for the Conveniency of its Carriage; and the Garment may be an Acceſſory to the Purple, when that is made for the ſake of it. We are apt to call a Thing by the Name of a *Principal*, with reſpect to another Thing, when it is not ſo, but (perhaps) they are both *Principals*, and uſually go together, as a Laſt Will and a Legacy: Therefore, if it cannot be determined which is the *Principal*, and which the *Acceſſory*, ſuch Names ought not to be applied. Where one Thing is added for the ſake of the other, (which we call the finiſhing of a Work) there is a Foundation for it, and then only can the Acceſſory follow the Principal, and the Owner of what is the *Acceſſory*, muſt yield up the Poſſeſſion to the Proprietor to the *Principal*. This Rule holds good, though the Addition of another Perſon's Goods to my own, was knowingly and diſhoneſtly contrived[d]: For here only Regard is had to the Thing joined, and not to the Perſon, as I have already ſhown in *Specification*. The Property of the Thing added is loſt ſo long as *Adjunction* continues; yet an Action lies, that the Thing added may by Sentence be ſeparated and reſtored, at leaſt for the Price and Value of it. If any one ſhall by Miſtake and erroneouſly join one Thing of his own, to ſomething of more Value belonging to another, as the principal Thing, ſuppoſing that to belong to himſelf; if he hath Poſſeſſion, he ſhall keep the whole till he is paid the Value of the Thing added[e]: But if this was done knowingly and *malâ fide*, it may be interpreted as a Gift to the Proprietor of the *Principal*.

[v] D.34.2.19. 13.
[w] I. 2. 1. 26.
[x] D.10.4.7.2.
[y] D.10.4.7.2.
[z] I. 2. 1. 26.
[a] I. 2. 1. 26.
[b] D.47.3.2.
[c] D.34.2.19. 13.
[d] I. 2. 1. 26.
[e] D.6.1.23.4.

A third *Species* or Kind of Acceſſion is by *Confuſion*, *viz.* when Things of the ſame, or of a different Nature, are mixt together by the Conſent of two Proprietors, or a certain *Species* is made out of them. For then that Body which is thus made by Confuſion, by natural Reaſon becomes common to each of the Proprietors, by reaſon of the Conſent of the Proprietors. As when they mix their Wines together, or ſhall melt down Gold and Silver, and work them up together[f]. But it is otherwiſe, if only the Conſent of one of them intervenes: For then the *Species* made is not common, but becomes the Property of him only, who made it. Things thus mixt by ſome fortuitous Caſe, do alſo become common to both Perſons, if the Things mixt cannot be ſeparated from each other: But it is otherwiſe, if they may be ſeparated[g], as in a Maſs of Gold and Lead. For *Confuſion*, properly ſpeaking, has a reſpect unto Liquids, as *Commixtion* has unto Solids. Thoſe Things are ſaid to happen by *Confuſion*, which produce a new *Species* on their Mixture, as Wine and Honey, *&c.* But Things are ſaid to happen by *Commixtion*, which, in their being blended together,

[f] I. 2. 1. 27.
[g] I. ut ſup.

together, do not paſs into a new *Species*, but remain under the ſame Subſtance. For if by Accident two Buſhels of Wheat belonging to different Perſons ſhall be mixed, the whole Heap ought not to be in common, becauſe each Corn in itſelf remains the ſame: But becauſe each Grain cannot eaſily be diſtinguiſhed by its Owner, the Judge ſhall divide the whole Heap, making a greater Allowance to one in Money or Corn, if his Grain was
[h] I. 2. 1. 28. better or finer than the other [h]. And the ſame Amends ought to be made in ſuch a Confuſion of Liquors. But if the Commixtion be made by the Conſent of the Proprietors, then they are Proprietors in common, and if they will divide the Subſtance, the one may have an Action of *Communi dividundo* for his part.

A fourth *Species* or Kind of *artificial* Acceſſion, and whereby the Dominion and Property of Things is acquired, according to the Law of Nations, is by *Building:* Which is effected two ſeveral ways, *viz.* either becauſe a Man builds on his own proper Soil with another Perſon's Materials; or elſe, becauſe he builds on another's Soil with his own Materials. When a Perſon builds on his own Soil with another's Materials, he is underſtoood to be the Proprietor of the Building, becauſe all that is built on
[i] D. 41. 1. 7. 10. his Soil, gives place to and goes along with the Soil [i]. But yet he, who was Proprietor of the Materials, does not therefore ceaſe to be the Proprietor
[k] I. 2. 1. 29. thereof [k]. But he cannot bring a real Action to claim the Materials, nor an Action *ad exhibendum* thereupon, becauſe it is provided by a Law of the twelve Tables, that no one ſhall be compelled to pull out thoſe Materials which he has employed in his Buildings, though they do belong to another Perſon; but yet he ſhall be obliged by an Action, ſtiled *de Tigno junctο*, to pay two-fold for thoſe Materials, if he uſed them, knowing them to belong to another Perſon. By the word *Tignum* is meant all ſorts of
[l] I. 2. 1. 29. Materials, that are ſerviceable to Buildings [l]. And this the Law of the twelve Tables has provided, to the end that no one ſhould be obliged to pull down his Buildings after they are raiſed and ſet up. But if ſuch Building ſhall be pulled down upon any account, then, and not before, the Owner of the Materials may claim the ſame, if he has not obtained the Value of two-fold, and have an Action *ad exhibendum* thereupon,
[m] D. 6. 1. 23. fin. notwithſtanding any Preſcription or Limitation of Time [m]. When I here ſay, that *the Building gives place to the Soil*, I do not ſpeak of moveable Buildings or Edifices, which may be transferr'd from one place to another, but ſuch only as are fix'd and cleave to the Soil: For the Soil is a Foundation or Firmament created by God, without which no Edifice or Building can ſubſiſt. And this natural Right of acquiring Dominion, the Lawyers call a publick Right. I have ſaid in *his own proper Soil:* And that is called a Man's own proper Soil, though another has the Uſufruct thereof, if the Property of ſuch Soil be only with the Builder. And it is the ſame thing, if the Soil be in common with me and another Perſon: for even in this reſpect I may call it my own proper Soil. But it is otherwiſe, if the Soil be in common unto all Perſons: For the Soil ſhall give place, and go along with the Edifice, *viz.* becauſe it is granted or given to the firſt *Occupant*; and thus the Anſwer of *Martianus* the Lawyer ought to be taken and underſtood.

On the other hand, if a Perſon ſhall build a Houſe on another's Soil with his own Materials, he ſhall be the Proprietor of the Houſe, unto whom the Soil belongs. But in this Caſe, the Proprietor of the Materials loſes his Property therein; becauſe it appears, that he had a mind to alienate the Materials, as if he had known, that he built on another's Soil: And, therefore, though the Houſe be pulled down, yet he cannot claim or recover the Materials, nor his Expences for the ſame, if he built the ſame *malâ*
[n] I. 2. 1. 30. *fide* [n]. But if he ſhall build *bonâ fide* on another's Soil with his own

Materials, believing the Ground to be his own, he does not loſe the Property of the Materials [o], but may (at leaſt) recover the Value thereof: And may as long as he is in poſſeſſion, repel the Proprietor of the Soil demanding the Houſe, and not paying the Price of the Materials, and the Charges of the Workmen, by an Exception of Deceit [p]; and thus indemnify himſelf as to the Charges. But if he be not in poſſeſſion of the Houſe, there lies no Action in Law for him, whereby he may recover the Value of the Materials, nor his Charges [q]. But if the Perſon thus building on another's Soil with his own Materials, makes it appear that he did not build there *animo donandi* [r]; or ſhews any good Cauſe for ſo doing, for example, if (perhaps) he built on Ground of a diſputed Title, which (he believed) would be adjudged in favour of himſelf, or on that Place which he firſt had Poſſeſſion of *bonâ fide*, and expected to obtain by *Uſucapion* [s]; or even in a Place rented, that he might uſe it more to his advantage; in theſe Caſes he does not loſe the Property of the Materials, but ſhall be paid for them [t]. And a Builder *malæ fidei*, unleſs he can ſhew ſome approveable Cauſe, ſhall not recover the Expences he has been at, though he be in poſſeſſion: For it may be objected to him, that he raſhly built at his own Peril on that Ground which he knew to be another's Soil [u].

[o] C. 3. 32. 2.
[p] D. 50. 17. 129. I. 2. 1. 30.
[q] D. 12. 6. 33. D. 41. 1. 7. 12.
[r] C. 3. 32. 2. D. 24. 4. 14.
[s] D. 6. 1. 37.
[t] D. 19. 2. 55. 1
[u] I. 2. 1. 30.

What I have before ſaid touching the Payment of two-fold to the Proprietor of the Materials is now out of uſe, ſince thoſe legal Penalties that deprive any one of his Right are now entirely at an end and aboliſhed. And being agreeable to Equity and the Law of Nature, that no one ſhould enrich himſelf by another's Loſs and Damage, it is therefore enacted, that he who knowingly builds on another's Soil or Ground, ſhall not loſe the Price of his Materials, nor the Wages and Hire of his Labourers, but may not only retain all profitable Expences whatſoever, by way of Exception, which he has laid out on ſuch Improvement, but may likewiſe ſue for the ſame by way of Action. And though in *France* ſuch a Builder has only an Action to recover the neceſſary Charges he has been at; yet in *Holland* he has an Action or Exception at pleaſure, and may (if he pleaſes) retain the Building, till all his Expences are paid him.

The firſt *Species* or Kind of *mixt* Acceſſion, whereby the Dominion and Property of Things is acquired, according to the Law of Nations, is by *Planting*: For as Buildings and Edifices give place to the Soil, whereon they are erected [v]; ſo *à majori*, ought Plants to do, which are not only raiſed and ſupported from the Earth, but do alſo receive their Nouriſhment from thence, and, as it were, from thence draw Life for their Growth and Increaſe. Hence, if any one plants another's Plant in his own Soil, or ſets his own Plant in another's Soil, the Plant becomes the Property of him who is Lord and Maſter of the Soil [w], which is true, if the Plant takes root: For before it has thus fixt its Roots to the Soil, it is no part of the immoveable Eſtate [x], but remains the Property of him who had the Property of it before [y]. And this holds true, whether a Man has planted in another's Soil *bonâ* or *malâ fide*. But yet this admits of a diſtinction, *viz.* if the Planter planted it *bonâ fide* in another's Soil, he ſhall recover of the Proprietor of the Soil the Value of his Plants by an *Utilis Actio*, or an Exception. And if the Planter be in poſſeſſion *bonâ fide*, he may by an Exception of *Deceit* repel the Proprietor of the Soil, who refuſes to pay him the Charges and Value of the Plant [z]. But if he be a Poſſeſſor *malâ fide*, and ſhall plant in another's Soil, he ſhall not in this caſe recover the Plant, nor even his Charges, by the Office of the Judge, as he may do in the former Caſe; becauſe theſe Expences are not neceſſary, but only of Utility to himſelf. For if a Man plants Trees, or ſows Corn in another's Soil, knowing it to be ſuch, the Owner of the Soil ſhall have the Property of the Trees or

[v] I. 2. 1. 30.
[w] D. 41. 1. 28 & 60.
[x] D. 41. 1. 9. D. 41. 1. 7. 13.
[y] I. 2. 1. 31. D. 41. 1. 9.

[z] C. 2. 32. 11. Corn, when they have taken Root [z]; becauſe the Planter is preſumed to do this *animo donandi*, as in the Caſe of Building aforeſaid.

Touching a Tree that has taken root in my Neighbour's Land, by extending its Roots, this diſtinction is to be obſerved, *viz.* either a Tree being ſet in the Confines of my Land has taken root in each Perſon's Land; and [a] I. 2. 1. 31. fin. then the Tree becomes common [a] in ſuch manner, that the Fruits thereof [b] D. 41. 1. 7. fin. ought to be equally divided between each Party [b]: or elſe the Tree being planted on my Soil, ſo preſſes upon *Titius*'s Land by its Roots that run thereinto, that it cannot be nouriſhed elſewhere: And then the Tree in [c] I. 2. 1. 31. reſpect of its Roots, whereby it is nouriſhed and lives, belongs unto *Titius* [c]; for more regard ought to be had to the Roots from which the Tree is nouriſhed, than to the Trunk or Branches. But *quære*, whether I can by my own proper Authority cut the Roots which another Man's Tree puts forth in my Land, or the Tree itſelf, or the Boughs of ſuch Tree which hang over my Houſe? And the Doctors ſay by way of diſtinction, that I may do this by the Authority of the Judge, upon Application made to [d] D. 47. 7. 6. fin. him [d]. But if I give notice or intimate to you, that you would take away the Boughs, and you neglect or refuſe to remove them, I may then by an Edict of the *Prætor*, *de Arboribus Cædendis*, even without the Judge's Authority, not only cut the Boughs and Roots by my own Authority, but alſo [e] D. 47. 7. 6. 2. dd. ibid. the Tree itſelf, and remove the Wood cut down [e]. And what is here ſaid of Trees, may be alſo ſaid of Vines: For Vines are comprehended under [f] D. 47. 7. 3. the word *Arbor* [f]. But if a Tree has more Roots in one Man's Soil than [g] D. 47. 7. 6. fin. in another's, then the Fruits are not equally divided [g]. But I ſhall treat and handle this Matter more largely hereafter, under the Title of *Trees cut down*, &c.

Growing Corn is alſo conſidered as an Acceſſory cleaving to the Soil: And, therefore, if a Perſon ſows Seed-Corn, and it takes root, it goes to [h] I. 2. 1. 32. the Proprietor of the Soil, as Trees or Plants do [h]. *Titius* ſowed his Corn in his Neighbour's Ground: And it was held, that for the ſame reaſon that Plants, which take root in another's Soil, do become the Property of him who is Owner of the Soil, Corn thus ſown does the like by the Right of Acceſſion. And as we have ſaid before, that as he who has built on another's Soil, if the Proprietor of the Soil claims the Building of him, may defend himſelf againſt the Proprietor making ſuch Claim, by an Exception *doli mali*, unleſs the Proprietor of the Soil be ready to pay him for his Materials, and to re-imburſe him the Charges of the Building: So he, who has *bonâ fide* ſown Corn at his own Expence on another's Land, may by the Help of the ſaid Exception defend himſelf againſt the Proprietor of the [i] I. 2. 1. 32. Land, if he claims the Corn of him [i]. But what if a Perſon ſhall ſow my Seed in another Soil, againſt whom ſhall I bring my Action? I cannot do it againſt the Perſon ſowing, becauſe he is not in poſſeſſion of the Land, nor has he acted by any fraudulent means to quit the Poſſeſſion thereof: nor can I bring it againſt the Perſon in poſſeſſion; becauſe nothing was done by his Act or Deed. But, I think, in this Caſe the Action lies againſt the Proprietor of the Soil, like unto the Caſe of a Perſon's putting my Timber into another's Building, who is liable, though he has put it therein by an-[k] D. 9. 3. 5. 10. other's Order [k].

Writing on Paper, Parchment and Vellum, is another Kind of *artificial* Acceſſion, whereby we acquire Things by the Law of Nations: For the Owner of the Paper, Parchment, or Vellum, ſhall be Maſter of the Writing too, though the Letters be of Gold or of greater Value than the Paper which [l] I. 2. 1. 33. bears them [l]. And, therefore, if *Titius* ſhall write a Poem, Hiſtory, or an Oration on your Parchment or Paper, *Titius* ſhall not be the Proprietor of this Writing or Book, but it ſhall be ſurrendred to you the Owner of the Parchment or Paper; as it is in the Caſe of Building, Planting, and Sowing

on another's Soil, where the Things built, planted, or ſown muſt yield to the Proprietors of the Soil. But if you demand your Books of *Titius* by a real Action, and are not ready to pay the Charges of writing, *Titius* may defend himſelf by an Exception *doli mali*, as if he had *bonâ fide* acquired the Poſſeſſion of thoſe Papers or Parchments. At this day Writings do not go to the Proprietor of the Paper, generally ſpeaking: For indeed it ſeems very abſurd, and the contrary Practice is obſerved by the *Moderns*. For ſuppoſe I ſhould write my Accounts on the Paper or Parchment of another, which would be prejudicial to me, if they were communicated, and would be of no advantage to the Owner of the Paper: What reaſon is there that I ſhould be deprived of my Accounts, when I am ready to pay the Price of the Paper [m]?

[m] Mynſ. & Vin. in I. 2. 1. 33.

In reſpect to *Painting*, which is another *Species* of *artificial* Acceſſion, there has been a great Diſpute among the ancient Lawyers, unto whom the Picture belongs, if a Perſon ſhall paint on another's Cloth or Tablet: For ſome thought, that the Tablet went along with the Picture; and others, that the Picture (of what kind ſoever it was) gave place to the Tablet: But *Juſtinian* has determined, that the Tablet ſhall yield to the Picture. For it is an abſurd and ridiculous thing, that the Painting of an excellent Painter, as *Apelles* or *Parrhaſius* were in their Times, ſhould give place to a mean Tablet [n]. And this is ſo ordained, contrary to the foregoing Reaſon, in reſpect of Writing, *&c.* becauſe of the great Eſteem the Ancients had for the Art of Painting [o]. The Tablet muſt be *moveable*; for if the Painting be drawn upon a Wall or on a Tablet that is fixed, it is otherwiſe. But yet the Proprietor of the Tablet may have an Action againſt the Painter to recover the Value or Price of the Tablet, if it be in his Poſſeſſion [p]. And an Action of Theft lies againſt a Poſſeſſor *malæ fidei*, and likewiſe a real Action, and a *Condictio furtiva* [q]: But againſt a Poſſeſſor *bonæ fidei* an Action on the Caſe [r].

[n] I. 2. 1. 34.
[o] D. 41. 1. 9. 2.
[p] D. 41. 1. 9. 2.
[q] I. 2. 1. 34.
[r] D. 6. 1. 3. 5.

The laſt *Species* or Kind of *mixt* Acceſſion, whereby Property is acquired according to the Law of Nations, is by *Perception of Fruits* [s]; that is to ſay, by receiving and gathering the Profits of an Eſtate, to which a Perſon truly and really thinks he has a good Title [t] either by Purchaſe, Gift, Exchange, Deſcent, Legacy [u], *&c.* The Profits ariſing from this Eſtate, and the Perſons gathering and receiving theſe Profits, ought to be conſider'd. By the *Profits* or *Fruits*, I here mean the *natural*, and not the *civil* Profits, as *Rent* or *Intereſt* for Money lent is, but ſuch only as are the Product of the Land or Eſtate *itſelf*, and either *chiefly* ariſe by the Operation of Nature, as Wood, Graſs, Fruit, *&c.* or chiefly by the Labour and Induſtry of Man, as Corn, Pulſe, *&c.* for theſe are the *natural* Profits of an Eſtate [u]. And thus the natural Profits of an Eſtate may be ſub-divided into ſuch as are *natural only*, and into ſuch as are acquired [v]. *Secondly*, Fruits are either ſuch as are growing, or ſtill depending on the Eſtate, and to be gathered, or elſe ſuch as are actually gathered: And again, theſe laſt are either ſuch as are *extant* [w], or ſuch as are *conſumed*. Therefore, to the end that a Perſon ſhould make the Fruits his own, which he has received or gathered from another's Eſtate, he ought firſt all to be the Poſſeſſor of ſuch Eſtate by a fair and honeſt Title, believing the Perſon from whom he received it to be the Proprietor thereof, or elſe thought he had Power of alienating the ſame [x]. He ought alſo to have received them from ſuch Eſtate [y]. And ſuch a Poſſeſſor is ſaid to have received them to this End and Purpoſe, who receives the Fruits as ſoon as they are ſever'd from the Eſtate he is poſſeſſed of *bonâ fide* [z]. And ſuch a Poſſeſſor makes all the Fruits ſo received his own, *viz.* the *natural* Fruits as well as thoſe which ariſe from his Induſtry [a]: For he receives the Fruits in the Right of the Soil, and by that Right which is given to the Proprietors of predial Eſtates. So that this

[s] I. 2. 1. 35.
[t] D. 50. 16. 109.
[u] I. 2. 1. 35. & 40.
[u] D. 33. 2. 59. 1.
[v] Arg. D. 22. 1. 45.
[w] C. 3. 32. 22.
[x] D. 50. 16. 109.
D. 18. 1. 27.
[y] D. 41. 1. 48.
[z] I. 2. 1. 35.
D. 6. 1. 78.
D. 7. 4. 13.
[a] D. 41. 1. 48.
D. 7. 4. 13.

Right

Right is not founded ſo much on the Tillage and Care of the Land, as on
[b] D.22.1.25.1. honeſt and fair Dealing [b]. But if the real Proprietor ſupervenes and claims
D.50.17.136. the Eſtate, ſuch Poſſeſſor *bonâ fide* ſhall only be obliged to reſtore him the *extant* Fruits, which are his *pleno Jure*, and not the Value of the
[c] I.2.1.35. Fruits conſumed [c], though he has enriched himſelf thereby [d]. But it is not
[d] D.10.1.4.2. the ſame thing with a Perſon, who knowingly has had the Poſſeſſion of another's Eſtate *malâ fide*: For he is compellable to reſtore all the Fruits together with the Eſtate, even though conſumed, or (at leaſt) the Value of
[e] I.2.1.35. them [e]. Yea, even thoſe Fruits which he has not received, if he might as
[f] D.6.1.33. & 62.1. a Demandant have honeſtly received the ſame, if he occupy'd the Eſtate [f]. But then an Allowance ſhall be made him for his Expences. Yet it has been queſtioned, whether the Heir, not privy to the Fraud, ſhall account for theſe Profits that are *ſpent*.

Note, When I ſay, that in *artificial* Acceſſions this Thing belongs to ſuch an Owner, I mean that his Poſſeſſion or Title is favoured in Law, *viz.* That it ſhall be in his *Election* to pay the Price and Value of the Thing added, or to quit the whole. And it is affirmed, that upon theſe Acceſſions, what the *Roman* Law has appointed in ſeveral Caſes is not Reaſon, or natural Equity, or the Law of Nations, but meerly civil and poſitive, for the Benefit of Trade and Commerce: And there is ſcarce one Head in the Law where there are ſo many different Opinions of the Lawyers, and more frequent Miſtakes, which I have endeavoured to correct. As if natural Equity ſuggeſted in ſome of theſe Caſes, that the thing ſhould be in *common*, proportionally to what each one had contributed; and that in the Caſe of acquiring by *taking the Profits*, an allowance ought to be made to the Perſon in Poſſeſſion, only for his Expences and Labour. And thus I have done with *Acceſſions* for the preſent, and ſhall further mention them in the Sequel of this Work, as they neceſſarily occur to the Subject in hand. Wherefore I ſhall proceed to ſpeak of *Tradition* or Delivery, another way of acquiring according to the Law of Nations.

For *Delivery* is that Method of gaining the Property of a Thing, whereby an Owner having the free Adminiſtration and Diſpoſal of his Effects, or he who has received a Power of alienating it from the Proprietor, willingly tranſfers the corporal Poſſeſſion thereof unto another, who accepts of it, upon
[g] D.44.7.55. a juſt and valuable Conſideration [g]: And ſurely nothing is more agreeable
I.2.1.40.& 2. unto natural Equity than to ſuffer the Will of the Donor to take effect, when he would transfer any thing upon another. All Things would be of little Uſe and Advantage, if they muſt always remain with one and the ſame Perſon, and by the Formality of a Delivery raſh Alienations are prevented, and Men forced to act with ſome Deliberation. And, therefore, it is a vulgar Rule in Law, that the Propertys of Things may be transferred by way of Delivery, in *Latin* called *Traditio*; but not by Nude-Pacts,
[h] C.2.3.20. that is to ſay, not by naked Titles [h]. And this is true, whether the Delivery be *true* and *real*, or elſe a *feigned* Delivery: For there are theſe two Kinds of Delivery in Law. The firſt is, when a *moveable* Thing is given or delivered by the Hand, and out of the Poſſeſſion of one Man, into the Hand and Poſſeſſion of another; or if the Thing be *immoveable*, when a
[i] D.41.2.34. & dd. ib. Perſon is brought into the Poſſeſſion of it, which we call *Induction* [i]. The ſecond Kind, which we ſtile a *feigned* Delivery, is, when a Delivery hap-
[k] I.2.1.44. 45.& 46. pens and intervenes by a Fiction of Law, which may be made ſeveral ways [k], as I ſhall ſhow by and by. It is agreed on all hands, that in an *immoveable* Eſtate there is a neceſſity to remove all Perſons from the Land when *Poſſeſſion* is taken, or *Induction* given; but it is a Queſtion, whether this be required upon transferring the *Property* only. Poſſeſſion of *Part*, in
[l] D.41.2.3. the Name of the Whole, is ſufficient [l]; and that may be delivered by the
[m] I.2.1.42. Owner himſelf, or by Proxy [m].

From

From what I have above hinted in the Definition of a *Delivery*, it appears, that ſeveral Things are neceſſary in order to paſs the Property of Things by Delivery, *viz. Firſt*, the Perſon who makes the Delivery ought to be the Proprietor of the Thing delivered [n]: For if he be not the Proprietor, he cannot convey that Property which is not veſted in himſelf [o], unleſs another Perſon delivers it by Commiſſion, in the Name, and by the Will of the Proprietor [p]. *Secondly*, 'tis neceſſary, that the Proprietor delivering the ſame ſhould have the free Adminiſtration and Diſpoſal of his own Goods, and by this means be a Perſon qualified to transfer the Property thereof: For a Pupil, Ideot, Madman, and a Prodigal, who have not the Adminiſtration of their Effects, cannot transfer the Property of a Thing delivered to another [q]. *Thirdly*, there ought to be a good or valuable Conſideration previous unto a Delivery, in order to transfer the Property of the Thing delivered: For a *nude* Delivery without a Conſideration does not convey the Property [r]; becauſe (perhaps) it might impoveriſh Perſons unawares. And this alſo diſtinguiſhes a Thing alienated from a *Commodatum* and a *Depoſitum*, wherein the Perſon that delivers them expects to have them returned him again, and (perhaps) has not a proper Title to transfer the Property of them. *Fourthly*, the Thing delivered ought to be ſubject to Commerce and Alienation, and not prohibited as a Thing ſacred is [s]: And ſo likewiſe is a jointur'd Eſtate, in our Law-Books called *Fundus Dotalis* [t]. *Fifthly*, in a Contract of Bargain and Sale there ought to be a Price paid [u]. And, *ſixthly*, in incorporeal Things, Sufferance is in the place of a Delivery: And he is ſaid to deliver a Service, who ſuffers me to paſs and re-paſs through his Eſtate, as often as I pleaſe; and to uſe and enjoy ſuch Service [v].

[n] D. 41. 1. 20.
[o] D. 50. 17. 54.
[p] D. 41. 1. 9. 3. & 4.
[q] D. 26. 3. 9. D. 45. 1. 6.
[r] I. 2. 1. 40. fin. D. 41. 1. 31.
[s] I. 2. 1. 8.
[t] D. 23. 5. per tot.
[u] I. 2. 1. 41.
[v] D. 8. 1. 20.

It has been already obſerved, that Property may be transferred, not only by a true and natural Delivery, but alſo by a feigned one, if the Will and Conſent of the Proprietor be had thereunto. Now a *feigned* Delivery is in Terms, when a Perſon delivers a Thing unto you by way of a *Commodatum*, or Thing lent to be returned again, (or lets its to Hire,) and then afterwards either gives or ſells it to you, tho' he did not at firſt deliver it to you upon that account; but by the very Act of ſuffering it to be yours, you do immediately acquire a Property therein [w], as if it was deliver'd to you *eo nomine:* And thus a Delivery being made according to an unqualify'd Title, is joined with a ſubſequent qualify'd Title; ſo that Sufferance even in Things corporeal is in the place of a Delivery, and the bare Will of the Proprietor is ſufficient to transfer Property without a real and natural Delivery [x]. By the Law of Nations, alſo the Property of Things ſold is transferred by the Delivery of the Keys of the Houſe or Warehouſe, where the Merchandizes are laid up, and ſold unto the Buyer [y]: And this holds good, if ſuch Delivery of the Keys be made in the ſight of ſuch Houſe or Warehouſe, though the Buyer does not open the ſame [z], if there be a juſt and proper Conſideration previous thereunto, as Bargain and Sale requires. But it is otherwiſe, if the Keys be only delivered for the ſake of Cuſtody; becauſe then the Delivery of the Keys imports nothing elſe but the bare Cuſtody of the Houſe or Keys [a]: For in a doubtful Caſe, the Delivery of the Keys of a Houſe is preſumed to be made for the ſake of keeping them or the Houſe, unleſs a Title proper to convey a Property be previous thereunto [b]. And in the ſame manner, a Horſe ſeems to be delivered by a Delivery of the Bridle, Saddle, or Harneſs belonging to a Horſe [c]. And this Rule in Law which ſays, that Property is transferred by a *feigned* Delivery, is extended ſeveral other ways. For the Property of a Thing contained in a Deed or Inſtrument is transferred by a Delivery of the Deed or Inſtrument itſelf, ſince the Charter alone is not deemed to be given or ſold [d]. Again, this *feigned* Delivery may be made *per appoſitionem Cuſtodis*,

[w] I. 2. 1. 44.
[x] D. 41. 1. 9. 5.
[y] D. 41. 1 9. 6. D. 18. 1. 78.
[z] D. 18. 1. 74.
[a] D. 31. 1. 77. 21. Gloſſ. in v. *Cuſtodia.*
[b] Bart. in l. 77. ut ſup.
[c] Gloſſ. in 45. I. 2. 1. v. *transfert.*
[d] C. 8. 54. 1. & Bart. ibid.

Cuſtodis, by ſetting a Keeper over the Goods ſold: As when I buy a Pile of Wood, or Parcel of Wine, and the Seller bids me take it away, and inſtead thereof I place a Keeper over it, ſuch Wood or Wine in this Caſe is deemed
[e] D. 41. 2. 51. to be delivered [e]. *Thirdly*, a *feigned* Delivery may be made by ſigning or marking of the Thing ſold: As when the Buyer puts his Mark or Seal
[f] D. 18. 6. 14. fin. on the Goods bought [f], left another Commodity ſhould be put in the place
[g] D. 18. 6. 1. 2. of the Goods purchaſed [g]: And this we properly call *conſigning* of Goods, when both Buyer and Seller, or each of them, do ſet their Mark or Seal thereon. *Fourthly*, a *feigned* Delivery may be made, and Property tranſ-
[h] D. 41. 2. 18. 2. ferr'd by View alone, if there be a proper Title precedent thereunto [h]: As when I order the Seller to leave the Goods, which I have bought, at my Houſe, and the like.

Delivery is proved, if I prove that I was in poſſeſſion of the Thing at the time of the Sale of it, and that I have ever ſince been poſſeſſed of it with the Knowledge and Privity of the Seller: For this is a Preſumption of
[i] Gloſſ. in l. 77. D. 6. 1. v. *ſufficiebat.* a Delivery, which amounts unto a Proof [i]. The receiving of the Keys proves the Poſſeſſion of that Thing, which belongs unto the Keys: And, therefore, if a Perſon be ouſted of Poſſeſſion, it is ſufficient to prove, that he
[k] D. 18. 1. 74. had once Poſſeſſion by a Delivery of the Keys; but then the Keys ought to be delivered at the Houſe unto which the Keys belong [k], as already hinted. For by a Delivery of the Keys, the Poſſeſſion of a Thing is only transferr'd, when ſuch Delivery is made in the Preſence of the Thing, or in ſight thereof. But of Delivery I ſhall have occaſion to ſpeak further hereafter under the Titles of *Poſſeſſion* and of *Bargain* and *Sale*: Wherefore, I ſhall next here treat of *Finding*, the laſt Method of acquiring Property according to the Law of Nations.

Finding, in *Latin* ſtiled *Inventio*, is, when any one finds and ſeizes Things which are not in the Property of any one according to the Law of Nations, or (at leaſt) have ceaſed ſo to be: As when a Man finds and ſeizes Jewels, or Precious Stones on the Sea-ſhore, or any other Things
[l] D. 1. 8. 3. there, which have not been in the poſſeſſion of any other Perſon before [l]; for by the Law of Nature, *viz.* right Reaſon, ſuch a Finder becomes the Pro-
[m] I. 2. 1. 18. prietor of the Things thus found [m]. By *Jewels*, *Gemmæ*, we mean ſuch valuable Materials as are of a lucid and tranſparent kind; and by *precious Stones* ſuch as are of an obſcurer Nature. Thoſe Things which have ceaſed to have an Owner, are *hidden Treaſure*, which no one can make claim to; and which has been out of the Property of any one beyond the Memory
[n] D. 41. 1. 31. 1. of Man [n]: And thoſe Things which are accounted as *Derelicts*. But if other Things than what are before related, are found on the Sea-ſhore, or in a private Place, or on the publick Roads, which have been in a Man's Property, and which he has loſt there in his Paſſage to and fro, they do not become the Property of the Finder; and he who does not reſtore a
[o] In l. 43. D. 47. 2. 4. Thing thus found, according to *Auguſtinus* [o], commits Theft. But to the end that a Man ſhould make himſelf a Proprietor by *finding*, it is not enough for him to have the ſight of the Thing alone, but he ought alſo to ſeize and
[p] I. 2. 1. 18. occupy the ſame [p]. Thus, if a Reward be promiſed to a Perſon that diſcovers a Highwayman or a Thief, he ſhall not receive the ſame, unleſs he
[q] Dd. in l. 13. C. 8. 41. ſeizes and apprehends him [q]. Heretofore, by the divine Law, an *Iſraelite* was obliged to receive into his Houſe or Cuſtody Things that were loſt or gone aſtray. "Thou ſhalt not ſee thy Neighbour's Ox or Sheep go aſtray, "and hide thyſelf from them: Thou ſhalt in any caſe bring them again unto "thy Brother. And if thy Brother be not nigh unto thee, or if thou "knoweſt him not, then thou ſhalt bring it unto thine own Houſe, and it "ſhall be with thee, until thy Brother ſeek after it, and thou ſhalt reſtore
[r] Deut. c. 22. v. 1. & 2. "it to him again [r]." So that, according to the Cuſtom of the *Hebrews*, the Perſon who found his Neighbour's Goods, was to cry the ſame, as Mr. *Selden* obſerves

obſerves in his Law of Nature[f]. Hence, according to the Cuſtom of *Holland*, and ſome other Countries, the Finder of Things loſt not only incurs an Action of Damage, but alſo falls into a Suſpicion of Theft, if he does not make publick Proclamation by the Mouth of the Cryer, and afterward reſtore the Things found unto the Owner claiming the ſame: But if the Owner does not appear, the Finder ought to render them to the Exchequer, or the Fiſcal Proctor, on a Reward given him[t]. In *England*, the King has the Goods belonging to him, whereof no Perſon can claim the Property, if he has not already made a Grant of them to ſome Lord of a Manor[t].

In reſpect to hidden Treaſure diſcover'd, which we in *England* call *Treaſure-Trove*, it does not indiſtinctly go to the Finder. For if a Perſon ſhall diſcover it in his own Land, or in a Ground that has no particular Owner, or in a Religious or Burying-Place, whether it be by Chance, or upon deliberate Search made after it, it ſhall become the Property of the Finder[u]; provided this be not done by the Help, or the Art of Conjuration[v]. And this is very agreeable unto right Reaſon, either becauſe it is of the Property of no one[w], or elſe becauſe it may be ſuppoſed to be depoſited there by ſome of the Finder's Anceſtors. Nor is it of any moment, whether a Man's own Ground be a religious or a profane Place, provided it be found in his own Burying-Place by chance, and not upon ſearch made after it. But if the religious Place be publick (as mentioned in the Law here quoted[x]) the Law is otherwiſe. But if a Perſon ſhall by chance find Treaſure in another's Ground, whether the Soil be private or publick, as belonging to the Prince, *&c.* he ſhall only have a Property in one Moiety of it, and the Lord of the Soil ſhall come in for the other half[y]. And the reaſon here aſſigned, why the Finder in this caſe only comes in for one Moiety alone of the Property, when other Things, in the Property of no one, go entirely to the *Occupant*, is this, *viz.* becauſe Treaſures are not truly in the Property of any one, for really the Heir of the Perſon that depoſits them is the Proprietor, but by reaſon of the Uncertainty thereof, they are looked upon as the Goods of no one. If the Finder ſhall ſuppreſs that part which belongs to the Exchequer, he ſhall be obliged to pay the whole that he finds[z]. At this day Princes in ſeveral Countries claim entirely unto themſelves all Treaſure found in any Place whatſoever within their Dominions: And this is true in *Germany*, *England*, *France*, *Spain*[a], and *Denmark*, as *Grotius* informs us in his Book *de Jure Belli*, &c. And *Covarruvias* thinks, that the ſame Law is introduced all over the World. But at the ſame time he tells us, that if the Finder has taken any pains in the Diſcovery of it, whereſoever it be found, he ſhall only have a fifth Part thereof according to the Laws of *Spain*, and the King ſhall have the Reſidue[b]. By the *Saxon* Law, all Treaſure lying under Ground, and found by the Furrowing of the Plow, appertains to the *Regalia*, contrary to the Diſpoſition of the *Civil* or Common Law. But *Zobellus* ſays, that this royal Right or Prerogative only obtains in Metals, and not in reſpect of Money[c]: For in reſpect to the finding of Treaſure, properly ſo called, he ſubmits it to the common Law; that is to ſay, to the Diſpoſition of the *Civil* Law. By the Laws of *England*, Treaſure-Trove is, when any Gold or Silver in Coin, Plate, or Bullion has been of antient Time hidden, whereſover it be found, and where no Perſon can prove any Property to it; in this Caſe it belongs to the King, or to ſome other Perſon by the King's Grant or by Preſcription. For ſuch Goods, whereof no Perſon can prove a Property, belongs to the King, as Wrecks, Strays, *&c*[d]. But even by the *Civil* Law, if a Perſon found Treaſure, though it were in his own Ground, by the Help of Magick or Conjuration, it was by ſuch Crime forfeited to the Exchequer[e], and the Perſon puniſhed with Death.

[f] Lib. 6. c. 4.

[t] Groenv. de ll. Abr. D. 47. 2. 40. 9.

[t] Cok. 3. Inſ. cap. 58.

[u] I. 2. 1. 39.

[v] C. 10. 15. l. un.

[w] I. 2. 1. 39.

[x] D. 49. 14. 3. §. pen.

[y] I. 2. 1. 39.

[z] D. 49. 14. 3. fin.

[a] Leg. Reg. Tit. 12. lib. 6.

[b] Covar. Tom. 1. Fol. 248.

[c] Conſt. Sax. P. 2. Quæſt. 59.

[d] Cok. 3. Inſ. cap. 58.

[e] C. 10. 15. l. un.

Treaſure

Treaſure found in a *Feudal* Eſtate does not go to the Vaſſal, but to the Lord of the Soil where it is found: For a *Feudal* Eſtate, properly ſpeaking, is not the Eſtate of the Vaſſal or Feudatory [f], but of the Lord of the *Fief*; and, therefore, the Lord ſhall have it according to the *Feudal* Law. But by the *Civil* Law it is otherwiſe. For a Tenant, who only pays a ſmall Penſion out of his Eſtate granted to him *for ever*, or who has a long Term of Years in it, is Owner of the Soil [g]; and he, not the Lord or Proprietary, ſhall have the Benefit of the Diſcovery: For ſuch a Poſſeſſor ſhall have all manner of Advantages ariſing from the Eſtate, as much as the Proprietor himſelf had, if there is no Reſervation to the contrary. But, why by the Law of Nations does not Treaſure found in another Man's Soil, upon Search and Induſtry, belong alſo to the *Occupant*, as well as Birds, wild Beaſts, and Derelicts? Now the reaſon of this difference in the Law, beſides what I have before hinted, ſeems to be, becauſe in thoſe Caſes there is no Prejudice to the Owner of the Land, whereas a liberty to dig after Money will create a manifeſt Damage. But then it may be asked, why is not the whole adjudged to the Occupier only, as other things are when the finding is by chance, as upon plowing in the Ground, and digging for its Improvement? I take it to be, becauſe Birds, wild Beaſts, Derelicts, and precious Stones found in the Sea, or upon its ſhore, do really and truly belong to no body, whereas certainly the Money dug up has an Owner if he could be diſcovered, as above remembred; and probably it might be hid there by ſome of the Anceſtors of the preſent Owner, who in reaſon may be thought to have concluded, that their own Grounds would be the ſafeſt Place, rather than thoſe of any other. Hence we may apprehend, that if it be known who hid the Money, and who is the Owner [h], upon what account it was hidden, (as for fear of Thieves, or in Time of War) the Finder can have no Title; but if he takes it, he has committed Theft.

[f] F. 2. 8. 1.

[g] D. 6. 2. 3. 1. & 2.

[h] D. 41. 1. 31. 1.

The Property of a Thing is ſometimes given to an uncertain Perſon, even by the Will and Conſent of the Owner himſelf; and this according to the Law of Nations. As when a Man wilfully throws away his Money, or any thing elſe among the People or Mob, with an Intent that he who can catch it ſhall make the ſame his own by ſeizing it: And this we in a vulgar Phraſe call a *ſcrambling* for it. Like unto this, is that which the *Civil* Law ſtiles a *Derelict*: which is, when the Proprietor of a Thing has left it, or caſt it away, with a Deſign that it ſhould not hereafter be reckoned among his Goods or Effects; and, therefore, he immediately ceaſes to be the Proprietor thereof [i]. And not only *Moveables*, but alſo *Immoveables*, and *real* Eſtates [k] may be looked upon as *Derelicts* (though the word *abjecerit* in the Law ſeems only to have a reſpect unto *Moveables*:) As a Man relinquiſhes his Land in ſuch a manner, that he will no longer deem it to be of his Subſtance, he does immediately in this caſe ceaſe to be the Proprietor of it, and the Thing thereby returns to its native Liberty; and becoming a *Derelict*, it is underſtood to be in the Property of no one. And, therefore, according to natural Reaſon, it is granted by the Law of Nations to the firſt *Occupants* [l]; becauſe, according to the Law of right Reaſon, Things ceaſe to be ours by the ſame Methods whereby they are acquired [m]. But what if the *Occupant* thinks a Thing to have been made a *Derelict* by the Proprietor, when the Matter is doubtful, ſhall he gain the Thing to himſelf, though he does not know by whom it became a *Derelict*? As for example, *Titius* without any manner of force obtained the Poſſeſſion of a certain Eſtate vacant through the Abſence or Negligence of its Proprietor, or becauſe the Owner died without leaving an Heir: And it was adjudged in this Caſe, that if he has held the Poſſeſſion thereof for any long time with the Privity of the Owner, or for thirty Years without his Privity, he ſhall acquire ſuch Eſtate by *Uſucapion* [n]; and may by an Exception bar the Owner, if

[i] I. 2. 1. 46.

[k] D. 41. 7. 3. & 6.

[l] D. 41. 8. 5. 1.

[m] D. 50. 17. 36. D. 41. 8. 1.

[n] D. 41. 8. 4.

he gives him any Diſturbance or Interruption afterwards[o]. *Accurſius* ſays, there ought to be a true *Conſtat*, that the Thing is a real *Derelict*, before a Man can make it his own; and that the Opinion of the Vulgar is not ſufficient[p]: And a legal Proof may be made hereof by Witneſſes, or by an Interpretation of Law. For the Intention of quitting a Property is ſometimes preſumed by an Interpretation of Law in a Perſon, who foregoes the ſame: As when a Maſter denies Alimony to his Bondman or Handmaid, and commands him or her to be delivered to another[q]; or if he deſerts or expoſes his Servant being ſick and in a languiſhing Condition, or being in Health leaves him in want of the Neceſſaries of Life. In this caſe he ſeems to intend him as a *Derelict*, and loſes the Property of his Servant: And then ſuch Bondman or Handmaid, by a kind of *Occupancy* of themſelves, may claim unto themſelves the true Liberty of *Roman* Citizens[r], and do not then become the Property or Acquiſition of any other *Occupant*.

[o] C. 7. 22. 1.

[p] D. 41. 8. 6.

[q] D. 41. 8. 8.

[r] C. 7. 6. 1. 3.

But Things thrown out of a Ship in a Storm or Tempeſt, for the ſake of disburdening the ſame, are not looked upon as *Derelicts*: For thoſe Things remain in the Property of the Owners; becauſe, 'tis plain, they are not caſt out with a Deſign of abandoning them, but that the Ship ſhould eſcape the Dangers of the Seas[s]; and the Maſter of them commonly ties a Buoy to them to know them again. Nor are mercantile Goods and Commodities, that ſuffer Shipwreck, to be accounted as *Derelicts*; for the Property of them continues in him in whom it was veſted before ſuch Shipwreck. Wherefore ſuch mercantile Wares and Commodities are not granted to the *Occupant*, or Perſon that firſt ſeizes them. Yea, he that collects, waſtes, or converts ſuch ſhipwreck'd Goods to his own Uſe, commits a grievous Theft; and by the *Civil* Law at this day, ſhall undergo a Forfeiture of all his Goods[t]. Wherefore, it follows, that he who ſeizes and poſſeſſes himſelf of Shipwreck'd Goods, cannot through length of Time plead a Right thereunto by *Uſucapion*; nor can any other Perſon do this, though (perchance) ſuch Goods come into his Hands as a third Perſon, if he knew them to be ſhipwreck'd Goods, becauſe *Uſucapion* is not admitted in ſtolen Goods[u].

[s] I. 2. 1. 47.

[t] C. 6. 2. 18. Auth. *Navigia.*

[u] D. 41. 3. 4. 6.

It is one Thing to have Goods as a *Derelict*, and another to have them as Goods *loſt*: There being a wide difference between a *Derelict* and a Thing *loſt*. For a Thing is ſaid to be a *Derelict*, when it is left and expoſed with a Deſign, that the ſame ſhould ceaſe to be in the Property of the Owner thereof, as already remembred: But that is ſaid to be *quid deperditum*, or a *Thing loſt*, that happens from a caſual Event, and which does not go from the Proprietor on a ſet Purpoſe: For thoſe Things which we loſe contrary to our Wiſh and Expectation, we look upon as Things loſt. Nor do I know any Text in the Law that makes a better diſtinction between a *Derelict* and a *Deperditum*, than what I have here made. From whence I infer, that he who finds Things that are loſt, whether they be Rings, or any other *moveable* Goods which be loſt, does not thereby make them his own by finding them, becauſe they are ſtill in another's Property: nor ſhall he poſſeſs the ſame by *Uſucapion* through length of Time; and he that does ſo, approaches to the Commiſſion of Theft. So that the Perſon who finds the Thing, ought to cry the ſame, as already obſerved, where ſuch Things are uſually cried: And if there be no Owner extant, or appears, then, according to *Imola* on the *Canon* Law, and *Hoſtienſis*[v], the Thing ſo loſt and found ought to be preſented to the Biſhop or Pariſh Prieſt, to be diſtributed to the Poor; but by the *Feudal* Law, to the Lord of the *Fief*. And thus I have done with the ſeveral ways of acquiring Property according to the Law of Nations. I ſhall only further add ſome

[v] In c. 5. x. 5. 19.

uſeful Obſervations touching Property in general, and ſo conclude this Title.

And *firſt*, it is to be noted, that if in an Action on a *Pawn* or *Mortgage*, a Queſtion ſhould ariſe touching the Property thereof, the Creditor ought, according to ſome Mens Opinion, to prove that the Debtor was the Owner and Proprietor of the Thing pawned or mortgaged to him, at the time of the Obligation or Engagement made: But the Doctors do, for the moſt part, reject this Opinion as falſe and contrary to Law, affirming the Proof of Property in this caſe to be in no wiſe neceſſary; ſince a Proof of this nature is the moſt difficult of all kinds of Proofs. And it is ſufficient Proof, if at the time of the Engagement made, or Obligation given, the Thing pawned or mortgaged was deemed among the Debtor's Effects; that is to ſay, if the Debtor was then in the Poſſeſſion of the Thing thus pawned and mortaged, as being his own. And this is not ſo difficult to be proved, ſince what we are poſſeſſed of *bonâ fide* is reckoned among our own Goods, though in reality we have no Property therein. But, *ſecondly*, it is to be obſerved, that he who claims any thing by a *real* Action, ought to prove himſelf to be the Proprietor thereof. As for inſtance, *Titius* is in poſſeſſion of an Eſtate belonging to me. If I would in this Caſe bring a *real* Action for the effectual Recovery of ſuch Eſtate, I ought to prove the Property to be veſted in me: which if I ſhall not do, the Eſtate ſhall remain with *Titius*; for it is not neceſſary that the Poſſeſſor ſhould prove the Eſtate belongs to him [v]. For even in a doubtful Caſe, where no Proprietor appears, he has the Property and Ownerſhip of a Thing, who is in poſſeſſion thereof, and is thereby preſumed to be Lord of it. *Thirdly*, it is to be obſerved, that Dominion and Property is a matter of Law, and is not placed in the Underſtanding of Man, nor is it immediately perceived by any corporeal Senſe, but only by the Reaſon and Judgment of Man; as that *Caius* ſaw *Titius* himſelf buy that Thing, and that he has been in poſſeſſion of it for ſo long a time, as that he may plead Preſcription for it: And, therefore, it is no Proof of Property for *Caius* to affirm, that *Titius* was Proprietor thereof, unleſs upon Interrogatories he anſwers to the Reaſon thereof. *Fourthly*, it is an eſtabliſh'd Rule in Law, that Property may be proved as well by Deeds as by Witneſſes, and alſo by other Documents [w]: For Property may be proved even without Deeds or Inſtruments, by proving a Title of Bargain and Sale on the Payment of a Price, and on Delivery of Poſſeſſion [x]. *Fifthly*, in a Queſtion touching Property, it is to be known, he has the Preference, unto whom Poſſeſſion is delivered by the true and real Owner [y]: And a Thing ſeems to be the Property of that Perſon, not with whoſe Money, but in whoſe Name it is purchaſed [z]; that is to ſay, it is the Property of him, whoſe Name is contained in the Deed or Inſtrument of Sale [a]. For that which is purchaſed with another's Money, or with Money in common, does not become the Property of him whoſe Money it was: But this is otherwiſe in reſpect of a Minor's Money, in the Money of Soldiers, and in reſpect of a Wife's Portion. *Sixthly*, a Pupil, as to the Buſineſs of acquiring the Property of a Thing, does not ſtand in need of his Tutor or Guardian's Authority [b], though it be otherwiſe in the Buſineſs of accepting of an Heirſhip according to the Gloſs: But he cannot alienate the Property of a Thing without the Authority of his Tutor; nor can he transfer Poſſeſſion on another without ſuch Authority [c]. *Seventhly*, it is to be noted, that by a Statute or Cuſtom the Dominion and Property of a Thing may be transferr'd to the Heir *ipſo facto* without any Poſſeſſion or Delivery, and ſuch a Statute or Cuſtom is good and valid in Law; ſuch a Cuſtom being every where received in *France*.

[v] C. 4. 19. 2.

[w] C. 4. 19. 12.

[x] C. 4. 19. 4.

[y] C. 4. 50. 6.

[z] C. 4. 50. 1.

[a] C. 4. 50. 8.

[b] D. 41. 1. 11.

[c] D. ut ſupr.

It often happens between particular Partners, Brothers, and others, that they lay out Money upon Wares or other Things *ſimply*, without ſaying

that ſuch Money was in common between them, or that it was the proper Money of ſuch a Perſon: In this Caſe, if any Queſtion ariſes touching whoſe Money it is, it is always preſumed to be the Property of him who pays the Money, and not Money in common [d]. Thus if a Brother buys an Eſtate for himſelf and his Brother, and the Seller acknowledges that he received the Purchaſe-Money for it of the Brother that drove the Bargain, and the Purchaſe-Deed does not mention that it was bought with the Money of the two Brothers, or of their Money in common, it is preſumed to be bought out of the Money of him who pays the Price for it, and he ſhall acquire the Property thereof [e]. If a Brother does not apply himſelf to Trade and Induſtry, and has nothing beſides Effects in common, he is preſumed to have acquired what he purchaſes out of the common Stock. But a Perſon that has the Management and Adminiſtration of another's Buſineſs, and receives his Money, if he makes a Purchaſe, is preſumed to pay the Purchaſe-Money out of the Stock of his Principal, if there are any Conjectures that concur and lead hereunto. If the Head of a College, or any Community, purchaſes in the Name of the College or Community, he is preſumed to do it out of the Money of ſuch College or Community; and, therefore, the College ſhall have the Property of the Eſtate.

[d] Bart. in l. 2. C. 4. 37.

[e] Bald. in l. 2. C. 4. 37.

TIT. IV.

Of a Peculium, *what it is, and the ſeveral* Species *thereof; what Right the Father, Mother, and Son has therein; and of an Action* de Peculio, *&c.*

THE words *Peculium* and *Peculatus*, according to *Varro* [f], are both derived from the word *Pecunia, quaſi puſilla pecunia*, or a ſmall Patrimony: For the word *Pecunia* comprehends all Things which are in our Patrimony, and is derived from the word *Pecus*, as noted under the Title of *Money*. And thus a *Peculium* is that Money which is left to a Bondman, or a Son under the Power of a Father, or which ſuch Son or Bondman, through the Will and Conſent of the Father or Maſter [g], acquire to themſelves by their own Induſtry, (for a Son or Bondman can acquire nothing of his own:) And this Money was kept ſeparate from the Money of the Father or Maſter, and never brought into their Accounts or Subſtance [h]. And hereupon, if the Father had an active, luſty, and induſtrious Son, who was willing to follow Trade, and the Father truſted him with a Sum of Money to trade with, this Money was in ſome meaſure ſaid to be the Son's Eſtate, though in reality it was not: But becauſe it was ſo ſeparated from the Father's Stock [i], the Father did not reckon it among his own Effects, but kept diſtinct Accounts thereof; and, therefore, in ſome meaſure it was ſaid to be the Son's Patrimony. And the ſame might be ſaid in reſpect of Bondmen: Becauſe it is certain, there have been Bondmen ſometimes, who have been Traders, Phyſicians, Songſters, and other

[f] Lib. 4. de Ling. Lat.

[g] D. 15. 1. 1. 5. & 47.

[h] D. 15. 1. 4. & 5.

[i] D. 15. 1. 4. pr.

other Maſters of Induſtry. And theſe Bondmen, that were ſo qualified, are in Law ſtiled *Ordinarii* and *Atrienſes*, as having other Bondmen in the *Peculium* granted them by their Maſter: which Under-Bondmen are ſtiled *Vicarii*, who ſometimes ſupply'd the Place, and did the Duty of the *ordinary* Bondmen, in caſe theſe ſuperior Bondmen were (perhaps) otherwiſe employed. And not only that was ſtiled a *Peculium*, which a Bondman had in a diſtinct manner from his Maſter's Accounts, but even that which the Maſter himſelf had ſeparated, that he might have it *in Peculio*, having Power to increaſe or diminiſh the ſame at pleaſure: As when a Maſter, being a Creditor unto his Bondman, granted him the Subſtance which he had in his Hands belonging to ſuch Bondman, to be his own *Jure Peculii*, though no Delivery had intervened. The word *Peculium* has various Significations, but I ſhall only uſe it here in the Senſe above given.

A *Peculium*, as here underſtood, is four-fold. The firſt *Species* of it is ſtiled *Profectitious*; and ſo called *quaſi proficiſcitur à Patre vel Domino* [k], as flowing from the Father or Maſter. The ſecond is termed *Adventitious*, becauſe the Son may acquire it by other means than by the Father; as (perhaps) from being Heir to his Mother, Brother, Friend, or Neighbour [l]: And the ſame may be ſaid in regard to a Bondman, becauſe whatſoever was given unto a Bondman, or he acquired by his own Induſtry, and not from his Maſter's Goods or Stock, or in his Maſter's Employment, might be termed the Bondman's *Peculium Adventitium*, becauſe theſe Things were foreign to the Maſter's Stock or Service. For theſe Things are ſtiled *adventitious*, becauſe they proceed not from the Perſon, Goods, or Eſtate of the Father or Maſter [m]. The third *Species* is called *Peculium Caſtrenſe*, being that which was given to a Perſon in the Service of the Wars, either by his Parents or Kindred, or even by other Perſons Strangers to him; or that which a Son under the Power of a Father acquired in the Wars, which if he had not been in the Service of the Wars, he had not otherwiſe purchaſed [n]. The laſt is the *Peculium quaſi Caſtrenſe*, which a Son under the Power of a Father acquired by a Profeſſion of the liberal Sciences, or from ſome publick Office or Function, as from the Revenues of the Prieſthood [o], or from the Patronage of Cauſes, and the like, or if he laid up Money by a parſimonious way of Life [p].

[k] Bart. in l. 6. C. 6. 61. pr.

[l] C. 6. 61. 6.

[m] C. ut. ſup.

[n] D. 49. 17. 11.

[o] Dd. in l. 4. C. 2. 8.

[p] C. 6. 61. 7.

In a *Peculium Profectitium*, the Property and Uſufruct did belong to the Father, though the Son had his Accounts ſeparately kept from the Father's [q]. Wherefore, in the Buſineſs of Succeſſion, ſuch a *Peculium* was to be divided between the Son and the Coheirs. Touching this matter, I ſhall here take notice of a very remarkable Deciſion of *Jaſon*'s [r], in a caſe very often in practice, *viz.* a Father during his Life-time had ſeveral predial Eſtates belonging to him, but being in his Dotage, or otherwiſe infirm by reaſon of Sickneſs, could not manage and intend the ſame as he ought: whereupon his eldeſt Son had the Care and Management of his domeſtick Concerns, as well as of his predial Eſtates; and the other Brother being (perhaps) an Infant or Minor, had no Employment therein. The Father being dead, the eldeſt Brother ſaid, that he had for a long time had the Care of the Family-Eſtate; and, therefore, demanded, that before any Diviſion was made of the Father's Subſtance, he might have ſo much allowed him for a Salary, as the Father would have given to any one Steward or Bailiff of his Eſtate. Now *Jaſon*, by way of Deciſion, ſays, that the Brother after the Father's Death could not demand a Salary of his Brother, becauſe the Son was obliged *ex debito reverentiæ paternæ* to undertake this Task or Employment, and for that a Power or Commiſſion is uſually executed *gratis*, by a Perſon not accuſtomed to take a Fee or Wages for Buſineſs done [s].

[q] I. 2. 9. 1.

[r] In l. 20. C. 6. 2.

[s] D. 17. 1. 1. fin.

As to a *Peculium Adventitium*, which does not accrue to the Son from the Father's Stock, but advenes to him ſome other way, as aforeſaid, the Property belongs to the Son himſelf, as owing it (perhaps) to the Liberality of Fortune, and the like; but the Father acquires the Uſufruct of it during his Life-time[s]. And in ſuch a *Peculium*, the Father is the lawful Adminiſtrator[t], and the ſame does not come to be divided between Coheirs[u]: But though the Son has the Property thereof, yet he cannot make a Will touching the Diſpoſal thereof[v]. By the way it is to be obſerved, that theſe two Titles in the *Code*, *touching the Mother's Goods*, and *thoſe which Children have the diſpoſal of*, never were received in *Saxony*; *viz.* as that the Father ſhould have the Uſufruct in the Mother's Effects, and the *adventitious* Goods of the Son during his Life-time, provided he gave Security to ſee the Goods forthcoming to the Children after his Deceaſe, as the *Civil* Law directs: For by the Cuſtom of the Country, theſe two Titles of the Law were rejected there, and the Uſufruct only accrues to the Father, ſo long as the Son does not ſeparate himſelf from the Father. For when he does this, the Father is then compelled to reſtore him all the Mother's Effects, and other *adventitious* Goods, whether he be a Son in the Power of the Farher, or not. See the Laws of *Saxony*[w].

[s] I. 2. 9. 1.
[t] C. 7. 4. 1.
[u] C. 6. 20. 21.
[v] C. 6. 22. 11. & 12.
[w] Art. 11. lib. 1.

As to the *Peculium Caſtrenſe* and *Quaſi Caſtrenſe*, the Son was deemed to be in the Place of a *Pater-familias*: ſo that in reſpect of the Property and Uſufruct thereof, they are the Son's entire Acquiſition, and the Father has no Right in them; and the Son may diſpoſe of them even by Will[x], nor ſhall they be divided in the Succeſſion. But it has been a Queſtion, whether when the Son's Patrimony or Eſtate is increaſed, it may be preſumed to be *profectitious* or *adventitious*? And here we ought to diſtinguiſh, *viz.* That either the Son is diligently induſtrious, and ſuch a one as has been accuſtomed to work, and the Father is poor; and then ſuch Things as accrue to the Son are preſumed to be *adventitious*: or if the Son be ſlothful, and knows not how to work, and the Father is rich; then the *Peculium* may be preſumed to flow from the Father's Subſtance, and thus to be a *profectitious Peculium*. And this diſtinction, according to *Zazius*, ought to be regarded; becauſe by means thereof, he, upon a time, obtained for his Client a thouſand Florins.

[x] C. 6. 60. 6. C. 6. 22. 11. & 12.

Having thus in the Premiſes given a Definition, and treated of the ſeveral Kinds of a *Peculium*, I come in the next place to ſpeak of an Action *de Peculio*. And here it is to be obſerved for the Explanation of this Action, that there are two Obligations ariſing from the Contract of a Son under the Power of a Father. The one ariſes againſt the Son *in ſolidum*: For tho' he be under the Father's Power, yet he is bound *in ſolidum* on the account of every Contract, whether *proper* or *improper*, and on the account of every Treſpaſs, whether *proper* or *improper*, even in the Father's Life-time: ſo that he may be convened by Creditors, and by a Sentence condemned to pay the whole Debt[y]. And this not only proceeds, when he has a *Peculium* adventitious, *Caſtrenſe* and *quaſi Caſtrenſe*, but even when he has no ſuch Thing as Property, and all the Effects are the Father's. For here an Execution may be ſerved againſt him, and if he pays not the Debt, he ſhall be impriſoned, unleſs he makes a *Ceſſion* of his Goods[z]. The other Obligation ariſes againſt the Father by the *Peculium* on the account of the Son's Contract, yet not *in ſolidum*, but only ſo far as the *Peculium* extends[a], unleſs the Father ratifies and confirms the Son's Contract. For then the Father may on the Score of ſuch Ratification be convened *in ſolidum*. But this admits of a Limitation in two Caſes, *viz. firſt*, in the Caſe of a Vow; for if the Vow or Promiſe be of Money to ſacred Uſes, neither he nor his Father ſhall be liable[b]. Now a Vow, in *Latin* called *Votum*, is a juſt and deliberate Promiſe of doing, or not doing ſomething in reſpect of God, though the Antients were wont to call ſeveral

[y] D. 5. 1. 57; D. 44. 7. 39.
[z] C. 7. 71. 7.
[a] D. 5. 1. 57.
[b] D. 50. 12. 2. 1.

Acts made for the Prince by the Name of *Vows*, as elſewhere to be remarked. *Secondly*, in caſe of Money borrowed; for if a Son under the Father's Power borrowed Money, regularly neither he nor his Father were bound to pay it, but each had the Exception of the *Senatus-Conſult. Macedonianum*[c], as already related.

[c] D. 14. 6. 1. & t. t.

An Action *de Peculio* was a perſonal Action, whereby we demanded of the Father or Maſter to pay a Debt for the Son or Bondman bound unto us by Contract, even in the Life-time of ſuch Son or Bondman, according to the Extent or Amount of the *Peculium*[d]. This Action was introduced by the *Prætor*, for it is not founded on the old civil Law: And the Reaſon of it was, becauſe the Father and Maſter had the Uſufruct of the Bondman and Son's Labour. An Action *de Peculio* continued as long as the Son or Bondman was under the Power of the Father or Maſter: But after the Death or Emancipation of the *Filius-familias*, or the Manumiſſion or Alienation of ſuch Bondman, it was limited to a Year[e]. The Father had this Intereſt over the Son's Eſtate, becauſe by the *Roman* Law they were ſuppoſed to be but one Perſon: But the Laws of *England* make no ſuch Suppoſal; and this Title *de Peculio* is now every where grown out of uſe.

[d] I. 4. 6. 10.

[e] D. 15. 2. 1.

TIT. V.

Of Services; *and therein of* Predial *and* Perſonal *Services*; *and likewiſe of* Rural *and* City *Services, according to a Sub-diviſion of them*; *and what theſe are*, &c.

HAVING before treated of Things *corporeal, viz.* of ſuch Things as may be ſeen and touched in their own Nature[f], and which are the Object of Property, and ſubject unto corporeal Poſſeſſion: I ſhall next ſpeak of Things *incorporeal*, which cannot be ſeen or touched, but do only conſiſt in *Right*; and, therefore, are not ſubject to corporeal Poſſeſſion, but yet may be the Object of Property, as Services, Inheritances, and Obligations. And *firſt*, of Services in general, under the preſent Title; and hereafter of Inheritances and Obligations.

[f] I. 2. 2. pr.

Now a *Service*, in *Latin* ſtiled *Servitus*, is a Right, whereby one Thing is ſubject unto another Thing or Perſon, for Uſe and Convenience, contrary to *common Right*; and where one Perſon is ſubject unto another Perſon, as I have already related under the Title *touching the State and Condition of Perſons*. So that *Services* may be divided into *real* and *perſonal*[g]. *Real*, which are alſo called *Predial* Services, are ſuch as one Eſtate owes unto another Eſtate: As becauſe I am Owner of ſuch a Ground, I have the Right of a Way through the Ground of another Perſon[h]; or becauſe I am poſſeſſed of this Houſe, my Neighbour cannot beat out a Light or Window out of his own Houſe towards mine, or build his Houſe higher without my Leave. They are called *predial* Services, becauſe they cannot be conſtituted *ſine Prædiis*[i], without Lands and Tenements: For no one can acquire either a *City* or *Rural* Service, unleſs it be he who has a predial Eſtate[k]. Thoſe *predial* Services are ſtiled *rural*, when a predial Eſtate owes Service to an Eſtate in the Country[l]: And thoſe *Predial* Services

[g] D. 8. 1. 1. D. 7. 1. 32.

[h] I. 2. 3. 3.

[i] D. 8. 1. 8. & 15.

[k] I. 2. 3. 3.

[l] D. 8. 3. 1. 1.

Services are termed *City* Services, when a Predial Eſtate owes Service to a Predial Eſtate in the City [m]. For by *Prædia Ruſtica*, I here mean all ſuch Places as are free and exempt from Buildings, as an *Area* or Square in the City, and a Field in the Country [n]: And, on the other hand, by *Prædia Urbana* I mean all Buildings, even built out of the City in a Ville, or in the Country [o].

Rural Services are thoſe, which the Lawyers call *Iter*, *Actus*, *Via*, *Aquæ-ductus*, or the driving of Cattle to Water, the Right of Paſcuage or Feeding of Cattle, the Right of digging Sand, burning Lime, *&c* [p]. I ſay, among *Rural* Services we may reckon the *Iter*, *Actus*, and *Via*: For the *civil* Law diſtinguiſhes theſe from each other. The *Iter* is a Right, which a Man has to go on Foot or Horſeback, or in a Sedan, *&c.* over another Man's Land to his own [q]: For an *Iter* is a Way either on Foot or Horſeback [r]. The *Actus* is a Right of walking, riding, driving Cattle, or a Cart over another Man's Land [s]. There may alſo be an *Actus* or Way without the Right of driving a Cart or Waggon; and this we vulgarly in *England* call a *Pack* and *Prime* Way. The *Via* or *Aditus* is a Right of walking, riding, driving Cattle or Carts, and alſo of drawing Stones, Timber [t], and even of leading an Army, provided it be done without Damage to the Corn or Graſs. This laſt Way was to conſiſt of eight Foot at leaſt in Breadth ſtraitways, and ſixteen Foot upon turnings [u], according to a Law of the twelve Tables. This with us in *England* is either the King's *Highway*, or the *common Streets*. Therefore, from what has been ſaid, he who has an *Iter* has not an *Actus*; but he who has an *Actus*, has alſo an *Iter*; and, by the tacit Will of him who has conſtituted the ſame, he may make uſe of it without driving Cattle: But if it be expreſſly covenanted and agreed to the contrary, it is otherwiſe [w]. Thus alſo there is a great difference between what we call *Via* and *Actus*: For a *Via* includes an *Iter* and an *Actus* therein; but an *Actus* only contains an *Iter* by the tacit Will of the Perſon who grants it, as aforeſaid. The *fourth* Kind of *Rural* Services is what we ſtile *Aquæ-ductus*, or a Right of bringing Water by a Pipe or Rivulet through another Man's Land to my own [v], without prejudice to navigable Rivers, or any other Man's Eſtate [w]. And this may either be from the Spring-Head, or from any other Place, not only of Water already diſcovered, but to be diſcovered hereafter. And this is true, if ſuch a Service be eſtabliſhed by Grant; for otherwiſe a Man cannot bring Water through another's Ground againſt the Will of the Proprietor [x]. Yea, the Proprietor may by his own Authority remove the Pipe, and intercept the coming of the Water [y]. A Perſon that has a Service granted him, may in the beginning bring Water through any Part of the Eſtate that is ſubject to this Service; but after he has once begun to bring Water through one Part of ſuch Eſtate, he cannot alter the Courſe, and bring it through another Part thereof [z]. The Perſon who has this Service granted him, ought at his own Coſt and Charge to repair the Pipe, and other Inſtruments through which the Water paſſes: For regularly in all Services, except that of an *Onus ferendum*, Repairs belong to him, who avers ſuch Service is due to him [a]. And the Reaſon is, becauſe he who owes the Service, is not compelled to do any Thing *actively*, but to be *paſſive* only [b]. Hence the Perſon, to whom a Service is due or granted, may at his own Coſt build and lay Pipes in the Eſtate that is ſubject to ſuch, though the Perſon that owes the Service ſhould oppoſe it, to the end that he may the better enjoy the Right of Service [c]. See *Capella* touching *City* Services. This Power of bringing Water may be granted to ſeveral Perſons, if there be a ſufficient Stock of Water [d]; otherwiſe if it be granted to one, it cannot be afterwards granted unto another, according to *Paul. de Caſtro* [e], in prejudice of the firſt Perſon. For a Grant is always underſtood to be made without

Damage

[m] D.8.4.1.
[n] D.50.16.211.
[o] D.50.16.198.
[p] I.2.3.pr. & II.2.
[q] D.8.3.7.
[r] D.8.3.12.
[s] I.2.3.pr.
[t] D.8.3.7.
[u] D.8.3.8.
[w] D.8.5.4.1. D.50.17.21. Arg.
[v] I.2.3.pr.
[w] D.43.12.2.
[x] C.3.3.2. & 11.
[y] D.9.2.29.1.
[z] D.43.12.20.
[a] D.8.5.6.2. Bart.ib.
[b] D.8.1.15.
[c] D.8.1.10. D.8.2.20.1.
[d] D.8.3.2.1.
[e] In l. 17. D.8.3.17.

Damage and Prejudice to a third Perſon [f]. Thus Privileges granted to one Perſon, ought not afterwards to be granted unto another, in prejudice of the firſt Grantee [g]. A *fifth* Kind of rural Services is a Right of drawing Water, and of watering Cattle, a Right of Common and of Paſturage, of Hunting, Hawking, Fiſhing, making Lime, digging Gravel, Chalk, Stone, and Sand for the Uſe of my Farm or Eſtate [h]; but not for any other Uſes, as to make earthern Veſſels, and the like [i]: For the Service muſt be made uſe of only for the Uſe and Advantage of the *ruling* Eſtate. To render this a Service in the Realty, it is neceſſary, that he who has acquired ſuch Service, ſhould have an Eſtate in the Neighbourhood [k]: For though Water be then drawn for the Benefit of Perſons who poſſeſs an Eſtate in the Neighbourhood; yet it is called a *real* Service, becauſe it is due from a real Eſtate in Contemplation of a Man's Eſtate bordering thereon: And, therefore, it is ſaid to be a real, and not a perſonal Right, which is not extinguiſhed with the Perſons themſelves, but, according to the Gloſs [l], paſſes to the Succeſſors of ſuch neighbouring Eſtate. But if ſuch Perſon as acquires this Service has not an Eſtate in the Neighbourhood, or the like, but the drawing of Water is only granted to him for the Uſe and Advantage of his Perſon, it is called a perſonal Right, which dies and is extinguiſhed with the Perſon [m]. This Service is iſſuable out of a private Spring or Brook: For every one may draw Water out of a publick Stream or River [n]. If a Perſon has a Grant of drawing Water, he is underſtood to have a Way granted him unto ſuch Water: And, on the other hand, he who has a Way unto a Spring or Brook, has by Interpretation of Law the Right of drawing Water there [o]. In relation to the feeding of Cattle in another Man's Ground, it is alſo neceſſary, that the Perſon to whom this Service is granted or due, ſhould likewiſe have an Eſtate in the Neighbourhood, in order to render it a *real* Service [p]. And ſuch Places are ſtiled *Paſcua* or Paſture-Lands, *ubi pecora paſcuntur* [q], where Cattle are depaſtur'd and fed. Under the word *Pecus* we may reckon all *Quadrupeds* or four-footed Beaſts which feed in Herds [r]. Regularly ſpeaking, every Perſon is forbidden to feed his Cattle in another's Ground, unleſs he has ſuch Service either by Grant or Preſcription [s], and then he ought to uſe ſuch Service only as it is covenanted in the ſaid Grant, or according to the manner of ſuch Preſcription [t]. Therefore, if the Covenant or Preſcription be only for feeding of Sheep on another's Eſtate, a Man may not feed Oxen, Hogs, or Horſes thereon; nor can he feed a greater number of Cattle than is limited by ſuch Grant or Preſcription. Hence it is, that if a Perſon has for a Term of Years by Preſcription fed a thouſand Sheep on another's Land, and no more, he cannot afterwards increaſe that Number, according to this Maxim in Law, *viz. quantum poſſeſſum tantum præſcriptum* [u]. Thus if there be a Service granted for bringing Water unto certain Eſtates, ſuch *Modus* of bringing Water which was limited in the beginning, cannot be increaſed, tho' other Eſtates ſhould afterwards be added thereunto [w]. And *Baldus* ſays, that this Law has not only place in a Service founded on a Grant, but alſo in a Service eſtabliſhed upon Preſcription: Becauſe Preſcription can no more exceed its proper Terms and Limits, than Poſſeſſion can [x]. For if a Service be granted for watering a certain number of Cattle, the Proprietor of the Eſtate, ſubject to ſuch Service, may hinder the watering of a larger Number. But, on the other hand, if the Proprietor of the ſubject Eſtate does any thing contrary to the ancient Form of the Service, whereby he may hinder the Uſe of ſuch Service due, he is liable to an Action [y]: For he cannot change and reduce ſuch Paſture-Lands unto Tillage or arable Land againſt the Will of the Perſon that has the Service; nor can the Perſon that has the Service, do it againſt the Will of the Proprietor. This, I ſay, the Proprietor of the *ruling* Eſtate cannot do,

[f] D.43.8.2.
[g] C.12.16.3.
[h] I.2.3.2.
[i] D.8.3.5.& 6.
[k] D.8.3.5.1.
[l] In l.1.D.8.3.v.*computan.*
[m] D.8.3.4. D.8.1.8.
[n] D.8.3.3.fin.
[o] D. ut ſupr.
[p] D.8.3.4.
[q] D.50.16.30.fin.
[r] D.32.1.65.
[s] D.9.2.39. & 40.
[t] Arg.D.16.3.1.6.
[u] D.43..1.4.
[w] C.3.34.12.
[x] D.43.19.1.4. D.43.20.1.
[y] D.8.5.9. C 3.34.7.

do, unleſs the other Perſon has only a Right of Paſturage for a certain time, *viz.* when the Land is not in Tillage: For every one may improve his own Eſtate, provided his Neighbour does not ſuffer thereby [x]. [x] D.8.5.6.fin.

The *Civil* Law diſtinguiſhes Paſture-Land into *publick* and *private* Paſture [y], as our common Law does. The laſt is that which accrues unto a Perſon *Jure proprio*, as Meadows, and the like, belonging to his Eſtate, excluſive of any other's Right: And the other is that, which we ſtile a *Common of Paſture*, which belongs to a whole Town, Village, or City, and has a common Herdſman or Shepherd appertaining thereunto, hired for the keeping and looking after Cattle, who if he ſhall loſe any, ſhall be liable, in caſe he be negligent in his Buſineſs [z]. This *Common of Paſture* is not the Object of a *real* Service, becauſe no ſuch Grant can be made thereof ſubject unto another Eſtate: Yet in ſome particular Caſes, a Perſon may let out his Right of *Common* unto another for a certain moderate time, provided he does not injure the other Commoners. I ſhall next proceed to ſpeak of *City* Services: And, [y] D.39.3.14. C.11.69. [z] Dd. in l.9. D.19.1.

Thoſe are ſtiled *City* Services which belong and are due to Eſtates in the City; that is to ſay, to Houſes and Buildings erected for the Habitation of Men, whether they be in the City or out of the City, in ſome Village or Country; for it is not the Place, but the Uſe they are apply'd to, which conſtitutes a City-Eſtate [a]. Theſe Houſes or Buildings ought not to be erected for Corn or Cattle, unleſs they are Out-Houſes to the principal Manſion: For Services have their Denomination from the *ruling* Eſtate. Theſe Services of *City* Inheritances are either *affirmative* or *negative*; whereas *rural* Services are *affirmative* only. The *affirmative* are, *firſt*, that of the *Oneris ferendi*, *viz.* that the Wall of my Neighbour's Houſe ſhall bear the Burthen of my Building [b]; and which he ſhall be bound to repair [c], as already hinted. For though it be the Nature of other Services, that he on whom the Service is impoſed, cannot be compelled to do any thing, but only to ſuffer: yet the particular Nature of this Service is ſuch, that he who owes it is not only obliged to ſuffer [d], but is likewiſe bound to do ſomething, as to repair his Wall, or to rebuild it if it be fallen down [e]; unleſs it be otherwiſe expreſſly ſtipulated by Pacts and Agreements, or it has been otherwiſe practiſed for length of time. But whilſt the Wall is rebuilding, the Support or Propping up of the Houſe, unto which ſuch Service is due, belongs unto the Owner of ſuch Houſe, to whom ſuch Service is due [f]. The *ſecond* affirmative Service is, that my Neighbour ſhall ſuffer me to fix a Beam, or piece of Timber, or Stone in his Wall [g]. For, regularly ſpeaking, no one can fix a Beam into another's Houſe without ſuch a Service: And if this be done againſt our Neighbour's Will, he may by his own Authority remove or deſtroy it [h]. And 'tis the ſame thing, if a Man builds a Wall, or erects a Coop upon my Eſtate, I may by my own Authority deſtroy it: Becauſe that which is built upon my Land, goes along with the Soil, and becomes mine, and conſequently I may deſtroy it. And, therefore, there is need of this Service to warrant it. This Service differs from the former in this reſpect, *viz.* becauſe he who owes this Service, only ſuffers his Neighbour's Beam or Timber to reſt on his Wall, and is not obliged to any Repairs [i]. A *third* Kind of an affirmative Service is, that my Building may project, ſo as Carts and Carriages ſhall be forced on his Ground; or that I may make a Balcony over his Ground, or a Vault under it [k]. A *fourth* Kind is, that the Eves of my Houſe, (called *Suggrundæ* or *Suggrundia*) may hang over his Ground, to protect my own Walls, and to keep them from the Injury of the Weather [l]. A *fifth* Kind is a Right of turning the Droppings of the Eves of my Houſe on my Neighbour's Houſe or Ground, or that I may receive the Droppings of his Eves into my Ciſtern [m], which may be beneficial where there is want of Water. A *ſixth* Kind is, that [a] D.50.16.198. [b] I.2.3.1. [c] D.8.2.33. [d] D.8.1.15. [e] D.8.5.6.2. [f] D.8.5.8.pr. [g] D.8.2.25. pr. [h] D.8.2.29. [i] D.8.5.8.2. [k] D.8.2.2. [l] D.8.2.2. [m] D.8.2.2.

that my Sink or Gutter may run through my Neighbour's Houſe or Backſide [n]. A *ſeventh* Kind is, that I may beat out what Lights and Windows I pleaſe againſt him [o], which otherwiſe I cannot do. An *eighth* Kind is, that I may have a clear and pleaſant Proſpect from my Houſe over his Court or Yard [p]. And a *ninth* Kind is, that I may have a Way or Paſſage through my Neighbour's Houſe or Backſide [q]. Though theſe are both *Rural* and Country Services, yet when apply'd to City Inheritances, they are *City* Services: For as to the laſt Inſtance, it often happens, that one Neighbour may go up the Stairs of another to his own Chamber, *&c.* The *negative* Services are, *firſt*, that a Man ſhall not turn the Droppings of the Eves of his Houſe on his Neighbour's Houſe or Ground [r]. *Secondly*, that he ſhall not darken his Neighbour's Windows [s]. *Thirdly*, that he ſhall not hinder my Proſpect by Building or Planting of Trees [t]. *Fourthly*, that he ſhall not make any Windows to overlook me, and by that means take away the Privacy which every Man deſires in his Dwelling. If I have no Service upon him in this Inſtance, he may make as many Windows as he pleaſes, but then I may erect Sheds againſt them, and ſo make them uſeleſs, except the Windows have been time out of mind. And this, I think, is every where practiſed. And *laſtly*, that he ſhall not build his Houſe without my leave [u]; which otherwiſe of *common Right* he may build as high as he pleaſes, tho' my Windows are darkened by it [w]. Yet he ought not, generally ſpeaking, to build contrary to the Form of the antient Building [x], (as I ſhall elſewhere obſerve) or exceed the uſual Height; neither ought he by any new Erection to hinder the Wind from coming into my Barn, which is neceſſary for the Winnowing of my Corn [y]. But if it be a Controverſy to what Height the Building may be erected, it muſt be decided by the Laws of the Place; and if there are none, the whole Matter ought to be left to the Diſcretion of the Judge [z], who ought to enquire how the Buildings have been formerly, and have an Eye upon the Form of the neighbouring Houſes [a]. If any Thing be done contrary to it, he may reduce the Building to its proper Form, and pull down that which was irregularly built at the Charges of the Perſon that erected it [b].

[n] D. 8. 1. 7.
[o] D. 8. 2. 4.
[p] D. 8. 2. 15.
[q] D. 8. 3. 7. I. 2. 3. 1.
[r] I. 2. 3. 1.
[s] Ibid.
[t] D. 8. 2. 15.
[u] C. 3. 34. 8.
[w] D. 8. 2. 9.
[x] C. 8. 10. 1.
[y] C. 3. 34. 14. 1.
[z] C. 3. 34. 1.
[a] C. 8. 10. 12. 1.
[b] C. 3. 34. 5.

It has been already obſerved, that a *real* or *predial* Service is ſuch a Service as one Eſtate owes unto another Eſtate, or the Right of doing ſomething, or having a Privilege in another Man's Eſtate for the Advantage and Convenience of my own, which I cannot do or have of *common Right*; for it cannot ſubſiſt and be without another Eſtate [c]. The Eſtate, unto which the Service is due, is in *Latin* ſtiled *Prædium Dominans*, or the *ruling* Eſtate: And the other Eſtate, which undergoes or ſuffers this Service, is termed *Prædium Serviens*, or an Eſtate ſubject unto a Rule or Service [d], which is either to *ſuffer* ſomething from the other, or *not to do* a Thing without the leave of the Owner of the *ruling* Eſtate. But theſe Eſtates muſt be in diſtinct Proprietors; for a Man's Eſtate cannot owe Service unto itſelf [e]. A *real* Service cannot conſiſt of that which is of no Value, and which yields no Profit to the *ruling* Eſtate [f]. Hence it is, that ſuch Eſtates ought to be in the Neighbourhood of each other, wherein the Service conſiſts; for otherwiſe the Service will be of no effect [g]. But though a Service brings no real Advantage, yet if the Perſons who ſettled ſuch Service, thought it to be uſeful and convenient, it ſhall be deemed a profitable Service [h].

[c] D. 8. 4. 1.
[d] D. 8. 1. 8. & 15.
[e] D. 8. 4. 1. fin.
[f] D. 7. 6. 5.
[g] D. 8. 1. 15.
[h] D. 8. 3. 7. D. 8. 2. 38. 39.

Services are ſettled and eſtabliſhed by Pacts *inter vivos*, and alſo by Laſt Wills and Teſtaments, if the Perſons have a Right and Power of eſtabliſhing the ſame [i]: And, at this day, they are acquired after the Manner and Example of immoveable Eſtates, *viz.* by a Preſcription of length of Time [k], though antiently they were not ſo acquired [l]. But then, if they are acquired by length of Time, they ought, according to *Paulus de Caſtro* [m],

[i] D. 8. 4. 16. D. 8. 1. 19.
[k] C. 7. 33. 12.
[l] D. 41. 3. 10. 1.
[m] In l. 2. C. 3. 34.

to be poſſeſſed *cum titulo*. When it is acquired by length of Time without a Title, then the Knowledge and Sufferance of the Owner of the *ſerving* Eſtate is neceſſary [l], which is in the Place of a Title, to compleat an *Uſucapion* founded upon length of Time [m]. But, to compleat a Preſcription founded upon thirty Years Poſſeſſion, neither of theſe is required, according to *Caſtrenſis*, as before-cited. Services, indeed, cannot in their own Nature be the Object of Poſſeſſion; but yet in Law he is underſtood to have the Poſſeſſion of them *figuratively*, who is in poſſeſſion of the Eſtate or Manor [n]. A *Mode* may be added unto Services: As what kind of Waggon or Carriage the Perſon ſhall make uſe of upon my Eſtate [o]: And a *Modus* does not render it to be leſs a ſimple, continued, and perpetual Service, but only defines and circumſcribes the Uſe of ſuch Service, and governs it by certain Laws: For a Service ought to be of a ſimple, continued, and perpetual Nature [p]. Though it be not the Nature of Services, that any one ſhould *do any thing*, as already hinted, but that he ſhould rather *ſuffer*, or *not do any thing* [q]; yet it ſometimes comes into conſequence, that a Man may be compelled to do ſomething, as before related in the Buſineſs of Repairs, and which is for the advantage of the *ruling* Eſtate: either the Nature of the Service, or the Pact of the Perſons contracting requiring the ſame [r]. Services do not admit of a Diviſion: And, therefore, a Way or Road through a Man's Eſtate cannot be bequeathed in Part, nor taken away in Part [s]; for a Service is total *in toto fundo*, and total in every Part thereof [t].

[l] C. 3. 34. 2.
[m] D. 8. 5. 10.
[n] D. 8. 2. 32. fin.
[o] D. 8. 1. 4. 1. cum l. 5.
[p] D. 8. 2. 28.
[q] D. 8. 1. 15.
[r] D. 8. 5. 8. 2.
[s] D. 8. 1. 12.
[t] D. 8. 1. 6.

A Service or Cuſtom is not induced by Acts of meer Will and Power, though they have been of long continuance [u]; becauſe thoſe Things which are *meræ facultatis*, or which are granted upon Curteſy, cannot be preſcribed, nor can a Right be ſaid to be acquired from thoſe Things, nor does an Action lie hereupon, according to the Gloſs [v]. Thus a Perſon, though he often goes to ſuch a Mill to grind his Corn, yet cannot be compelled for the time to come to grind at this Mill, ſince this is a Matter meerly in his power, which does not import a future Neceſſity. The Grant of a Service made unto the Men of any City or Town, for the cutting of Firewood in ſuch a Coppice, and the like, is extended to all the Inhabitants that ſhall at length come thither to dwell [w]; becauſe Cities, and the like, do receive an Increaſe and Diminution of People as it happens: And hence, he who granted the Liberty of cutting Fewel in his Woods, may think, that ſuch an Increaſe of Inhabitants will happen; and, therefore, he muſt blame himſelf. If it be granted to a Perſon to cut Fewel or Wood, for warming himſelf and his Family, in ſuch a Wood; and he dies, leaving ſeveral Families from his Loins; each of theſe Families cannot cut as much Wood as will ſerve all their diſtinct and reſpective Families, but they ought all of them to cut at once only ſo much as the Father might cut, and no more.

[u] Dd. in l. 2. C. 8. 53.
[v] D. in l. 6. D. 1. 16.
[w] D. 50. 15.

It has been noted, that there is one kind of *real* Service, which is ſtiled an *affirmative*, and another which is called a *negative* Service. The firſt is, when any one aſſerts a Service to be due to him, and ſuch Service is due [x]. But a *negative* Service is, when only one Perſon alone intends to preſcribe unto the Uſe of a Thing, by forbidding all others the Uſe thereof; as of Fiſhing, Hunting, and ſuch like Things as accrue unto all Men by the Law of Nations: becauſe Poſſeſſion alone is not ſufficient, but it is neceſſary for him to prohibit others, and that they have ſubmitted and acquieſced under ſuch Prohibition. A Perſon that has an Aqueduct, whereby a Man brings Water to his Land or Mill, if he makes uſe of it for ten Years together, he acquires the Service of an Aqueduct, and an honeſt Title is preſumed: becauſe he who brings Water from another's Land to his own Ditches, Ciſterns, *&c.* and pays a yearly Acknowledgment for it unto him,

[x] I. 2. 3. per tot. & dd. ib.

him, from whoſe Eſtate he draws it, is ſaid to acquire a Service *bonâ fide*: But ſuch a Service may be loſt by a ten Years diſcontinuance of the Uſe of it, if the Perſon be preſent; and twenty, if abſent [x].

[x] C. 3. 34 pen.

But *predial* Services are not loſt by Death, or by a *Capitis Diminutio* [y]: But do remain ſafe and entire, *ſalvo prædio, viz.* if the Eſtate itſelf be not loſt. The word *Caput* here is put for the State and Condition of Man, which conſiſts in three Things, *viz.* in the Rights and Privileges of the City, in the Liberty of a Man's Perſon from Baniſhment, and in the Freedom of his Perſon in reſpect to another's Power over him. And thus there are three *Species* of *Capitis Diminutio*, viz. the *maxima*, *media*, and *minima* [z]. The firſt is, when a Man loſes his Liberty and the Rights of a Citizen, which happens unto thoſe who are made Servants unto Puniſhment by the Severity of a Sentence [a]. The ſecond is that, whereby a Man loſes the Privileges of a Citizen, but retains his Liberty: which happens to thoſe that are under an Interdiction of Fire and Water, or that ſuffer Deportation [b]. And the third is that, when a Man retains his Liberty and the Rights of a Citizen, but changes his State in reſpect of being under the Power of another, who before was entirely independent [c]. But *predial* are extinguiſh'd, *firſt*, by *Confuſion*, *viz.* when the ſame Perſon ſhall become Proprietor *in ſolidum* both of the *ruling* and *ſerving* Eſtate [d], or if he ſhall be ſo *pro parte*, and retain the whole Service [e]. *Secondly*, a Service is deſtroyed and at an end by the Perſon's Permiſſion of an Act, which is contrary unto ſuch Service [f]. *Thirdly*, it is extinguiſhed by the Loſs or Periſhing of the Thing itſelf [g]: But if a publick Way be loſt by the Force of a River, the next Neighbour is obliged to reſtore it [h]. And *fourthly*, a Service may be loſt by Neglience and Non-uſes thereof, as before hinted, for ten Years among Perſons preſent, and twenty among Abſents. But if a Perſon be hindred by any Neceſſity from uſing it, it is not extinguiſhed [i].

[y] D. 8. 6. 3.

[z] I. 1. 16. pr.

[a] I. 1. 16. 1.

[b] I. 1. 16. 2.

[c] I. 1. 16. 3.

[d] D. 8. 6. 1.

[e] D. 8. 1. 8. 1.

[f] D. 8. 6. 8.

[g] D. 8. 6. 14.

[h] D. 8. 6. 14. fin.

[i] D. 8. 6. 14.

There are ſeveral Things common to Services, beſides Neighbourhood and Convenience. As *firſt*, all Services ought to follow the Eſtate, and to paſs by an Alienation of it [k]. *Secondly*, every one may acquire them for the Uſe of his own Eſtate, and not on the account of others; and as he may thus acquire them, ſo he may thus impoſe them on his own Eſtate only. *Thirdly*, Services cannot be impoſed on Things publick or exempt from human Right [l]. *Fourthly*, the Proprietor of two Eſtates may acquire or impoſe a Service on that Eſtate, which he delivers. *Fifthly*, if Services are merged by *Confuſion* on a Man's accepting of the Heirſhip, they ſhall be reſtored, if the Inheritance be ſold; becauſe then the Inheritance paſſes into other Hands, and the Service remains [m]. *Sixthly*, ſeveral Services may be impoſed on one Eſtate, if they hinder not each other [n].

[k] D. 8. 4. 12.

[l] D. 8. 4. 4. & 12.

[m] D. 8. 4. 9.

[n] D. 8. 4. 15.

There are ſeveral Caſes wherein a real Service does not accrue. As when a Perſon ſells or exchanges an Eſtate, if he does not ſave unto himſelf the Right of Paſturage, or ſome other real Service, he cannot pretend to any Right in the Eſtate itſelf, becauſe he is deemed to have granted it free from any Service, as having not expreſſed the contrary; and in a doubtful Caſe, a Service is not preſumed to be eſtabliſhed. A Service is not deemed to be eſtabliſhed by leave given to make a Window in a Wall, becauſe this is a perſonal Grant.

[The *Feudiſts*, as well as our common Lawyers here in *England*, give us another Diviſion of *Services* beſides what we have already related, and diſtinguiſh them into *military*, which are *noble* Services, and into *ruſtick* or ignoble Services. The firſt we call Knight-Service, and is that which has a reſpect unto War and military Affairs: And this is alſo two-fold. The firſt is that which is due to the King alone [o]; and the other is that which is due to any Lord of a Fee or Fief whatſoever, even though he himſelf be Feudatary unto another ſuperior Lord. What is due to the King alone, is alſo two-fold, *viz.* Sergeanty and Caſtlegard: But of theſe I ſhall have occaſion to treat in my Second Volume; and, therefore, I ſhall refer the Reader thereunto.]

[o] Litt. lib. 2. c. 8.

TIT.

TIT. VI.

Of an Uſufruct, *what it is; and how conſtituted; what Duties are incumbent on the Uſufructuary; and by what means an Uſufruct is determin'd, and to whom it reverts, when extinguiſhed,* &c.

HAVING in the foregoing Title ſufficiently explained the Buſineſs of *real* Services, I ſhall in this and the following Title, treat of *perſonal* Services, *viz.* of ſuch as are due unto a Man's Perſon from another's Eſtate: For a *perſonal* Service is, when an Eſtate is ſubject or miniſterial unto a Man's Perſon, as an *Uſufruct*, *Uſe*, *Habitation*, and the *Service of Labour* are. Indeed, a *perſonal* Service may be inferr'd two ſeveral ways. As *firſt*, when one Man becomes a Slave or Servant unto another, which may in ſome Senſe be called a *perſonal* Service: But this Kind of Service is only ſeen in Bondmen and Slaves, which is now aboliſhed and out of doors; and, therefore, I ſhall not here diſcourſe of it, having already ſpoken thereunto under a former Title. The other Kind of *perſonal* Service is that, which is founded upon Things in Imitation of Perſons: For a Thing may yield immediate *perſonal* Service, and hence it is alſo called a *perſonal* Service, *viz.* from the Perſon to whom ſuch Service is due, as an *Uſufruct*, *Uſe*, or *Habitation* is. Yet *Bartolus* and *Accurſius* [p] deny this, which is due from a Thing to a Perſon to be meerly a *perſonal* Service, but rather chuſe to call it a *mixt* Service: ſaying, there are ſome Services which are *perſonal*, ſome which are *real*, and others which are *mixt*. But theſe Men ought to have conſidered, that in order to know and judge of the Quality and Circumſtances of a Service, a regard ought to be had to that Thing unto which a Service is due, whether it be a Perſon or a Thing: For there is a wide difference between a Service which belongs to the State of a Perſon, and that which is uſually referr'd to the State of Things: Becauſe there is as great a difference between that Right, which belongs to Perſons, and that Right which appertains to the Diſtribution of Things unto Men, as there is between a human Service and an inanimate Service of Things. But to return to my Purpoſe of treating of an *Uſufruct* under this Title.

[p] In l. 1. D. 8. 1.

Now an *Uſufruct* is a Right of taking, uſing, and enjoying all manner of Profits, which ariſe from a corporeal Thing belonging to another Perſon, without any Prejudice or Diminution had to the Subſtance or Property thereof [q]: For it does not change, nor diminiſh the Subſtance of the Thing. By the word *Right* we exclude what the Law ſtiles *Hiring*, an *Emphyteuſis*, and a Thing granted on *precarious* Terms called a *Precarium*: For though in theſe Caſes a Man receives the Fruits and Profits of another's Eſtate, without diminiſhing the Subſtance thereof; yet not by the ſame Right as a *Fructuary* does. The Words *belonging to another Perſon*

[q] I. 2. 4. pr. D. 7. 1. 1.

in this Definition, ſhew, That he who has the *Uſufruct*, has not the Property of the Thing; becauſe that which is a Man's own, owes no Service unto another Man, as our common Lawyers ſay of a Freehold abſolute. For he who receives the Profits from an Eſtate, whereof he has the Property, cannot be ſaid to receive them *Jure Servitutis*, but it muſt be *Jure Dominii*, *viz.* by Right of Property. I alſo add the word *uſing* in this Definition to diſtinguiſh an *Uſufruct* from a *Pawn*, which a Creditor cannot make uſe of without the Debtor's Conſent, though he has it in his poſſeſſion. And the word *enjoying* is inſerted to ſeparate and diſtinguiſh an *Uſufruct* from a *Nude Uſe* and *Habitation*. For a *Nude Uſe* is only the Right of uſing and enjoying, as I ſhall remember in the next Title; and *Habitation* is a Right of inhabiting. *Laſtly*, the Words, *without any Prejudice or Diminution had to the Subſtance*, are tacked not only to exclude an improper *Uſufruct* of thoſe Things which periſh and are conſumed by Uſe, as Wine, Oil, Corn, Wool, *&c.* but to conſtitute and reſtrain the Right of the *Uſufructuary*, who can only uſe and enjoy the Thing, ſo far as he does not render the Subſtance of it the worſe: For if the Property of the Thing be worſted thereby, the Uſufruct or Thing does not revert to the Proprietor as the ſame Thing. And thus an *Uſufruct* is a *perſonal* Service iſſuable out of an Eſtate or Thing real, and is ſeveral ways diſtinct and ſeparate from the Property of the Thing itſelf, as I ſhall afterwards remark: I ſay *perſonal*, becauſe it is due to a Man's Perſon, and ends with him.

Having thus conſidered what an *Uſufruct* is, I ſhall ſhew that an *Uſufruct* is two-fold, *viz.* *cauſal* and *formal*. A *cauſal* Uſufruct is that which is joined *cum causâ rei*, that is to ſay, ſuch as the Proprietor has by Right of Property[r]: But I ſhall not in this Title treat of this Kind of *Uſufruct*. A *formal* Uſufruct is a Right of uſing and enjoying the Eſtate of another Perſon, as we have already defined it: And it is ſo called, becauſe there is a certain Kind of Form annexed for the Uſe and Enjoyment thereof, ſeparate from the Property of the Thing. Generally ſpeaking, there is a two-fold Kind of Caution required from every Uſufructary. The firſt is to oblige him to uſe the Uſufruct, as an honeſt Man ſhall judge fit and proper for him to do, according to his Diſcretion[t]. And the ſecond is to oblige him to reſtore the Thing upon the Determination of the Uſufruct[s]. And that Perſon is underſtood to uſe a Thing according to the Judgment and Diſcretion of an honeſt Man, who does not render the *Uſufruct* in a worſe Condition than it was delivered to him, or does the ſame Thing in reſpect to the *Uſufruct*, as a wiſe and provident Man would do of his own Goods and Eſtate[t]. But though an *Uſufructuary*, regularly ſpeaking, ought to give this Caution or Security; yet it is not of the Subſtance of the Definition, becauſe an *Uſufruct* may be granted even without ſuch Caution given. If an *Uſufructuary* does not uſe the *Uſufruct* as he ought to do, he may be convened *ad Intereſſe*, *viz.* in an Action of Damage, according to the Stipulation; which the *Uſufructuary* is compelled to make good[u]. He who has an Uſufruct, has all the Fruits and Emoluments whatſoever, which are received from ſuch Eſtate, or through the means thereof, not only the *natural*[v], but alſo the *civil* Profits of it; as Penſions, Rents, Intereſt-Money, and all other civil Obventions[w]. For he who has the Fruit, has alſo every other advantage entirely, not only ſuch as conduces to Neceſſity, but alſo to Gain and Pleaſure. But he who has the Uſe of a Thing, has no more than is ſufficient to ſupply his daily Wants and Occaſions[x].

An *Uſufruct* is conſtituted either by the Pact and Agreement of the Parties contracting[y], or by Preſcription, or by Laſt Will and Teſtament, whereby an Uſufruct is bequeathed. And it is conſtituted not only in Houſes and Eſtates in Land, but alſo in Cattle, and Bondmen, and other Things,

[r] D. 7. 1. 4.
[t] D. 7. 1. 65.
[s] D. 7. 9. 1. 6.
[t] D. 7. 1. 13. 2.
[u] C. 3. 33. 4. D. 39. 2. 18. 2.
[v] D. 7. 1. 9.
[w] D. 7. 1. 7.
[x] I. 2. 5. 1.
[y] I. 2. 4. 1.

Things, except it be ſuch as are conſumed by uſe [z]. For theſe Things do not admit of an *Uſufruct* either by the Law of Reaſon, or by the Civil Law: As Wine, Oil, Corn, Garments, and the like, unto which we add Money, which is near of kin unto theſe Things; for that, by continual exchange, ſeems in ſome meaſure to be conſumed and vaniſh from us. As when the Uſe of ſo much Money for Life is given by way of Legacy, upon Security and Caution, that ſo much ſhould be repaid to the Heir by the Legatary when he died; or ſo much Wine or Oil, upon Caution and Security, that at the Time of the Death of the Legatary, the Value of it ſhould be repaid to the Heir in Money [a]. But an *Uſufruct* may be conſtituted by Law as well as Cuſtom. By the firſt, an *Uſufruct* is granted unto the Father in the *adventitious* Goods of his Son. And by the ſecond, the Survivor in Wedlock has an *Uſufruct* in the Goods and Eſtate of the Party deceaſed in Wedlock, or dying firſt in that State. An *Uſufruct* is ſometimes granted by the Judge, when in Suits touching the Diviſion of Lands he has adjudged the *Fundus* to one, and the *Uſufruct* of that *Fundus* to another. An *Uſufruct* is alſo ſaid to be granted by Law, according to ſome Men, when the Lord of the Fee, who has the Right and free Power of diſpoſing of his Eſtate, does either by an Act *inter vivos*, or elſe by a Laſt Will and Teſtament, grant the ſame; ſo that if he ſhall bequeath the *Uſufruct* to any one, the Heir has only the *nude* Property, and the Legatary has the *Uſufruct* thereof: or *vice versâ*, if he ſhall bequeath the *Uſufruct* to one, and the *Fundus* to another, deducting the *Uſufruct*. But, I think, ſuch an *Uſufruct* is not properly conſtituted by Law [b].

[z] I. 2. 4. 2.

[a] I. 2. 4. 2.

[b] D. 7. 5. 6.

An *Uſufruct* is in many reſpects a *Species*, or part of that which the Lawyers call *Dominium*, and is compar'd thereunto: For as that which they term *Dominium* is a Kind of a *Totum* or *Genus* containing under it a *nude* Property and an *Uſufruct*; ſo an *Uſufruct* is a *Species* of Dominion or Property. And, according to this Senſe of the Word, a *nude* Property is one Thing, and a *plenum Dominium* is another: For a *nude* Property is, when the Proprietor has the Property of a Thing, the *Uſufruct* being veſted in another. And thus an *Uſufruct* is diſtinct and ſeparate from the Property of a Thing: As when a Perſon has bequeath'd the *Uſufruct* of a Thing unto another; for then the Heir has the *nude* Property, and the Legatary has the *Uſufruct* thereof. And ſo, on the other hand, if a Perſon ſhall bequeath an Eſtate in Land, the *Uſufruct* deducted: The Legatary ſhall have the *nude* Property, and the Heir the *Uſufruct* thereof [c]. If a Perſon ſhall bequeath a Legacy in this manner, *viz. I bequeath unto* Caius *the yearly Profits of my* Cornelian *Eſtate*, which is the ſame Thing as an Annuity; this way of expreſſing himſelf ought to be underſtood in the ſame manner as if he had bequeathed the *Uſufruct* of ſuch Eſtate. And thus the *Uſufruct* of Lands may be bequeathed to one, and the Eſtate itſelf may be deviſed unto another without the *Uſufruct* [d].

[c] I. 2. 4. 1.

[d] I. 1. 4. 1.

But leſt that Properties ſhould become entirely unprofitable, the *Uſufruct* being always, or, for the moſt part, ſeparated from the Property, certain ways have been found out to extinguiſh and put an end to an *Uſufruct*, and that the entire Eſtate, with the Profits of it, may return to the Proprietor of it: And hence it is, that an *Uſufruct* only laſts during the Life-time of the *Uſufructuary*, and no longer [e]. But then the Fruits of the laſt Year do not belong to the Heir of the *Uſufructuary*, unleſs they are gather'd or ſever'd from the Ground [f]; as Corn and Hay from the Soil, Grapes from the Vine, Wool from the Sheep, Milk from the Cow, *&c.* For by the Death of the *Uſufructuary* the Title vaniſhes, ſo that he cannot have a proportionable Rate according to the time that he was in poſſeſſion [g]. Neither does this ſeem unjuſt, that the Proprietor ſhould take the Product

[e] I. 2. 4. 3.

[f] I. 2. 1. 36.

[g] D. 23. 3. 7.

of the Pains and Labour of the *Uſufructuary*: For, on the contrary, the *Uſufructuary* receives all thoſe Profits that are not ſeparated from the Soil
[h] D. 7. 1. 27. or Thing [h] (perhaps of the whole Year) though his Right commenced at the latter end of the Year. Yet the Heir ſhall claim the Charge and Ex-
[i] D. 10. 2. 51. pences which were laid out on the Tillage of the Land [i]; for Equity ſuggeſts, that the Proprietor ſhall not be enriched at the Loſs of the *Uſufructuary*. Further, if a Tenant has received the whole Profits of the Land for that
[k] D. 7. 1. 58. Year, the Heir of the *Uſufructuary* ſhall have the Rent [k], though the *Uſufructuary* died before the Day of Payment agreed on: For the *Uſufructuary* has no more or leſs than if he had held it in his own Hands. A Teſtator bequeathed unto me the *Uſufruct* of ſuch an Eſtate, whereon Corn was ſown on the Ground, and other ripe Fruits pendant on the Trees, as Apples, *&c.* And the Queſtion being, to whom they belonged, if they were ſtill on the Ground when the Heir took on himſelf the Heirſhip, it was reſolved
[l] D. 7. 1. 27. that they did belong to the *Uſufructuary*, and not to the Heir [l]. An *Uſufruct* is alſo loſt by the Change or Periſhing of the whole Thing, which
[m] D. 7. 1. 53. owes the Service, but not by a Part of it [m], (wherein the whole Uſufruct is
[n] D. 7. 4. 5. 2. retained [n]:) but it is not loſt by a Change or Loſs of the Property [o]. It is
[o] D. 7. 4. 19. alſo loſt by a Conſolidation, that is to ſay, when the *Uſufructuary* acquires
[p] D. 7. 4. 17. the Property of the Eſtate or Thing which owes the Service [p]; and like-
[q] D. 7. 4. 10. & 23. wiſe by aſſigning the *Uſufruct* over unto the Proprietary [q], but not to a Stranger. And *laſtly*, an *Uſufruct* is extinguiſhed by a Condition exiſting
[r] D. 7. 4. 15. and in force [r], whereby it is provided, that the *Uſufruct* ſhall not be made uſe of for ten Years among Perſons preſent, and for twenty Years among
[s] D. 7. 4. 25. Abſents [s]: But it is not loſt by the Abuſe of it, by reaſon of the Caution that is given, which obliges the *Fructuary* to make good the Damage, as aforeſaid, unleſs we make uſe of it in Winter, when the *Uſufruct* is only
[t] D. 8. 6. 10. granted to be uſed in Summer [t]. In Towns and Corporations, an Uſufruct is determined, if the Town be razed and diſmantled, or the Corporation be
[u] D. 7. 1. 56. diſſolved, as it were, by a kind of Death [u]. An *Uſe* is wont to end by the ſame means as an *Uſufruct*. Thus far of an *Uſufruct* properly ſo called.

I ſhall next ſpeak of an *Uſufruct*, improperly ſo termed, otherwiſe ſtiled an *improper* Uſufruct: which was eſtabliſhed by a Decree of the Senate,
[x] D. 7. 5. 1. & 2. fin. touching ſuch Things as periſh, or are conſumed by uſe [x], as Wine, Corn, Money, and the like; for Money is diminiſhed by paſſing from one Hand to another. And here the *Uſufructuary*, becauſe he is Maſter of Things
[y] D. 7. 5. 7. *Uſufructuary* [y], is obliged to give perſonal Caution or Security, that after his Death a Thing of the ſame Quality and Goodneſs ſhall be reſtored to
[z] D. 7. 5. 6. the Proprietor of the Uſufruct [z]. In this kind of Stipulation, touching the Returning of the *Uſufruct*, (for the *Uſufruct* reverts unto the Proprietor) there are only two Caſes mentioned, whereby the *Uſufruct* is determin'd, *viz.* Death and the *Capitis Diminutio* of the Uſufructuary; becauſe the
[a] D. 7. 5. 9. & 10. Uſe of theſe Things cannot be loſt any other ways [a]. For as they conſiſt in Kind, they do not ſuffer a Change, nor do they periſh ſo but that they may be reſtored; as Wheat for Wheat, Money for Money, *&c.* provided
[b] C. 4. 2. 11. they be of the ſame Goodneſs and Quality [b]: Nor are they loſt by a Non-Uſer of them. Caution cannot be remitted by a Teſtament in this Kind of
[c] C. 3. 33. 1. Uſufruct, no more than it can in a *proper* Uſufruct [c]; and it ought to be given by Sureties. An *improper* Uſufruct differs from a *Mutuum*, becauſe in a *Mutuum* or Loan, a Perſon may ſtipulate for Intereſt, but not in an *Uſufruct*. A *Mutuum* may be recovered at any time; but an *improper* Uſufruct is only ended by Death, and a *Capitis Minutio*. Here Caution is required, but not in a *Mutuum*.

If *Uſufructuary* Houſes or Buildings ſhall be conſumed by Fire, or an Earthquake, or ſhall fall by their own Decay, the Uſufruct is thereby extinguiſhed, as already hinted; and the Uſufruct is not ſo much as due to the

the *Area* on which they ſtood. Nor does the Uſufruct, being extinguiſhed, revive again, though the Edifice ſhould be rebuilt, or reſtored to its former State, as it has been adjudged in *France*, according to *Ann. Rob.* in his Treatiſe *de Rebus Judicatis*. And this is good Law, if the Houſe entirely periſhes or falls down: But as long as any Part thereof remains ſtanding, the *Uſufructuary* retains the *Uſufruct* of the whole Soil. The *Uſufructuary* ought to ſtand to all ſmall Repairs in preſerving the Buildings, unleſs the Expence be ſo great that he had rather quit the *Uſufruct* [a]: But this is not granted to him, if ſuch Dilapidation happens through his Fault and Negligence [b]. He ought likewiſe to bear and pay all the Taxes, and other Duties laid upon the Eſtate [c], unleſs there is an Order by the Teſtator, or ſome Agreement to the contrary. He ought not to cut down Timber-Trees, unleſs it be for Repairs, nor Trees bearing Fruit [d]; for hereby the Proprietor would be injured. If he builds upon the Eſtate, he cannot afterwards take it down [e]. He muſt take care of the Cattle that are ſick, recruit their Numbers if any die, plant young Trees in the Place of thoſe that are fallen [f], unleſs they fall by an inevitable Accident; and, in general, muſt act as a prudent Man would do on ſuch an Eſtate [g].

[a] D. 7. 1. 65.
[b] D. 7. 1. 65.
[c] D. 7. 1. 7. & 27. 3.
[d] D. 7. 1. 10. 11. 12. & 13.
[e] D. 7. 1. 15.
[f] D. 7. 1. 68. 1.
[g] D. 7. 1. 9. & 65. I. 2. 1. 38.

The Law does not forbid a Proprietary to mortgage the Property of an Eſtate, though the *Uſufruct* of it belongs to another Perſon; for this does not affect or hurt the *Uſufructuary*: And as he may mortgage it, ſo he may wholly alienate the ſame. If an *Uſufructuary* be willing to relinquiſh an *Uſufruct*, he ſhall not be compelled to repair the Houſe, or to undergo ſuch other Incumbrances as he would be liable to, in caſe he retained the ſame, *ex. gr.* An *Uſufruct* is left me in a Houſe which is fallen to Decay, though not through my Fault: In this Caſe, I am diſcharged from the Repairs thereof, if I will relinquiſh the *Uſufruct*. But if it comes to Decay by my Fault, I cannot relinquiſh the *Uſufruct*, ſince I ought to repair the Houſe firſt [h].

[h] D. 7. 1. 64.

[As no one here in *England*, beſides the King, had a full Property in real or immoveable Eſtates, it is not eaſy to diſcern who are Uſufructuaries, and who are not, *viz.* whether all Perſons are ſuch, that hold Lands by any Title whatſoever, or only ſome that hold them by this or that Right. For thoſe who have a Fee, have only the *Utile Dominium*, and may forfeit the ſame, according to the *Feudiſts*, if they violate the Oath which they have taken unto their Lord: But by our Law it is only, if they commit Felony. He who has Lands and Tenements for Life, is almoſt the ſame as an Uſufructuary by the *Roman* Law; and it has been a Queſtion among our Lawyers, whether ſuch a one be the Owner of the Profits of Land not received and gathered? But herein they diſtinguiſh, whether thoſe Fruits grow by the Help of Nature alone, or whether they are alſo raiſed by the Co-operation of human Induſtry? And they conclude, that ſuch a Tenant for Life may diſpoſe of ſuch Fruits. See *Perkins*'s Tit. of *Deviſes*. For they who only have the Uſufruct, have alſo a Property in ſome reſpect. Beſides, he who rents, or has the Demiſe of a Fee, which the *Roman* Civil Law ſtiles the *Jus Emphyteuticum*, though he has a Perpetuity, yet he pays unto another a yearly Penſion as an Acknowledgment of his Property. *Laſtly*, he who has a Freehold, is ſubject unto an Action of Waſte, and may forfeit the ſame by a Mal-Uſer thereof; which could not be, if he was the abſolute Proprietor of the Land, and had the free Diſpoſal thereof. But *Bracton* plainly declares what Eſtates thoſe are, which our Lawyers call *Uſufructs*.]

TIT. VII.

Of a Nude Uſe *and* Habitation; *what Things are common in an* Uſufruct, *and to an* Uſe; *and what is the Difference between an* Uſufruct *and an* Uſe. *Of the Uſe of Houſes, Slaves, and Draught-Cattle, Cattle of the Plow and Cart; and of the Uſe of Sheep, and ſuch like Cattle.*

HAVING already handled the firſt Part of a perſonal Service, *viz.* an *Uſufruct*; I paſs on here to conſider the ſecond and third *Species* of theſe Services, an *Uſe* and *Habitation:* for I ſhall comprehend both theſe under one and the ſame Title, as *Juſtinian* has done in his Inſtitutions. And *firſt*, of an Uſe, in *Latin* ſtiled *Uſus:* which is a perſonal Right of uſing Things belonging to another, without diminiſhing the Subſtance of them [i]. And herein an *Uſe* agrees with an *Uſufruct*, it being conſtituted after the ſame manner almoſt as an *Uſufruct* is, *viz.* by a Grant of *Moveables* and *Immoveables:* ſaving that the *Uſuary* has the Thing only for his neceſſary Uſe, without any Fruits or Profits from thence [k]; and hence it is called a *nude* Uſe, becauſe the Perſon cannot make ſuch Gain or Advantage to himſelf. And as it is conſtituted after the ſame way as an *Uſufruct*, ſo it is determined and ended by the ſame means [l]. As an *Uſufructuary* ought to give Caution or Security; ſo an *Uſuary* ought to do the ſame thing touching the Uſe thereof, *viz.* that he will uſe the ſame according to the Judgment and Diſcretion of an honeſt Man, and reſtore ſo much as is waſted and conſumed in the Uſe of the Thing, if it be ſo agreed between the Parties [m].

[i] D. 7. 8. 1. & 2.
[k] D. 7. 8. 1. & 12.
[l] I. 2. 5. pr.
[m] D. 7. 9. 5. 1.
[n] D. 7. 8. 14. 1.
[o] D. 7. 8. 8. & 10. fin.
[p] I. 2. 5. 1.
[q] D. 7. 8. 22. 2.
[r] Arg. D. 7. 8. 12. 6.
D. 7. 8. 14. 1.

But herein an *Uſe* differs from an *Uſufruct*, *viz.* becauſe there is leſs Profit and Advantage in a *nude* Uſe than in an Uſufruct: For an Uſe is conſtituted without any Emolument accruing to the Perſon, but meerly for his neceſſary occaſions [n]. Hence it is, that if the Uſe of ſuch a Farm be bequeathed unto any one, he may have the naked and ſimple Uſe of it to maintain himſelf and his Family, but cannot lett or ſell the Uſe of it ſeparately, nor can he make a *gratuitous* Grant of it [o]: But it is otherwiſe, when a Man has the *Uſufruct* of an Eſtate. For he, to whom the *Uſe* of an Eſtate is bequeathed, has only the Power of living upon it, and of receiving the *natural* Profits of it; as Corn, Hay, Apples, Flowers, *&c.* ſo far as they are neceſſary to his daily Suſtenance [p], but cannot alienate or ſell the Surpluſage, or that which is over and above his own Suſtenance; for the whole Surpluſage reverts to the Lord of the Soil or Property. So that if he takes more than is neceſſary for his Subſiſtance, he may be compelled by the Office of the Judge to make no other Uſe of it than he ought to do [q]. But though an *Uſuary* cannot grant the Uſe of it to another; yet he may ſell the Fruits, which he has received for his own neceſſary Uſe and Occaſions, unto another, if he pleaſes [r].

A Perſon that has only the Uſe of a Houſe for himſelf and his Wife, may alſo uſe the ſame for his Children and Servants, and ſometimes he may even take an Inmate and lodge a Stranger therein, provided he lodges therein himſelf.

himſelf [r]. And if an *Uſe* be only left to a Widow, ſhe ſhall inhabit the ſame even after a ſecond Marriage contracted with another Husband. Part of the Uſe of a Thing cannot be bequeathed: For though we ſhould have the Fruits of a Thing in part, yet we cannot uſe a Thing in part [s]. And the Reaſon is, becauſe as Fruits themſelves do admit of a Diviſion, ſo an *Uſufruct* may be effectually bequeathed, for that the *Fructuary* has the Fruits: But an *Uſe*, as it relates to a Man's daily Subſiſtance of Life, cannot be divided; becauſe a Man cannot live in part. By the word *Uſe* ſometimes even the Fruits are contained, if this be neceſſarily inferr'd from the Words of a Teſtator, or from the Nature of the Thing, or the Condition of the Legatary [t].

[r] D. 7. 8. 2. 3. 4. 5. 6.

[s] D. 7. 8. 19.

[t] D. 7. 8. 22.

The third Kind of *perſonal* Service is what the *Civilians* ſtile *Habitation*. And this is a Right and Power of living in another Man's Houſe, without any Damage or Prejudice done to the Houſe. According to *Mynſinger* on the Inſtitutes, the Inhabitant or Perſon that dwells therein is obliged to give Caution or Security by Sureties, after the ſame manner as an *Uſufructuary* is, *viz.* that he will make uſe of the Houſe according to the Diſcretion and Approbation of an honeſt Man, that he will repair and look after the ſame; and reſtore it in as good a Condition as he found it. For *Habitation* is likened unto an *Uſe* and an *Uſufruct* [u]: And it differs from an *Uſe*, for that an *Uſe* conſiſts in *Law*, but *Habitation* conſiſts in *Fact*. And hence it is not loſt by a *Capitis Diminutio*, nor by a Non-Uſer, as an *Uſufruct* and an *Uſe* is [v]: But it ceaſes by Death, becauſe it is a *perſonal* Service, and entirely requires the Act of him unto whom it accrues, *viz.* Habitation. And for this reaſon heretofore ſome of the ancient Lawyers thought, that it could not be let or aſſigned over unto another. But *Juſtinian*, for good Reaſons, afterwards granted unto the Perſon to whom the Service was due, a Power of demiſing the ſame [w].

[u] D. 7. 8. 10.

[v] D. 7. 8. 10. C. 3. 33. 13.

[w] C. 3. 33. 13.

Paulus de Caſtro ſays, that the Convenience and Advantage of an Houſe ariſes three ſeveral ways, *viz. firſt*, by bequeathing the *Uſufruct* of the Houſe, and then *Habitation* is reſtrained to the Nature of an *Uſufruct*. *Secondly*, by bequeathing the *nude* Uſe of the Houſe, and then it is reſtrained to the Nature of an *Uſe*: So that he to whom the Uſe of the Habitation is bequeathed, cannot lett the ſame unto another by way of Demiſe. And *thirdly*, by bequeathing the Habitation of the Houſe, and then, though it participates of *Uſe* and *Uſufruct*, yet it has a peculiar Right and a ſeparate Nature [x]. Wherefore, for the better Explanation of this Service, I ſhall further conſider wherein theſe *perſonal* Services agree and differ from each other. And *firſt*, *Habitation* agrees with an *Uſe* and an *Uſufruct* both together, in that it is conſtituted by the ſame Methods *inter vivos*, and by a Laſt Will and Teſtament. *Secondly*, *Habitation* does not deſcend to a Man's Heirs, as juſt now hinted, becauſe it is perſonal; nor is an *Uſe* or *Uſufruct* thus tranſmitted [y]. But, *thirdly*, in reſpect of the Caution or Security given to make uſe of the Thing as it becomes a prudent and honeſt Man to do; *Habitation* differs from both the others together herein, *viz.* becauſe *Habitation*, in relation to its Exiſtence, has only to do with Houſes; but an *Uſe* and *Uſufruct* conſiſts as well in *City*-Eſtates, that is to ſay, in Houſes, as in *Rural* Eſtates or Lands, and in *Moveables* and *Immoveables*. See the Gloſs [z]. For as a *Fructuary* may leaſe out the Commodity of the Profits to be received by him unto any other Perſon whatſoever [a]; ſo in this particular Caſe now, an *Habitation* agrees with an *Uſufruct* [b], but not with an *Uſe*, though anciently an *Habitation* could not be demiſed: For he that has the Service of Habitation may now lett it to another. Again, *Habitation* differs from an *Uſufruct*, becauſe an *Uſufruct* is determined ſeveral ways, not only by *natural*, but by *civil* Death, as by a *maxima* and *media Capitis Diminutio*, and alſo by a Non-Uſer of the *Uſufruct*, as related under that Title: But *Habitation* is

[x] C. 3. 33. 13.

[y] D. 7. 8. 10. v. *Hæredem.*

[z] In l. 13. C. 3. 33. v. *Uſufructu.*

[a] D. 7. 1. 12. 2.

[b] C. 3. 33. 13.

is not loſt or forfeited by ſuch a *civil* Death, or by a Non-Uſer thereof, but only by the *natural* Death of the *Habitator*, becauſe we cannot live without Alimony and Habitation. But *Habitation* rather ſeems to agree with an *Uſe* than an *Uſufruct*. And, therefore, the Text ſays, that a Legacy of the Uſe of a Houſe, and a Legacy, are in effect, as it were, the
[c] D. 7. 8. 10. ſame thing [c]; becauſe he that has an *Habitation* left him, may receive the ſame Perſons as an *Uſuary* may. *Note*, That the word *Habitation* here does not ſignify an Houſe, but the Right of inhabiting.

If the Uſe of Sheep, or of Draught-Cattle, and the like, be granted or bequeathed unto any one, the *Uſuary* ſhall not have the Lambs, Wool, Milk, *&c.* becauſe theſe Things are reckoned among the Fruits of ſuch Cattle; but ſhall only have their Dung and Labour to manure his Land;
[d] I. 2. 5. 4. for the Uſe of them was granted only for this End and Purpoſe [d]. And in the ſame manner a Perſon, unto whom the Uſe of a Bondman or Slave belongs, ſhall only have the Labour and Service of ſuch Bondmen: But
[e] I. 2. 5. 3. he ſhall not by any means have a Right of transferring him unto another [e]. And the ſame Law is touching Draught-Cattle, *&c.* And thus I have gone through the Buſineſs of *real* and *perſonal* Services, and ſhewn how they are conſtituted and loſt. I ſhall next ſpeak of Uſucapion and Preſcription founded on poſſeſſion, *&c.*

TIT. VIII.

Of Uſucapion *and* Preſcription *founded upon Poſſeſſion and Length of Time; what Things may be retained by Uſucapion, and what not: How Uſucapion is interrupted by* Uſurpation: *of Things ſtolen and poſſeſſed by force; of Error* falſæ cauſæ, *or upon a falſe Title; and of purging and doing away of a Fault; and of the Acceſſion of Poſſeſſion.*

I Have in a former Title of this Book conſidered, how Property may be acquired according to the Law of Nations, and promiſed to enquire how it may be gained according to the Methods of the *Civil* Law; and, therefore, I ſhall here, and in ſome of the following Titles ſhew, how it may be obtained and purchaſed according to the Rules of this Law. And *firſt*, it is to be obſerved, that Property is ſometimes immediately acquired by Poſſeſſion, if he be the Proprietor of a Thing, who has delivered it: And ſometimes *Uſucapion* or Non-Claim takes place, though a Thing be
[f] I. 3. 29. 3. delivered by a Perſon, who is not the Proprietor thereof [f]; and this is according to the Rules of the *Civil* Law.

Now *Uſucapion* may be defined to be an Acquiſition of Property, by a continued Poſſeſſion of a Thing for ſuch a Length of Time as is limited
[g] D. 41. 3. 3. by Law [g]: For here the Law gives the Property to the Poſſeſſor; becauſe it is for the Intereſt of the Publick, that the Property of Things ſhould
I. 2. 6. pr. not be caſt under an Uncertainty [h], and by this means engender perpetual
D. 41. 3. 1. Law-Suits. For the Law preſumes, that a Proprietor, who has been ſilent and negligent of his Affairs for ſo long a time, has conſented to an Alienation.

Alienation[i]. Yet this Poſſeſſion, whereon *Uſucapion* is founded, ought to be a continued Poſſeſſion; for *Uſucapion* is hindred and cut off by an interrupted Poſſeſſion[k]: which Interruption in our Books the *Civilians* ſtile *Uſurpation*. *Uſucapion*, in a large Senſe, has a reſpect even unto a real Eſtate, or an immoveable Thing; but ſtrictly taken it regards only a moveable Chattle, and *Preſcription* reſpects an immoveable or real Eſtate[l]: And both of theſe were principally introduced on the account of the publick Good[m], in order to prevent or put an end to Law-Suits.

[i] D. 50. 16. 28.
[k] D. 41. 3. 3. 5. 20. & 31.
[l] D. 41. 3. 3.
[m] D. 30. 1. 55.

As the Time defined and limited by Law for Poſſeſſion in *Uſucapion* and *Preſcription*, is different; ſo, according to this Diverſity, there are alſo divers *Species* of *Uſucapions* and *Preſcriptions*. For there is one kind, that is *Triennial*, as in Things moveable[n]; another which is *Quadriennial*, or limited to four Years, *viz.* when Things are bought and purchaſed by the Exchequer[o]; another which is *Decennial*, or circumſcribed by a ten Years Poſſeſſion, *viz.* in Things immoveable between Perſons preſent; that is to ſay, within the Verge and Confines of *Italy*, or any other Country where they are ſituated; and *Vicennial*, or extended to twenty Years between abſent Perſons[p]. But at this day, not only in *Italy*, but in all other Places of the World, that are ſubject to the *Roman* Laws or Empire, Things moveable become a Man's Property by three Years *Uſucapion*, and Immoveables by ten Years *Uſucapion* or *Preſcription*, if the Perſons are preſent, and by twenty Years among abſent Perſons[q]. But there is another kind of *Preſcription* which runs for thirty Years, *viz.* when any one has acquired an Eſtate by very long Poſſeſſion, without a Title[r]; another which is perfected by a forty Years Preſcription, as in preſcribing to Eccleſiaſtical Eſtates[s]; and the laſt kind is limited to a hundred Years, or to ſuch a time, the beginning of which exceeds the Memory of Man, as in City-Eſtates[s], and Eſtates belonging to the Prince[t].

[n] I. 2. 6. pr.
[o] C. 7. 37. 4.
[p] I. 2. 6. 1.
[q] I. 2. 6. pr.
[r] D. 41. 3. 8.
[s] Nov. 131. c. 6.
[s] C. 1. 2. 23.
[t] C. 7. 39. 6.

By the ancient *Civil* Law it was ordained, that he who purchaſed a Thing *bonâ fide* of him, who was not the Proprietor thereof, when he thought himſelf to be ſuch, or had acquired a Thing by *Donation*, or any other juſt Title, and had enjoyed the quiet Poſſeſſion of that Thing for a whole Year, made the ſame his own by *Uſucapion*, if it were a moveable Chattle; or elſe by a two Years Poſſeſſion, if it were an immoveable Thing, as Land, and the like. But tho' the Ancients thought one or two Years enough for Proprietors to look after their Concerns; yet it was afterwards judged more equitable to enlarge this time, leſt they ſhould be defrauded by ſome evil Accident: And, therefore, it was provided[u], that *Moveables* ſhould become yours, if you had had quiet Poſſeſſion of them for three Years; and of *Immoveables*, for the Space of ten Years, if the Perſons that owned were preſent, as aforeſaid; but if abſent, then twenty Years was required for *Uſucapion*, under the Limitation remembred in the foregoing Paragraph. And thoſe Perſons are ſaid to be preſent, that have their uſual Reſidence and Abodes in the ſame Province. But it ſometimes happens, that he who has been in poſſeſſion of a Thing *bonâ fide*, that is to ſay, honeſtly and fairly, does not acquire that Right, how long ſoever he has been in poſſeſſion of it: As when a Man poſſeſſes himſelf of a Freedman, of a Thing ſacred or religious, or a fugitive Bondman[v], *&c.* nor can Things ſtolen or poſſeſſed by force become another Perſon's Property by *Uſucapion*, (for the Lawyers often uſe the words *Preſcription* and *Uſucapion* promiſcuouſly) though they have been poſſeſſed for a length of time: For the Law of the twelve Tables, and the *Atinian* Law, do each of them forbid *Uſucapion* in reſpect of Things ſtolen; and the *Julian* and *Plautian* Law do forbid it in reſpect of Things poſſeſſed by force[w]. This Prohibition of the Law relating to Things ſtolen, or taken away by violence, does not concern the Thief, or him who poſſeſſes a Thing by force

[u] I. 2. 6. pr.
[v] I. 2. 6. 1.
[w] I. 2. 6. 2.

(for *Uſucapion* does not by any means accrue to theſe Perſons, as being Poſſeſſors *malâ fide*:) But it extends to all ſuch Perſons as have purchas'd a Thing *bonâ fide*, or acquired it by other means. Hence it does not eaſily obtain in Things moveable, that *Uſucapion* ſhould accrue to Poſſeſſors *bonæ fidei*: For he who ſhall knowingly ſell that which belongs to another, commits Theft [x]. But this is not always obſerved: For if an Heir ſhould ſell or give by ſimple *Donation*, or by way of *Dower*, a Thing which is lent or depoſited with the Deceaſed, through a Belief that it belongs to him as Heir, doubtleſs he who accepts of it *bonâ fide* may preſcribe thereunto, or make it his own by *Uſucapion*; becauſe ſuch a Matter cannot come within the Crime of Theft, ſince the Heir who *bonâ fide* alienated the ſame as his own, does not commit Theft [y].

[x] I. 2. 6. 3.

[y] I. 2. 6. 4.

It appears from the beginning of this Title in the *Inſtitutes*, that *Preſcription* and *Uſucapion* are Creatures of the *Civil* Law, and introduced thereby: So that *Baldus* ſays, if there was no ſuch Thing as the *Civil* Law, there would be no ſuch Things as *Preſcriptions* or *Uſucapions*. But *Baldus* calls *Preſcription* an unjuſt Protection of the Law, introduced in oppoſition to natural Equity; and that which is injurious, can never be deemed lawful, though it ſhould be founded on a hundred Years Limitation. For no one ought to enrich himſelf by another's Loſs: But *Preſcription* enriches him who preſcribes with the Loſs of him, againſt whom ſuch *Preſcription* is urged; and, therefore, (ſays he) 'tis contrary to natural Equity, and conſequently does not proceed, becauſe the Law of Nature is immutable. To this I anſwer, that that cannot be injurious, when any one acquires it by legal Preſcription; becauſe he who ſuffers a Thing to be preſcribed unto, ſeems to conſent to an Alienation thereof, as already obſerved. Nor does he loſe the Property of the Thing without a Cauſe, but through his own Fault and Negligence: and, therefore, he muſt impute it to himſelf. Wherefore, Preſcription is not contrary to natural Right, but rather agrees with it, becauſe it inflicts a Puniſhment on negligent Perſons, and puts an end to Law-Suits, a Thing very agreeable to natural Reaſon. And thus the *Civil* Law in this caſe does not entirely recede from the Law of Nature, nor is wholly ſubſervient thereunto, which is the Property of a poſitive or civil Law. And as this Rigour was introduced for the ſake of publick Peace: it therefore follows, that though *Preſcription* may be ſaid to be founded upon Iniquity in reſpect of Mens private Advantage; yet in regard to the publick Utility, which ought to be preferred to Mens private Intereſt, it is grounded upon Equity. And thus an inferior Law, which commands us to give unto every one his own, muſt give place to a ſuperior Law, *viz.* that the publick Peace and Tranquillity of human Society may be preſerved.

As all Perſons may retain by *Uſucapion* and *Preſcription*, who may be the Poſſeſſors of a Thing; becauſe theſe cannot be had without Poſſeſſion [z]: So all Things which may be poſſeſſed (ſome few excepted) may be acquired by *Uſucapion* and *Preſcription* [a]. For thoſe Things which cannot be poſſeſſed as private Property, cannot be thus rightly acquired, as Things Religious, Sacred, Divine [b], Fiſcal [c], Publick [d], Things *meræ Facultatis* [e], and ſuch as are exempted from human Uſe and Commerce. But though Things Fiſcal cannot be acquired by *Uſucapion*: yet *Papinian* ſays, that the Buyer may by *Uſucapion* acquire a Thing delivered *bonâ fide* to him, of ſuch eſcheated Goods as have not been yet notify'd to the Exchequer. For as Fiſcal Eſtates cannot be alienated, they cannot be acquired by *Uſucapion*, by any length of Time [f]. But though an incorporeal Thing, as a Service, Juriſdiction, and the like, cannot be the Object of natural Poſſeſſion; yet it may be preſcribed unto by length of Time after the manner of Immoveables [g].

[z] D. 41. 3. 25.

[a] I. 2. 6. 1.

[b] D. 41. 3. 9.

[c] D. 41. 3. 55.

[d] D. 41. 3. 45.

[e] D. 43. 11. 2.

[f] D. 50. 16. 28.

[g] D. 8. 5. 10.

There are ſeveral Things neceſſary to effect and compleat *Preſcription* and *Uſucapion*. As *firſt*, there ought to be ſuch a Thing as *bona fides*; that is to ſay, a good Conſcience and honeſt Dealing, *viz.* the Perſon who enjoys a Thing by *Preſcription* or *Uſucapion*, ought to poſſeſs it with the Privity or Conſent of the Proprietor, or the Poſſeſſor ought (at leaſt) to believe the Perſon, from whom he has obtained it, was the Proprietor thereof, and had a Right of alienating the ſame [h]. Which fair Dealing is preſumed, unleſs Fraud and Knavery be proved, either by notice given to the contrary, or by an Interdict of Law, which forbids a Thing of that kind, which is poſſeſſed, to be alienated. And thus a *bona fides* is a ſincere and upright Conſcience, which excuſes the Poſſeſſor, for that he knew it not to be the Goods of another. For as Fraud or *mala fides* is ſaid to be in a Poſſeſſor, when he knows the Thing poſſeſſed to be of another's Right: So a *bona fides* is ſaid to be, when he does not know it to belong to another. Fraud and Knavery is preſumed to have intervened, when a Man contracts and markets againſt a Prohibition of Law, and likewiſe when any neceſſary Solemnity has been omitted in the Conveyance of an Eſtate, or the transferring of Goods, and due Order has not been obſerved. But we ought to conſider at what time this *bona fides* is required in *Preſcription*, wherein the *Civilians* and *Canoniſts* differ. For by the *Civil* Law it is ſufficient, if it intervenes or happens at the beginning of the *Preſcription*, *viz.* at the Time of the Delivery, unleſs it be in Bargain and Sale. For in Bargain and Sale, it ought to be both at the Time of Contract, and at the the Time of the Delivery; but in other Contracts the Time of the Delivery is ſufficient.

[h] D. 50. 16. 109.

The ſecond thing principally required to *Uſucapion* or *Preſcription* is, that Poſſeſſion be acquired by a juſt and legal Title; that is to ſay, a lawful Conſideration, (which is neceſſary at this day in every *Preſcription*, except an immemorial one [i]) whether it be by a ſpecial Title, as Bargain and Sale, Deſcent, *&c.* which have a certain and particular Name, or by a general Title. For though a Title in our Law-Books is taken in ſeveral Senſes, yet here the word Title is taken for a reaſonable Conſideration proper to transfer a Property; or (as *Baldus*) for a juſt Cauſe of Poſſeſſion ſufficient to acquire a Property: And this is the Root and Origin, from whence all Right and Property is derived. As for example, Donation, Purchaſe, and Succeſſion are Titles, whereby the Property of a Thing given, purchaſed, or deſcending by Inheritance is acquired. In the like manner Election, Deſcent, and Conqueſt are Titles, whereby Kings and Princes acquire the Property of Juriſdiction in their reſpective Kingdoms: And Collation and Preſentation are proper Titles for the obtaining of an Eccleſiaſtical Benefice. Thus in *Preſcription*, a juſt Cauſe of poſſeſſing is a good Title to found *Preſcription* on, in concurrence with the other Things requiſite thereunto. But a Title is ſometimes ſtiled a *true*, and ſometimes termed a *preſumptive* Title. The firſt is, when it is the *Radix* and very Foundation of real Right and Property. And the ſecond is, when a true Cauſe or Conſideration is preſumed, and yet it is not a true Cauſe thereof: As when any one *bonâ fide* buys a Thing, or receives it as a Gift from him, who has not the Property thereof, believing the Perſon from whom he has it to be the lawful Proprietor of it, or (at leaſt) that he procured it from the lawful Owner. For ſuch a Purchaſe or Gift, though it be not a true and ſufficient means of transferring Property, yet it is preſumed to be ſuch, when honeſt Dealing is at hand and attends it; and this excuſes the Poſſeſſor from Theft or Force. Hence he who is poſſeſſed of a Thing by this means, is ſaid to poſſeſs it *bonâ fide*, not with a *true*, but with a *preſumptive* Title: And by ſuch a Title every Man may defend his Poſſeſſion againſt the unjuſt Attempts and Impugnation of another Perſon, who

[i] D. 43. 20. 3. 4; C. 7. 33. 12.

invades

invades his Right, and deſpoil him of it. As for example, if any Man queſtions, whether I am juſtly poſſeſſed of ſuch an Eſtate, I may propound to him the Conſideration on which I am poſſeſſed thereof, *viz.* that I either purchaſed it, or elſe received it by way of Gift, Deſcent, and the like. And the Cauſe or Form hereof being proved according to Law, ſuch Conſideration is to me a good Title, and a valid Plea for my poſſeſſing of this Eſtate. Theſe Titles of Bargain and Sale, Gift, Deſcent, *&c.* which ſhew the manner how I am poſſeſſed of this Eſtate, do partly proceed from the Law of Nature and Nations, and partly from the *Civil* Law. Thoſe Titles which are derived from the Law of Nature and Nations, are many in number: Such as *Occupancy*, *Captivity*, *Finding*, *Procreation* of ſuch Animals as are in our Power, *Alluvion*, *Specification*, *Acceſſion*, *Confuſion*, *Commixtion* of *Species*, if it happens by the Will and Conſent of the Proprietors, *Building*, *Planting*, *Sowing*, *Writing*, *Painting*, *Receiving* the Fruits of another's Eſtate, *Delivery*, *Bargain* and *Sale*, &c. all which I have or ſhall treat of in their Places. A Title is given, according to the *Civil* Law, by *Preſcription* and *Uſucapion*, with which I have now to do. In Things of a ſpiritual Nature, a Man may acquire a Right to a Thing by a Title alone, without Delivery: For, by the Intervention of the Superior's Authority *alone*, he acquires a Right.

The third thing principally neceſſary to *Preſcription* or *Uſucapion*, is a Delivery of Poſſeſſion, *viz.* that the Thing be delivered to the Perſon preſcribing thereunto, and not occupy'd by force. For as a bare Title is not ſufficient to transfer a Property, though procured from the true Proprietor, but a Delivery is neceſſary; ſo a *nude* Title procured by a Perſon that is not the true Proprietor, does not transfer a Condition of taking by *Uſucapion*, unleſs a Delivery intervenes, which is made by a Perſon, tho' not the Proprietor, through the means of a Title; or unleſs ſomething be done in the Place of a Delivery. But ſome Perſons will have it, that a Delivery is not neceſſary to effect *Preſcription*, though the Text ſeemingly requires it[k]: And hence I ſhall here ſay no more of Delivery, but leave it doubtful as I find it among the Lawyers; though, I think, a Delivery is the ſafeſt way of gaining by *Preſcription*, if a good Title, fair Dealing, and a Length of Time be added thereunto.

[k] I.2.6.3. &7.

The laſt Requiſite unto *Preſcription*, is a Continuance of Poſſeſſion for a limited Time at leaſt; for ſuch Poſſeſſion ought not to be interrupted by any Acts of Diſcontinuance. But ſuch Continuance in reſpect of Time is not required *à momento in momentum*, or computed from Hour to Hour; but ſo reckoned, that the whole laſt Day ſhould be reckoned as one Moment[l]. Nor is ſuch a Continuance of Time ſo preciſely neceſſary, that the Poſſeſſion of the ſame Thing ſhould always and continually remain in one and the ſame Perſon; but it is well enough, if the Poſſeſſion be legally continued from one Perſon unto another[m]. Thus the Time that the Teſtator poſſeſſed it, may be continued unto the Heir and the Inheritance[n], and the Time of the Heir may be continued unto a Legatary, and of a Seller unto a Buyer, *&c*[o].

[l] D. 41. 3. 6. & 7.
[m] I. 2. 6. 7.
[n] D. 41. 3. 22. & 31. pen.
[o] D. 41. 3. 14. 1.

It has been ſaid, that the Poſſeſſion of the Thing ought to be a continued, and not an interrupted Poſſeſſion[p]: which Interruption the *Civil* Law ſtiles *Uſurpation*; wherefore I ſhall next ſpeak of *Uſurpation*, which is a Diſcontinuance given to Preſcription in point of Time and Poſſeſſion[q]. For, upon a Commencement of *Uſurpation*, *Uſucapion* or *Preſcription* is entirely deſtroyed and annihilated, and muſt begin again. Now *Uſurpation*, according to *Bartolus*[r], is either *natural* or *civil*. The firſt is that, whereby a Man's Poſſeſſion is diſcontinued to him by ſome natural Act, as by the Force and Inundation of a River or the Sea, or by the natural Act of a Man himſelf, as when a moveable Chattle is taken away from him by

[p] I. 2. 6. 7.
[q] C. 7. 32. 10.
[r] In l. 5. D. 41. 3. n. 5.

by Theft, or an immoveable Thing is invaded by another, or when a Thing is alienated by him who poſſeſſes in our Name and Stead [f]. A *civil* Interruption or Uſurpation is that, which is made either by a *judicial* Citation, or an *extrajudicial* Denunciation or Claim of Right [s], and eſpecially by a Conteſtation of Suit [t]. And becauſe Interruption is a Matter of Fact, it is not enough to alledge the ſame, but it ought to be proved [u]; and, according to the Doctors, this may be proved by ſingle Witneſſes [v]. To *uſurp* is to ſeize that which is in another Perſon's Poſſeſſion; and as he who thus ſeizes interrupts the Poſſeſſion of that Perſon, ſo here *Uſurpation* is nothing elſe but an Interruption of Poſſeſſion.

[f] D. 41. 3. 33.
[s] C. 7. 40. 2.
[t] C. 7. 32. 10.
[u] C. 4. 30. 10.
[v] Felin. in c. 8. x. 2. 26.

An Error *falſæ cauſæ* does not produce *Uſucapion*: As when a Perſon poſſeſſes a Thing through a Belief that he has purchaſed the ſame, when in truth he has not done it; or when a Man poſſeſſes a Thing by way of Gift, when the Thing is not given him [w]. This Error or Miſtake in the Title muſt be an Error in point of Law, or an Error of his own Act and Deed, to hinder *Uſucapion*; for an Error of another Man's Act does not impede the ſame. *Titius* purchaſed an Eſtate of a Pupil *ab initio* without the Authority of his Guardian, and the Pupil delivered the Eſtate unto him. This is an Error in Law in reſpect of the Title: and therefore he ſhall not take ſuch Eſtate by *Uſucapion*, tho' the Tutor's Authority afterwards accedes thereunto [x]. But an Error of a Man's own Act does not always obſtruct *Uſucapion*; for if a Man be induced hereinto through another's Advice and Perſuaſion, he may take by *Uſucapion*.

[w] I. 2. 6. 11.
[x] D. 41. 3. 31. pr.

If long Poſſeſſion has been of an Advantage to the Perſon deceaſed, it is alſo continued to his Heir, and to the Poſſeſſor of his Goods, though he himſelf knows the Eſtate to belong to another Perſon: But if the Perſon deceaſed had not a juſt Title in the beginning, ſuch Poſſeſſion ſhall be of no Advantage to the Heir, or the Poſſeſſor of the Goods, though he was ignorant of ſuch vicious Title [y]. This is what we here call an *Acceſſion* of Poſſeſſion; for as the Heir repreſents the Perſon of the Deceaſed, the Time which the Deceaſed was poſſeſſed of a Thing ſhall accede and be continued unto the Heir, or a Poſſeſſor of Goods, in order to compleat the Time of *Uſucapion* or Preſcription. In *Uſucapion*, the beginning of the Time is always to be conſidered; and, therefore, an Act *malæ fidei* ſupervening does not vitiate *Uſucapion* commenced upon fair and honeſt Dealing.

[y] I. 2. 6. 12.

It has been before hinted, that a Thing ſtolen or poſſeſſed by expulſive force, is not the Object of *Uſucapion* or *Preſcription* [z], though the Poſſeſſor has a juſt Title, and comes fairly by it; and this upon the account of the Theft or Violence inherent thereunto. For theſe are real Flaws or Faults, which always cohere to the Thing ſtolen, or forcibly poſſeſſed; nor do theſe Flaws ever leave the Things, to whomſoever they paſs, but the true Proprietor may recover them. But yet theſe Flaws or Faults may be purged and cured by a Preſcription of thirty or forty Years, if the Goods paſs from the Thief through ſeveral Hands, and the Poſſeſſors do not know them to have been ſtolen Goods [a]. And the ſame may be ſaid in reſpect of real Eſtates: For ſuch a Limitation bars a Claim or Action. For though a Perſon, who forcibly enters into another's Eſtate, can never make ſuch Eſtate his own by diſſeizing the lawful Owner; yet if ſuch Eſtate paſſes to ſeveral Perſons in courſe of Time, without their Knowledge of the Diſſeizing, and thirty or forty Years be elapſed ſince ſuch forcible Entry, it cures the Viciouſneſs of the Title, if the ſeveral Purchaſers were ignorant of ſuch Diſſeizing. A vicious Title may alſo be purged and cured, if the Thing ſtolen or poſſeſſed by force ſhall revert into the Hands and Power of the Proprietor.

[z] I. 2. 6. 2.
[a] C. 7. 39. 3. & 4.

Preſcription is ſo called from the *Latin* Verb *Preſcribo*, importing the ſame as to prefix, limit, and appoint: Becauſe the Laws prefix, limit, and appoint a certain Time, within which the Owner or Proprietor of a Thing ought to recover, or (at leaſt) to ſue for the ſame under pain of loſing the Property thereof. So that *Preſcription* is a Right or Law, which makes that which is another Man's to be mine, if I have been in poſſeſſion thereof *bonâ fide* by a juſt Title for a certain time appointed by Law. Though ſtrictly and properly ſpeaking, according to the modern Lawyers, *Preſcription* has only a reſpect to incorporeal Rights and Things immoveable, and *Uſucapion* only to Things moveable; yet *Juſtinian* does not diſtinguiſh *Uſucapion* from *Preſcription*, as may be ſeen both in the *Inſtitutes* and *Digeſts*, where the word *Uſucapion* is promiſcuouſly made uſe of to denote even *Immoveables*; and ſo I have uſed them in this Title, by referring them as well to Things moveable as immoveable.

All Actions which are not taken away by a Limitation of thirty Years, or a leſſer ſpace of Time, are taken by a *Preſcription* of forty Years: For ſuch a *Preſcription* is a bar to all Actions not taken away by a ſhorter Limitation, even though they concern the Right of the Publick, unleſs it
[b] C. 7. 39. 4. be, I think, in the Caſe of demanding publick Taxes [b]. An Eſtate ſold for the Non-Payment of Taxes may be claimed at any Time within thirty
[c] C. 7. 39. 1. Years, if the Solemnities required by Law be not therein duly obſerved [c]. *Mævius* leaſed a Farm unto *Titius* for Husbandry: But the Mother of *Titius* purloin'd or ſtole away the Leaſe or Deed, whereby *Mævius* might prove the ſaid Eſtate did belong to him, and ſhe gave it to her Son *Titius*. *Titius* would have made himſelf a Proprietor of the Eſtate by a ten Years
[d] C. 7. 34. 1. Preſcription: But his Title was not allow'd [d]. Length of Time, *viz.* a ten Years Preſcription is not a bar to a *mixt* Action, as an Action of *Communi*
[e] C. 7. 34. 3. *dividundo* or *Familiæ erciſcundæ* is [e]. *Seius* had an Eſtate in common with *Sempronius*, and was ſole Poſſeſſor thereof for ten Years. *Seius* would defend his Right by a Preſcription of ten Years, whereby *Sempronius* ſhould not ſue for a Diviſion of the Eſtate. But it was adjudged that ſuch a Preſcription did not lie.

TIT. IX.

Of Donations *or* Gifts, *and the ſeveral* Species *thereof: as* inter vivos, mortis causâ, *and a Donation* ante *or* propter nuptias. *Of Gifts which are* purely *made, and ſuch as are made under a Duty or Condition, and eſpecially in Contemplation of Death, which are compared unto Legacies themſelves; and what Terms Gifts require, and what not,* &c.

ANOTHER way of acquiring the Property of Things, according to the *Civil* Law, is by *Gift* or *Donation*, which requires the *true* and *expreſs* Conſent of the Proprietor, and is not ſatisfy'd with the *tacit* Conſent of the Owner that is willing to alienate the Thing, as Preſcription or Limitation of Time is a tacit Conſent. And though a *Donation* in

reſpect of its Original eſpecially, which begins from Tradition or Delivery, be founded on the Law of Nations [f]: yet as to the Form thereof, which gives a Being to the Thing itſelf [g], it may be ſaid to be grounded on the *Civil* Law. For heretofore by the old Law, no Donation was made or contracted, unleſs it were by the means of a formal Stipulation, which was the Growth of the *Civil* Law, and entirely depended thereon: And the reaſon of this was, (becauſe if it be a matter of Neceſſity) it is not a *Gift* or *Donation* [h]. And after the ſame manner we may argue, if it be done upon any valuable Conſideration; for then it may rather be ſtiled a *Remuneration* than a *Donation* [i]. But at this day even a Nude-Pact *de donando* produces an Action contrary to that ancient Rule [k] in Law, *viz. ex nudo pacto non oritur actio.* And *Salycetus* on the Text aſſigns two Reaſons for this: *Firſt*, that Men might not raſhly proceed to make Gifts of their Subſtance without due Advice and Conſideration, knowing that there is nothing more ſuitable to good Faith and Honeſty, than a ſtrict Obſervance of our Promiſes and Agreements [l]. And *ſecondly*, leſt Men ſhould under ſuch a Pretext defraud thoſe with whom they have covenanted to make a *Donation*, who (perhaps) have in the mean time done many Services to the *Donor* on this very account [m]: And in this Caſe it countenances a Nude-Pact, becauſe it confirms and makes it to be valid [n]. Therefore, it is no wonder, that an Action ariſes from ſuch a Nude-Pact [o]; and from hence this Action is in our Books called a *Condictio ex lege*, or a perſonal Action founded on a particular Law.

[f] I. 2. 1. 40.
[g] D. 10. 4. 9.
[h] D. 34. 1. 18.
[i] C. 8. 54. 35.
[k] D. 2. 14. 7. 4.
[l] C. 2. 4. 20.
[m] D. 5. 3. 25.
[n] C. 8. 54. 35.
[o] D. 2. 14. 6.

A *Donation* is properly ſaid to be an Act or Kind of meer Liberality, which proceeds without any Compulſion of Law, but flows from the free Bounty of the *Donor* alone [p]. Hence it is, that that which is given or granted upon any valuable Conſideration whatever, is not properly called a *Donation*, but a *Remuneratory* Gift, as aforeſaid, unleſs it exceeds the juſt Value of a *Remuneration* [q]. Wherefore, it is not neceſſary to regiſter or enroll ſuch a *Remuneratory* Gift; nor can it be revoked on the ſcore of Ingratitude. It is called a Donation, *quaſi doni datio*; and in general it comprehends every kind of *Donation.* Now there are two *Species* of a *Donation*, viz. a Donation *inter vivos*, and a Donation *mortis cauſâ*, viz. in Proſpect of Death. Under the firſt we may reckon all the other *Species* of Donations, as a Donation *propter nuptias*, a Donation between a Husband and Wife (which is now become obſolete and out of uſe) and the like. Many Perſons think, the word *Donation* to be a general Term: And, therefore, they will have even a Donation *mortis cauſâ*, and all other Donations to be couched under it. But when the word *Donation* is taken ſpecially, it only properly includes ſuch a Gift as is *pure*, and which immediately transfers the Property of a Thing without any hope of recovering the ſame again [r]: And in this Senſe the Word is always uſed in a doubtful Caſe, whether ſuch Gift be made by a Diſpoſition of Man, or by an Act of Law. Wherefore, he who permits his Son to make a Gift (for by the *Roman* Law a Son could not do this without the Father's Conſent) is not deemed to intend ſuch a Gift as is made *mortis cauſâ* [ſ]. But the Expoſition of theirs, which cramps the Law here quoted in the Margin [t], and leaves us in doubt when this Word is to be underſtood *ſpecially*, and when not, I entirely reject. Wherefore, I think, the word *Donation* includes every kind of Gift, ſave only after a different manner. For a conditional Gift, after the Event of ſuch Condition exiſts, is properly enough deemed to be a Gift or Donation: But before the ſaid Event happens, it is improperly ſo called by reaſon of the Uncertainty of it. A Donation alſo *propter Bene-merita*, or for good Offices done to a Man, ſhall ſo far in Propriety of Speech be deemed a *Donation*, as it exceeds the juſt Reward or Return of a *Remuneration*; which may be ſaid even in every *Remuneration*,

[p] D. 39. 5. 1. & 29.
[q] D. 39. 5. 19. 1.
[r] D. 39. 5. 1.
[ſ] D. 39. 5.
[t] D. 50. 16. 67. v. *Donatio.*

[s] D.39.5.27. *Remuneration* [s], which is made *modico pretio:* For that which remains above is a *Donation.*

A Donation *inter vivos* is that, which is truly and properly called a *Donation*; and is that which a Man makes *animo Liberali*, through meer Liberality, being induced hereunto by no Thoughts or Apprehenſion of [t] I. 2. 7. 2. Death [t], but with a Deſign and Intent that the Property of the Thing itſelf ſhould immediately paſs to the Receiver, either in Event of ſome Condition, or elſe in Event of Time. Therefore, in this *Species* of Gift, which is called a *ſimple* Donation, there is no room for Repentance or Revoking [u] I. 2. 7. 2. the ſame, unleſs it be upon ſuch a juſt Account as that of Ingratitude [u], *viz.* when ſome atrocious Injury or great Damage is done to the Eſtate and Perſon of the *Donor.* But the Benefit of revoking a *Donation* is not a Matter, which deſcends and paſſes to the Heir or Heirs. But if a Perſon, that has no Children, ſhall have given away all his Eſtate, or any Part of his Subſtance, or any particular Thing to a certain Monaſtery, and afterwards ſhall beget and have Children, the Whole of that which was granted or given away ſhall *ipſo Jure* revert to the *Donor.* And this is ſo true a Poſition in Law, that the Father cannot even by an Oath renounce and wave this Benefit: For a *Donation* made by him that has no Children is underſtood to have this Condition go along with it, *viz. if the* Donor *ſhall not have Children,* or *that the Donation ſhall be revoked if the* Donor *ſhall afterwards have Children:* And, therefore, if he ſhall have any Children, whilſt the Condition exiſts, the *Donation* is revoked. And the Reaſon and Foundation, as it were, of this Conſtitution is placed in the Love and Affection of Parents towards their Children, which if they could foreſee or think *they* ſhould have hereafter, probably they would not have made a Giſt or Grant of their Eſtates unto other Perſons, leſt they ſhould ſeem to preſer Strangers unto their own Children and their Poſterity: And, for this reaſon, they are deemed to have made ſuch Giſt or Grant upon this Condition, *viz.* That if *they have Children afterwards*, ſuch Grant ſhall be irritated.

I have before hinted, that that is called a Donation *inter vivos*, or a *ſimple* Donation, when any Thing is given or promiſed through meer *Liberality*, to the end that the Thing ſhould become the Property of him that accepts thereof, and that the ſame ſhould not by any hap revert to the [w] D. 39. 5. 1. Owner again [w]. It is ſaid *through meer Liberality*; becauſe what is given upon a Conſideration, as becauſe you have redeemed a Perſon taken by the Enemy, and the like, may rather be called a *Remuneration* than a [x] D. 39. 5. 19. *Donation* [x], as already remembered. And to our Definition we may add 1. the Words, *by virtue of a Nude-Pact*, or *a naked and ſimple Promiſe*; D. 39. 5. 27. becauſe though heretofore either a Stipulation or a preſent Delivery of the Thing was neceſſary to perfect a *Donation*, yet now by a Law of the *Code* a Donation is not ineffectual, though a Stipulation does not intervene, or the Thing be not immediately delivered thereupon; but it is compleated [y] C. 8. 54. 35. by a Nude-Pact, and an Action ariſes thereupon [y]. And we may ſubjoin the Words *not by any hap*, &c. to diſtinguiſh it from a *Commodatum* and a *Precarium*, which revert to the Owner. For in a *Commodatum* and *Precarium*, we give Things upon this Condition, *viz.* That we may receive the ſame again in their proper Seaſon. And by this difference even a Donation *mortis causâ*, or on the Proſpect of Death, is excluded.

A *Donation* is perfected as ſoon as the *Donor* himſelf, and the *Donatary* or *Donee* have conſented thereunto [z]: And he, to whom ſuch a *ſimple* [z] I. 2. 7. 2. Donation is made, has then a *Condictio certi*, or a perſonal Action, by vir- [a] C. 8. 54. 35. 5. tue of the Stipulation, if any Stipulation has interven'd [a], or a perſonal Action grounded *on the Law*, as aforeſaid. And in the mean while the [b] C. 3. 32. 15. *Donor*, who has made the *Donation*, is forbidden either to ſell [b] or mortgage

it

it [c] unto another, ſoraſmuch as the *Donatary* does not loſe the Property of the Thing given, though no Delivery be yet made of it [d]. At this day a Donation *inter vivos* is valid even without regiſtring ſuch Gift, if it does not exceed the Sum of five hundred *Solids* or *Aurei*; but if it exceeds that Sum, it ought to be ſolemnly regiſtred. Though the future Uſe or Intereſt of Money may be remitted by way of *Donation* without the ſame [e]; yet the Gloſs on the Law here quoted [f] ſeems to hold, that an Acquittance ought to be made *animo donandi*. But the Law here cited in the Margin [g], as aforeſaid, does not require ſuch *Donation* to be regiſtred, how great ſoever the Intereſt be: For Intereſt-Money may be given by Pact or Covenant.

[c] D. 39. 5. 35. 1.
[d] D. 39. 5. 35. 1.
[e] D. 39. 5. 23.
[f] D. 50. 17. 115.
[g] D. 39. 5. 23.

Now the Regiſtring of a *Donation* is cauſing the ſame to be reduced into Writing before a competent Judge [h]: For a *Donation* made and regiſtred before an incompetent Judge is ineffectual and avails nothing. But in regiſtring of a *Donation* it is not neceſſary, that the Judge ſhould have Cognizance of the Cauſe or Matter. This Solemnity of regiſtring Gifts is made uſe of upon two accounts. *Firſt*, that Gifts ſhould not be made in a raſh and clandeſtine manner. And *ſecondly*, to prevent fraudulent Mortgages and Conveyances of Eſtates in order to cheat and deceive Creditors. The Regiſtring of Deeds of Gift may be made before any Judge whatſoever of the Province, even before a Judge to whom the *Donor* is not ſubject, nor the Thing itſelf granted: Becauſe this depends on the meer Will of the *Donor* [i]. It ought alſo to be regiſtred, when the *Donor* denounces and intimates his *Donation* to the Ordinary, and prays his Conſent and Authority thereunto, as is ſometimes done; and if the Judge decrees ſuch a *Donation* to be made, it ought to be reduced into publick Writing, and mentioned in the Acts of Court to prevent all ſubſequent Frauds: But it matters not, whether this be done before or after ſuch *Donation* is made [k]. And if ſuch Regiſtring ſhall be entirely omitted, the *Donation* ſhall only be valid ſo far as the Sum of five hundred *Aurei* or *Solids* extends itſelf [l]. But a *Donation* made to the Church or Poor, to the Sum of five hundred *Aurei*, is valid tho' not regiſtred, unleſs it be made to defraud another: For ſuch a fraudulent *Donation* may be revoked, tho' it be regiſtred [m]. But yet there are ſome Caſes that are an Exception to this Rule of regiſtring Deeds of Gift, wherein it is not neceſſary to regiſter a *Donation*, but a *Donation* is valid without it. As *firſt*, in a *Donation* made for the Redemption of Captives, and ſuch as are in Priſon, tho' ſuch Gift ſhould be even *ultra* 500 *Solidos* [n]. *Secondly*, when the *Magiſter Equitum*, or General of the Horſe, has *Honoris ergo*, made a Gift unto any one of his Soldiers for his gallant Actions and Behaviour in the Wars, eſpecially if ſuch Gift conſiſts in *moveable* Goods [o]. *Thirdly*, when a Perſon makes a *Donation* on the account of a Houſe burnt, or for the Repairs of a ruinous Building [p]. *Fourthly*, the *Roman* Emperor might confer a Gift upon any Perſon, how great ſoever it was, without regiſtring: And ſo, on the other hand, might any one confer a Gift on the Prince without regiſtring [q]. And *laſtly*, a *Donation*, which is only a *Remuneration* for a Benefit conferr'd, does not require regiſtring: nor does a *Largitas Sponſalitia*, or a Gift made in Eſpouſals, require it [r]. A Donation *mortis causâ* does not ſtand in need of regiſtring, whatever the Sum or Quantity be that is given [s], though heretofore it did [t]. If a *Donation* be made upon a lawful Conſideration, it may be regiſtred extra-judicially *ex poſt facto*, *viz.* after ſuch Donation is made and executed [u]. Though the Regiſtring of a Gift may be made at any time within thirty Days, if there has been no Time prefixt by the Parties [w]: yet if ſuch *Donation* ſhall be impugned, for that it is of no Validity, becauſe the Time of Regiſtring is elapſed, it cannot be afterwards regiſtred in ſuch a manner as to make it effectual. A

[h] C. 8. 54. 25. 31. & 34.
[i] C. 8. 54. 27.
[k] C. 8. 54. 37.
[l] C. 8. 54. 35.
[m] Nov. 52. c. 2.
[n] C. 8. 54. 38.
[o] C. 8. 54. 36. 1.
[p] C. 8. 54. 36. 2.
[q] C. 8. 54. 34.
[r] D. 39. 5. 27.
[s] C. 4. 57. 4.
[t] C. 4. 54. 25.
[u] C. 5. 3. 20.
[w] C. 6. 30. 8. C. 7. 39. 7.

Donation *inter vivos* in thoſe Caſes, wherein Regiſtring is not neceſſary, is contented with a Writing or Deed ſubſcribed by the *Donor*, and does
[u] C.4.54.31. not require any Witneſſes [u]. Nor are Witneſſes neceſſary in a *Donation* that is made at the Acts of Court before the Judge: But in a *Donation*, which is made *extra acta*, or out of Court, the Subſcription of the *Donor*
[v] C.8.54.31. Nov.52. c.2. is required, though it be written by a Notary Publick [v].

As a *Donation* is a voluntary Act, ſo it is a *nominate* Contract *ſtricti Juris*, and not *bonæ fidei*; and, therefore, Uſury or Intereſt does not accrue thereupon, though the *Donor* ſhould deny to pay the Money or any
[w] D.39.5.22. Thing which he has promiſed [w]. If I promiſe a hundred Pounds to ſome City by way of Gift or Donation, I am obliged to pay the Money, if I have made this Promiſe upon a juſt Conſideration, as on the account of ſome
[x] D.39.5.19. Honour conferred on me by ſuch a City [x]. And thus a *Donation* may be founded on a Conſideration, and then it is not called a *ſimple* Donation, but a Donation *ob cauſam*, or for a Conſideration. 'Tis ſaid, that if you have covenanted to give ten Pounds, or the like, provided I will be your Advocate or Proctor, or will be your Surety, a *Donation* does not come under either of theſe Contracts; becauſe that which is given upon a Con-
[y] D.39.5.19. ſideration, is not ſtrictly a *Donation* [y], but rather an Act of hiring: For every *Donation*, properly ſpeaking, is an Act of Liberality, as already related; and, therefore, a Stipulation *ob cauſam*, *viz.* for a Conſideration, is
[z] D.39.5.19. fin. not a *Donation* [z]. As a *Donation* cannot be made, if the *Donor* be ignorant of the Gift, or knows not what he gives; ſo neither can it be made againſt his Will, becauſe it is an Act of Choice and Deliberation in the
[a] C.8.54.10. *Donor* [a]. *Donations* are ſuſpended by a Condition or Time to come. We have the word *Liberality* in the *Digeſts* put to ſignify a *Donation*, the Cauſe being put for the Effect, as ſometimes it is: For a Liberality is not a Gift, but a Virtue of the Mind.

If I deliver or give a Thing to you, to the end that you ſhould give it unto *Titius* in my Name, and you give it in your own Name, I may have an Action of Theft againſt you, and in ſtrictneſs of Law the Thing thus given ſhall not become the Property of *Titius*: But if I bring a real Action, called *rei Vindicatio*, againſt *Titius*, to claim the Thing, he may repel or ſet aſide ſuch Action by an Equity of Law, through the means of
[b] D.39.5.25. an Exception, ſtiled an Exception *of Deceit* [b]. A *Donation* is alſo perfected, as is ſhould have been before remembred, by a Retaining of the *Uſufruct* for ever; and a Retention of the Uſufruct is perfected by a Delivery of the Property. And thus far, for the preſent, of ſuch *Donations* as take effect in a Man's Life-time. I ſhall next treat of a *Species* of Gift which takes place after his Death, called a Donation *mortis causâ*. And,

This is made, when a Man has any Apprehenſion or Suſpicion of his own approaching Death. As when he gives a Thing upon Condition, that he who accepts of it ſhall have it in caſe that he dies. For the Perſon that makes ſuch a Gift would rather retain it himſelf, if he ſurvives his Sickneſs, than he ſhould have it unto whom it is given; and that he unto
[c] D.39.6.1. I.2.7.1. whom he gives it in caſe of Death, ſhould have it rather than his Heirs [c]. An example whereof we have in the ſeventeenth Book of *Homer*'s Odyſſey, where *Telemachus* is ſaid to have made a Gift unto *Pireus*. This kind of Gift alſo owes its Riſe unto the Law of Nations; and there are three *Species* of it. The *firſt* is, when a Perſon makes a Gift without being much terrify'd with any Apprehenſion of preſent Death or Danger, but only in Contemplation of Mortality. The *ſecond* is, when a Perſon frighten'd with ſome preſent Danger makes a Gift, that it ſhould immediately become the Property of him who receives it. And the *third* is, when the Perſon moved with Danger does not give it upon this Condition, *viz.* That it ſhould immediately

immediately become the Property of him who receives it, but only when Death follows thereupon [d]. Thus a *Donation mortis causâ* is a kind of Liberality, which is made through a Contemplation of inſtant or future Death, ſince the *Donor* had much rather have the Thing given himſelf than he ſhould have it, to whom he gives it; and that he ſhould have it, to whom he gives it, than his Heirs ſhould have it [e], as juſt now delivered. For to the end that a *Donation* be made *mortis causâ*, it is principally required in ſuch Deed of Gift, that expreſs mention be made of the *Donor*'s Death, elſe it ſhall be reckoned as a Donation *inter vivos*, or a *ſimple* Donation: So that though he ſhould *in articulo mortis*, or at the Point of Death, make a Gift; yet if he does not ſay, that he gives it *mortis causâ*, *viz.* on a Proſpect of Death, or does not mention his Death, it is in a doubtful Caſe preſumed to be a *ſimple* Donation [f], unleſs it may be evidently inferr'd from other Conjectures that it was given in Proſpect of Death [g]. And the effect thereof is great: For if it be a Donation *inter vivos*, it cannot be revoked, unleſs for the Reaſons mentioned in a foregoing Paragraph; and if it exceeds the legal Standard, it muſt be regiſtred: But it is otherwiſe in a Donation *mortis causâ* [h].

[d] D. 39.6.2.
[e] D. 39.6.1.
[f] D. 39.6.42. fin. dd. ibid.
[g] Tab. & alii in §. 1. I.2.7.
[h] C.4.57.4.

But a Donation *mortis causâ* may be revoked in two Caſes; and the Doctors add a third. The firſt Caſe is, when ſuch a *Donation* is *ſimply* made by the Perſon in his Sickneſs (as lately hinted,) and ſuch Perſon is reſtored to his Health again [i]; for then his Recovery is a Revocation of the Gift [k]; becauſe when the Reaſon of ſuch a *Donation* ceaſes, the Diſpoſition itſelf is extinguiſhed [l]. For 'tis the Nature of this Contract, that he who makes ſuch a *Donation* would rather firſt have it himſelf than the *Donatary* ſhould have it, and that the *Donatary* ſhould rather have it than his Heir [m]. Yet ſome think, that ſuch *Donation* is not revoked by the *Donor*'s Recovery, if ſuch *Donation* be made *mortis causâ*, and not on the account of his Infirmity: But this Opinion of *Decius*, and others, I do not approve of, as being contrary to Law [n], I humbly conceive. The *ſecond* Caſe is, when the *Donatary* dies before the *Donor*: For here in this Caſe, a Donation *mortis causâ* is apparently revoked and extinguiſhed [o]; and ſuch a *Donation* cannot be demanded in the Donor's Life-time. A Donation *mortis causâ*, even whilſt it has a Pendency touching the Validity thereof, may be revoked by the *Donor*'s repenting thereof [p], as well as by the *Donataries* Death, before the Event of ſuch Condition. A Donation *mortis causâ* is not valid, how regularly ſoever it be made, if it extends *ultra vires Hæreditarias* [q], or (as we ſay) beyond Aſſets. This kind of *Donation* is an imperfect Gift ſo long as it depends on the Event of the *Donor*'s Death, whereby it is perfected: And a Man may make it either in reſpect of his own or another's Death [r]. Not only a Perſon under a bodily Infirmity may make this *Donation* through fear of Death, but even a Perſon in the Wars, or in any other Circumſtances, who is afraid of being killed by the Enemy [s]; and likewiſe he who is afraid of Death in his Travels through dangerous Places, may do it [s]; and ſo may he who is ſo far advanced in Years, that he is in daily Expectation of Death [t]: For all theſe Caſes ſhew imminent danger of Death [u]. A Donation *mortis causâ* ought to be perfected in the Preſence of five Witneſſes, as a Laſt Will or Codicil is, whether it be in Writing, or without the Support of Writing [v].

[i] D.39.6.31.1.
[k] Gloſſ. in l. 3. D. 39. 6.
[l] D. 34.4.30. fin.
[m] I. 2. 7. 1.
[n] D. 22.1.19.
[o] D. ut ſup. D.12.1.19.pr.
[p] D. 39. 6. 16.
[q] D. 39. 6. 17.
[r] D. 39.6.18.
[s] D 39. 6. 3.
[s] D. 39. 6. 4.
[t] D. 39.6.5.
[u] D.39. 6. 6.
[v] C. 4 57.4.

A *Donation* in Proſpect of Death is likened unto a Legacy in many reſpects: wherefore, the Law which relates to Legacies ought to have place, generally ſpeaking, in every Donation *mortis causâ* [w]. But though ſuch a *Donation*, generally ſpeaking, be thus likened unto a Legacy; yet it is ſometimes [x], as I ſhall here inſtance in a Son that is under the Power of a Father, who, though he may make a Donation *mortis causâ*, yet he cannot bequeath a Legacy even with his Father's Conſent. Theſe Donations

[w] D.39.6.37.
[x] D. 39.6.15. 2.

are ſometimes delivered by the Perſon deceaſed in his Life-time, and ſometimes by the Heir: But a Legacy is always delivered by the Heir [y], which is another Inſtance of their Diverſity. Again, in this kind of Donation the *Donatary* is obliged to render an account of his Poſſeſſion: But 'tis otherwiſe in a Legacy. He who may make a Teſtament, may alſo make a Donation *mortis causâ* [z]. Thus as a *Filius-familias*, or a Son under the Power of a Father, being a Soldier, may make a Will, ſo he may alſo make a Donation *mortis causâ*; becauſe ſuch a Donation is reduced to the Similitude of a Legacy, as aforeſaid. And thus theſe *Donations* are revoked after the ſame manner as a Legacy is [a]. A Donation *mortis causâ* differs from a Capion *mortis causâ*, as a *Species* differs from a *Genus*; becauſe whatſoever is taken or received through the Occaſion of another Perſon's Death, is ſtiled a Capion *mortis causâ*, though it be not a Gift: As thoſe Things which are taken *Jure Legati*, or for the fulfilling of a Condition, are [b].

[y] I. 2. 20. 1.
[z] D. 39. 6. 15.
[a] D. 39. 6. 15. 2.
[b] D. 39. 6. 8. 11. & l. 18. pr.

Among improper Gifts, as a Donation *mortis causâ* is, I ſhall here ſubjoin and reckon another *Species* of Donation *inter vivos*, *viz.* a Donation *propter nuptias*, or by reaſon of Marriage. This was formerly called a Donation *ante nuptias* [c], becauſe it could only be made before Marriage. For *Juſtinian* takes notice of three ſeveral times, wherein Gifts on the ſcore of Marriage were made. The Emperors *Severus*, *Antoninus*, *Alexander*, *Diocleſian*, and *Maximian*, introduced the firſt time for making theſe *Donations*; and this kind of Gift they called a Donation *ante nuptias*, becauſe theſe Gifts or Preſents were always made before any future Marriages. For the Suitor or Woer preſented his Miſtreſs upon this Condition, *viz.* that if ſhe at length became his Spouſe, the Donation ſhould be valid; but if Marriage did not follow thereupon, the Preſent made, or Thing given (in *Latin* called *Largitas Sponſalitia*) was to be returned, if the *Sponſus* or Suitor was not in fault [d]. And ſo *vice versâ* on the Part of the *Sponſa* or Woman, if ſhe made any Preſent to her Suitor. If the Death of either enſued before Marriage, and the Woman was the Giver, then the whole was to be returned; but if he had kiſſed her, then half only [e]: For a Kiſs was then looked upon as a kind of Conſummation, and the Women eſteemed immodeſt that ſuffered it upon any other account. And this was called the firſt time, according to *Juſtinian*. Then *Juſtin*, the adoptive Father [f] of *Juſtinian*, ordered, that this kind of *Donation* might be increaſed even after Marriage, like unto a Dower; which by the ancient Law might be enlarged at any time during the Continuance or Subſiſtence of Matrimony. This they called a Donation *poſt nuptias* [g]; and was reckon the ſecond time of making Marriage-Gifts. The Emperor *Juſtinian* perceiving two Things to be wanting to this Innovation of his Father's, enacted, *Firſt*, that Donations of this Kind might not only be increaſed after a Contract of Matrimony, but may alſo receive this beginning, if nothing has been covenanted touching theſe Donations before Marriage. Then he changed the Name given to this *Donation*, and would have it no longer an *antenuptial* Donation, but a Donation *propter nuptias* [h]. From this Conſtitution of *Juſtinian*, therefore, both *Dowries* and Donations *propter nuptias* ſeem to walk in all reſpects *paſſibus æquis*, and to be governed by the ſame Law.

[c] I. 2. 7. 3.
[d] C. 5. 3. 15.
[e] C. 5. 3. 16.
[f] I. 2. 7. 3.
[g] I. 2. 7. 3.
[h] I. 2. 7. 3.

Theſe Gifts, by reaſon of Marriage, were formerly (before the Conſtitution of *Conſtantine* [i]) irrevocable, whether Marriage followed thereupon or not, as well as thoſe which proceeded from meer Liberality, unleſs there was an expreſs Condition to return them [k]. For if the *Sponſus* gave a Thing *purely* and *abſolutely* unto his *Sponſa* or Miſtreſs, it was ſtiled a *true* and *real* Gift, and could not be revoked, though Matrimony did not enſue: But if he gave it with this Intent, that it ſhould be revoked, if Matrimony did

[i] C. 5. 3. 8. & 9.
[k] C. 5. 3. 2.

did not follow thereon, then ſuch Gift was revocable, if the Condition was not fulfilled. All Donations were then forbidden Perſons in Wedlock after Marriages contracted; and, therefore, theſe were ſtiled Donations *ante nuptias*, becauſe they could only be made before Marriage according to the antient Law. The Donation *propter nuptias* was by *Juſtinian* introduced [l], and is made and conſtituted by the Husband in the Name of his Spouſe, as a Security for the Marriage-Portion, which ſhe brings to him. Upon which account this Donation does not ſeem to be made contrary to the Decree of the Senate, which prohibits a Donation between a Husband and a Wife; becauſe that Prohibition only relates to *ſimple* Donations, and ſuch as proceed from meer Liberality. But this kind of *Donation* rather ſeems to be founded on a juſt Cauſe or Conſideration, and by way of Remuneration for the Wife's Dowry or Marriage-Portion [m], and may be called the Wife's *Jointure* in our Stile.

[l] I. 2. 7. 3.

[m] I. 2. 7. 3.

In the *Digeſt* [n], as well as the *Code* [o], we have a Title touching Donations between Husband and Wife: But as the Law does not encourage theſe Gifts, but rather forbids them, unleſs as hereafter limited [p], I ſhall ſay little of them; eſpecially as they are now grown out of uſe, as I ſhall obſerve by and by. It has been already remembred, that a Donation is permitted to be made between a *Sponſus* and a *Sponſa* before Marriage contracted, even ſuch a Gift as is ſimple and irrevocable: and, after a Marriage-Contract, a Donation *propter nuptias* is allowed of between the marry'd Couple, which is not a *pure* Gift, but a Donation *ob cauſam*; and when the Cauſe expires, the Gift is revoked. But every *ſimple Donation* between Husband and Wife is forbidden, leſt that Concord which ought to be between Husband and Wife ſhould ſeem to be purchaſed, and leſt it ſhould adminiſter occaſion for Divorces and Adulteries, if the Perſon that has Poſſeſſions does not beſtow them on the other [q]. This Prohibition alſo extends to *putative* Husbands and Wives; and has alſo place, though Matrimony does not ſubſiſt in Law, leſt the Condition of thoſe Perſons who have offended ſhould be better'd [r]. Wherefore if a Perſon be miſtaken in the Quality of a Husband or Wife, believing himſelf to make a Gift to a true Wife, when ſhe is not ſuch, he may have a perſonal Action to recover what he has given to his Wife [s], provided he be ignorant of the Impediment, becauſe he was guilty of no Offence: But if the Perſon giving ſhall be conſcious of an Impediment, it ſeems to be otherwiſe, unleſs the Perſon receiving be alſo conſcious thereof; in which caſe the Exchequer may claim the Gift [t]. Moreover, if both the Parties ſhall be ignorant of ſuch Impediment to Marriage, the Goods which came to each, whilſt ſuch a *putative* Marriage ſubſiſts, ſhall upon a Diſſolution of Wedlock be divided among them [u]. But here there ought to be a *Conſtat* thereof, otherwiſe in a doubtful Caſe, what the Woman has acquired, ſhe is preſumed to have acquired out of her Husband's Effects: And the Reaſon of ſuch a *Conſtat* is to avoid a Suſpicion of diſhoneſt Gain in the Woman [v]. This Prohibition does not only reſpect the Perſons contracting, and making Gifts, but alſo other Perſons that are concerned for them, in regard to the Power they have over them [w]. Hence the Father-in-Law cannot make a Gift unto his Daughter-in-Law, or to his Son-in-Law by Marriage.

[n] D. 24. 1.

[o] C. 8. 16.

[p] C. 8. 16.

[q] D. 24. 1. 1. 2. &c.

[r] D. 24. 1. 3. 4.

[s] C. 5. 16. 7.

[t] D. 24. 1. 32. fin.

[u] X. 4. 20. 1. & 2.

[v] C. 5. 16. 6. D. 24. 1. 52.

[w] C. 5. 16. 4.

But there are ſome Caſes wherein theſe Donations do ſubſiſt, *viz.* when the *Donor* does not become the poorer, or the Receiver the richer thereby: As when a Husband gives a Bondman unto his Wife for the ſake of Manumiſſion [x], or ſuffers his Wife to receive the Fruits and Profits from her Jointure [y], and the Woman ſhall ſpend and conſume them, or if the Huſband ſhall pay unto his Wife a monthly or yearly Penſion in the place of Alimony [z], or if the Wife ſhall give any Thing to her Husband to purchaſe him Honour or Dignity [a]. And ſuch a Donation or Gift is ſo far

[x] C. 5. 16. 22.

[y] C. 5. 16. 8.

[z] C. 5. 16. 11.

[a] C. 5. 16. 21.

binding, that if the Thing be delivered, it cannot be retrieved or recovered again, unleſs the Receiver becomes the richer thereby [a]. Such a Gift alſo is valid which is made at the Time of a Diſſolution of Marriage, ſince it is the ſame thing to have a Thing at a lawful Time, and to have a reſpect to a lawful Time [b]. And hence a Donation *mortis causâ* is valid between Husband and Wife, becauſe it has a reſpect to that Time when they ceaſe to be Man and Wife, *viz.* after the Death of the *Donor* [c], unleſs ſuch Gift be made irrevocable, for then it comes within the ſaid Prohibition of a Donation *inter vivos* [d]. But the Gift of a Legacy or an Inheritance does not come within the Verge of ſuch Prohibition; becauſe the Legacy or Heirſhip does not take Place till after the *Donor*'s Demiſe [e]. A Donation made by the Prince unto his Wife or Conſort, is likewiſe excepted out of this Prohibition; and ſo *vice versâ* a Gift of ſuch Conſort unto the Prince [f]; nor does ſuch a Gift require regiſtring, how large ſoever it be. A Donation made between a Man and his Wife is confirmed by the *Donor*'s Death, though he dies without an Heir [g], ſo that it excludes the Exchequer on the account of eſcheated Goods. *Caius*, during the Time of his Marriage-State, made a Deed of Gift unto his Wife, and died without an Heir. The Exchequer ſeized upon all the Eſtate as eſcheated Goods. And it was adjudged, that the Exchequer could not revoke ſuch a Gift made by the Husband to his Wife, and then confirmed by his Death: For the Wife in point of Succeſſion is preferr'd unto the Exchequer. But a Donation made between a Man and Wife is not confirm'd by the Perſon's Death, unleſs a Delivery of the Gift intervenes in the Perſon's Life-time [h]. But with us, and in *Holland*, as a Wife is not *ſui Juris*, but under the Care and Power of her Husband, a true Delivery cannot be made as long as Matrimony ſubſiſts; becauſe, according to the Cuſtom of *England* and *Holland*, the Goods of the Husband and Wife are in common during Matrimony; and, conſequently, a Gift of this kind cannot be confirmed at this day by Death. And as this Community of Goods between Husband and Wife obtains in *France* [i], *Flanders*, and *Saxony*, ſo ſuch a Donation is not confirmed by either of the Party's Deaths: For ſuch a Donation cannot be made in either of theſe Countries, whilſt Marriage ſubſiſts. See *Reinhard* touching the Laws of *Saxony*, and *Nicol. Burgund.* on the Cuſtoms of *Flanders*. At this day in *Holland* no Gift between Husband and Wife affects Debts, becauſe the Wife may be convened for her Husband's Debts [k]. What has been ſaid touching Donations between Husband and Wife, I think, is ſufficient, ſince they are almoſt in all Places grown out of uſe at this day, as practis'd among the *Romans*, and the Title become obſolete, unleſs it be ſo far as a Communion of Goods is excluded by *ante-nuptial* Pacts and Covenants. And, therefore, having gone thorough the ſeveral *Species* of Gifts, I ſhall only make ſome general Remarks thereon, and ſhew how a Donation may be proved, and when, and when not preſumed.

And *firſt*, it is to be obſerved, that all Perſons who may contract, may alſo make Donations; nor does old Age, nor any Diſeaſe, obſtruct the ſame [l]. But a Father cannot by the *Civil* Law make a Donation unto his Son that is under his Power [m], unleſs it be *ob Bene-merita*, or for ſome other juſt Cauſe [n]; becauſe by the *Roman* Law, ſuch a Father and Son were deemed as one Perſon. Nor can a Husband make a Gift to his Wife, nor a Wife unto her Husband, unleſs as before limited and related [o]; yet ſhe may alienate and give away her *Paraphernalia* [p], though ſhe cannot give her Dower. *Secondly*, it is to be noted, that all Things are ſubject to Donation, which do conſiſt in Commerce [q]; unleſs they are otherwiſe reſtrained by ſome prior Obligation, as a Mortgage, and the like. Again, it is to be conſidered, that all Donations are either *ſimple*; or elſe *ob cauſam*, namely, upon ſome Conſideration; or *thirdly*, *ſub modo*; or *fourthly*, *conditional*.

[a] C. 5. 16. 8. 9. & 17.
[b] C. 5. 16. 11. 2.
[c] D. 24. 1. 9. & 10.
[d] D. 39. 6. 27.
[e] D. 24. 1. 31. 7.
[f] C. 5. 16. pen.
[g] C. 5. 16. 32.
[h] D. 24. 1.
[i] Mornac. in l. 32. C. 5. 16.
[k] Groenv. de ll. Abrog. in l. 13. C. 5. 16.
[l] C. 8. 54. 16.
[m] C. 8. 54. 11.
[n] Jaſ. in d. l.
[o] C. 8. 16.
[p] C. 8. 56. 6.
[q] D. 39. 5. 9. & 35.

A

A *ſimple* Donation is that which is *pure* and *unconditional*, and not ſubject to any *Modus* or Conſideration: And this is properly a *Donation*. A Donation *ob cauſam* and *ſub modo* is, when any Thing is given, either that ſomething ſhould be done, or that it ſhould not be done, and the like [r]. A *conditional* Gift is, when a Perſon gives a Thing in ſuch a manner, that it ſhould then become the Property of the Receiver, if ſuch Event enſues thereupon: And ſuch a Gift is a Donation *mortis causâ*, for if the Event does not follow, the Thing given either remains with, or reverts to the *Donor*. *Fourthly*, it is to be obſerved, that a Donation ought to be made by Words in the preſent Tenſe, or by Terms equivalent thereunto, otherwiſe it is not a Donation, but only a Pact of ſome future Donation intended [t]: And it may be made between abſent Perſons, *viz.* by a Proctor or an Epiſtle [s], and without the help of Witneſſes [t], provided it may be proved by any other ſufficient Means or Evidence [u].

[r] D. 39.5.1.1. C. 8.55. t. 1.

[t] Saly. in l. 2. C. 4. 6.
[s] D. 39.5.4. & 10.
[t] C. 8.54.31.
[u] C. 8.54.13. 20. & 29.

Regularly ſpeaking, a Donation is not preſumed; and, therefore, it ought to be proved: For no one is preſumed to waſte and throw away his Eſtate, but rather to enrich himſelf by new Acquiſitions. And hence *Ulpian* ſays, that to make Gifts is to dilapidate and throw away an Eſtate. Yea, the Law ſo little favours a Donation in point of Proof, that an Error is rather preſumed than a Donation: For a Woman is not preſumed to do or make it, becauſe ſhe is covetous; and a Man is not preſumed to make it, becauſe he is preſumed to aggrandize his own Family. For though, regularly ſpeaking, an Error is not preſumed in a Man's own Act and Deed; yet it ſhall be preſumed in a Donation, unleſs it be proved. And, therefore, he that aſſerts a Donation, ought to prove the ſame by clearer and ſtronger Evidence than is otherwiſe required; for it ought to be manifeſtly proved. Now a Donation may be proved by Witneſſes that were preſent at the time of ſuch Donation made: Among which Witneſſes *Paul. de Caſtro* thinks it convenient, that there ſhould be a Notary Publick. A Donation may likewiſe be proved by a private Writing, as by a Letter or an Epiſtle, if ſuch Letter be preſented and recorded before the Death of the Donor. But it is not barely ſufficient to prove a Donation made, but it is alſo neceſſary to prove, that the Donor had a Right of giving, when it is ſaid in the Deed of Gift, that the Donor gives a Thing belonging to himſelf. All Donations are founded upon Merits and good Offices; and therefore Merits and good Offices ought to be proved to be done unto the Donor, unleſs the Donor expreſſly acknowledges the ſame in the Deed of Gift. And ſuch Merits and good Offices ought likewiſe to concur with the Value of a wiſe Gift made, to the end that ſuch a Donation ſhould be ſaid to be made *ob Bene-merita:* But a Donation made by a Perſon, who can freely diſpoſe of his Goods by way of Gift, is valid, though no Merit or good Offices are previous thereunto; yea, though no ſuch Merit or good Offices appear any otherwiſe than by the Aſſertion of the Donor himſelf.

If a Gift or Donation has been made unto any Perſon, and ſuch Perſon be afterwards convicted of Ingratitude, the *Civil* Law has ſuch a Deteſtation thereunto, as one of the greateſt Vices Men can be guilty of, that it revokes and determines ſuch Gift or Donation, though the ſame has been completely perfected [v]. St. *Bernard*, in his Deſcription of Ingratitude, calls it a ſcorching Wind, which dries up the Fountain of Pity and Compaſſion, as it alſo does the Dew of Piety and Charity, and the Fruits of Grace and Benevolence. And it proceeds for the moſt part from Pride, there being ſeveral Perſons in the World who think that all Services are due to them. Ingratitude is ſo odious in the Eye of the *Civil* Law, that if a Slave, who has been manumiſed, ſhall behave himſelf undutifully towards his Maſter, or if a Son ſhall recompence the Benefit of his Emancipation with any ill Act or Office againſt his Father, they may both for their Ingratitude be brought

[v] C. 8. 56. 10.

[w] D. 37. 15. brought back again under their former Yoke [w]. And hence it is, that if I have, out of my free Bounty, beſtowed any Gift on another, who ſhall attempt to betray my Life or Eſtate unto miſchief, or paſs any weighty Injury on me, I need not ſuffer my Bounty to remain with ſuch an unworthy Perſon, but may recall it again from him [x], ſince Bounty ought rather to invite Men to be obſequious, than to be proud and inſolent [y]. Yet if I die, my Heir cannot after my Death ſue to recover it: For ſince I, againſt whom the Ingratitude was committed, did not complain, let it be bury'd in ſilence for ever [z].

[x] C. 8. 56. 10.

[y] C. 8. 56. 1.

[z] C. 8. 56. 10.

TIT. X.

Of Poſſeſſion, *what and how many Kinds thereof,* civil *and* natural, *and when it may be ſaid to be lawful; whether it may be induced by a Statute or Cuſtom, and may be acquired by an Infant and Pupil, and by whom it is acquired: whether it may be loſt by the Mind alone, and how many ways it is loſt: And* laſtly, *how Poſſeſſion may be proved, and of the Effects of an acquired Poſſeſſion,* &c.

FOR the better underſtanding of this Title of *Poſſeſſion*, it is firſt to be obſerved, That Poſſeſſion in reſpect of the Etymology of the Word, is ſo called from the two *Latin* words *Pedum Poſitio* [a]; that is to ſay, from a Perſon's ſetting his Foot on the Thing poſſeſſed, in other Terms ſtiled *rei Inſiſtentia:* And from hence Dominion and Property heretofore had its Riſe and Commencement; and at this day has its Beginning in ſuch Things as are not in the Property of another Perſon. By *Pedum Poſitio* I here mean ſuch corporal Act, which we may ſtile *natural* Poſſeſſion: For wherever a Man ſets his Foot, he does for a Time acquire the natural Poſſeſſion of that Place. But ſome will have it, that from this Etymology moveable Things cannot properly be ſaid to be poſſeſſed, becauſe they are not trod upon by human Feet. But the Law is plainly againſt them: For we may have both a *civil* and a *natural* Poſſeſſion in Things moveable, as appears by the Laws here cited [b]. Again, it appears by the *Juſtinian* Code, that Things of a moveable Nature may be the Subject of Poſſeſſion properly enough, becauſe they may be acquired by the means of *Uſucapion* [c]; and *Uſucapion* cannot be had, it is well known, without Poſſeſſion [d]. Others ſay, that this Derivation *à Pedibus,* is a falſe Reading in the Text of the Law; becauſe the word *Poſſidere,* as formed from *Sedeo* in the Etymology of it, has nothing common with Feet. But, leaving this Matter to learned Grammarians, I will give a Definition of it according to *Alciatus* [e]; *viz.*

[a] D. 41. 2. 1.

[b] D. 41. 2. 15. & 47. D. 41. 2. 1. 14.

[c] D. 41. 2. 3. 3. & 13.

[d] C. 7. 31. 1. 4 D. 41. 3. 25.

[e] In l. 1. D. 41. 2.

That it is the Uſe of ſomething which is ſeparated from the Right or Property thereof: And he, therefore, ſays, that Poſſeſſion is ſeparated, *viz. firſt,* to ſhew that Poſſeſſion differs from that *Uſe,* which is a *Species* of a Service: And *ſecondly,* to follow the Opinion of ſuch, as deem Poſſeſſion to be a Matter of *Fact,* and not of *Law*; which is very clearly atteſted in

in ſeveral of our Law-Books (as a Truth) by many eminent Lawyers: And this Doctrine obtains, whether it be a Poſſeſſion *acquired*, or a Poſſeſſion *loſt*. But, I think, the Definition of Poſſeſſion, given by *Theophilus*, on the *Inſtitutes* [f], is a much better Definition, *viz.* That it is a Right of occupying and detaining a corporeal Thing unto a Man's ſelf: or, as *Azo* ſays, it is an Act or Right, whereby a Perſon retains a corporeal Thing unto himſelf either *really*, or by an *Interpretation* of Law, the Body and Mind of the Poſſeſſor concurring hereunto. For there muſt be an Intention of poſſeſſing, as well as a corporeal Act concerned therein. I call it a *Right*, becauſe Poſſeſſion is a Matter of Law, which reſults from *Apprehenſion* or *Seizing*, which is a Matter of Fact [g]. So that Poſſeſſion is a Right acquired by the Apprehenſion or Seizing of a Thing; the Aid of the Body and Mind concurring thereunto [h]. Thus corporeal Poſſeſſion cannot be without the Intervention of a corporeal Seizing and Apprehenſion of the Thing to be poſſeſſed. Some ſay, that this Seizing may be made by being ſeized of another Thing than the Thing itſelf: And thus a Man is ſaid to be ſeized of Treaſure, when he knows it to be in his Eſtate or Land, by the very Act that he poſſeſſes the Land, and has Knowledge of ſuch Treaſure. A Man may be ſaid to have the Poſſeſſion of any Thing by virtue of ſeveral Titles, but he can only have the Property of it by virtue of one Title alone.

[f] I. 2. 9. 5.

[g] D. 41. 2. 49.

[h] D. 41. 2. 25. fin.

Poſſeſſion is two-fold, *viz. natural* and *civil*, as before hinted. *Civil* Poſſeſſion is a Right of occupying a Thing, which is not forbidden by the Law to be in a Man's Poſſeſſion, ſuch Right having an Aptitude of producing civil Effects [i]: For it is ſo called, becauſe it is a Right that is proper to produce civil Effects in reſpect of the true Property of the Thing poſſeſſed, as it produces *Uſucapion*, and the like. And ſuch a Poſſeſſion is ſufficient alone to acquire the Fruits of an Eſtate without the Imputation of Theft, and is alſo ſufficient unto *Uſucapion* aforeſaid, and other Purpoſes in Law. *Natural* Poſſeſſion is a Right of occupying a Thing not prohibited to be poſſeſſed, according to natural means, and not by any Act of Law, as civil Poſſeſſion is: And thus he who is locally and bodily poſſeſſed of any Spot of Ground, is ſaid to be *naturally* poſſeſſed of it; this Right being only proper to produce civil Effects in reſpect of ſome Right diſtinct from the Property of the Thing thus poſſeſſed. And thus if I am bodily poſſeſſed of any Place, no one can remove me from thence, unleſs he ſuffers thereby, becauſe I have a natural Right to the Space of Ground I am thus poſſeſſed of.

[i] Bart. inl. 1. D. 41. 2.

Though two Perſons, at the ſame time, cannot have the numerical Poſſeſſion of the ſame Thing *in ſolidum* [k]; yet ſeveral Perſons may have Poſſeſſion *in ſolidum*, if they are ſpecifically and numerically different in the manner of poſſeſſing it: As *Titius* may have the *natural*, and *Caius* only the *civil* Poſſeſſion [l]. An abſent Perſon, that has left no one in his Houſe, retains the civil Poſſeſſion thereof, though he loſes the natural Poſſeſſion of it, and he that privily enters the ſame has the natural Poſſeſſion, and if he does not admit the Owner or Maſter of it on his Return, and the Perſon on his Return ſuſpects that he ſhall be repulſed with force, he ſhall have the civil Poſſeſſion of it remaining to him [m]. But if the Owner will not return to his Eſtate, becauſe he fears a greater force, he ſeems to have loſt or quitted the civil Poſſeſſion, not from his former Act, but from his own Will [n].

[k] D. 41. 2. 3. & 5.

[l] D. 41. 2. 3. 4.

[m] D. 41. 2. 6. fin.

[n] D. 42. 2. 7.

Only Things corporeal are the proper Object of Poſſeſſion, or properly ſaid to be poſſeſſed [o]: And, therefore, there are two Things neceſſary to the acquiring of Poſſeſſion, *viz.* the Body and Mind of the Perſon. But it is not neceſſary in an Eſtate of Land, and the like, that I ſhould poſſeſs every particular Glebe with my Body (for that is impoſſible) but it is

[o] D. 41. 2. 3. pr.

enough, that I enter on part of the Eſtate, to the end that I may be ſaid to poſſeſs the whole. But where there are ſeveral diſtinct Eſtates, an Entry made upon one does not give a Man the Poſſeſſion of the reſt. Incorporeal Things, as Rights and Services, are only acquired by a *Quaſi*, or an improper Poſſeſſion. He is ſaid to have a juſt and lawful Poſſeſſion of a Thing, who poſſeſſes by the Authority of the Judge interpoſed according to the Order of a judicial Proceſs, though not rightly made in
[o] D. 41.2.11. reſpect of the Right of the Litigant [o]. The civil Poſſeſſion of a Thing that is not vacant, is not acquired by an Entry thereinto: As when a Perſon is on one Part of his Eſtate, and another privily enters thereupon without the leave of the Poſſeſſor, the true Poſſeſſor does not hereby ceaſe to be in Poſſeſſion, even though he ſhould give leave to ſuch an Entry; ſorthe true Poſ-
[p] D.41.2.18.3. ſeſſor may expel him from the Borders of his Land, whenever he pleaſes [p].

In reſpect of what we are diſcourſing of, Poſſeſſion may be ſub-divided into *formal* and *cauſal* Poſſeſſion. The firſt is that which is ſeparated from the Property, but yet is made uſe of to acquire a Property; or elſe it is that Deed and Inſtrument whereby we are made Owners and Proprietors of a Thing. It is called *formal*, becauſe it ſubſiſts and ſtands of itſelf, and that *formally* too: And we ſay the ſame thing of a *formal* Uſufruct, which is ſeparated from the Property. The ſecond is termed *cauſal* Poſſeſſion, and this every Proprietor has, that makes uſe of his own Eſtate. Thus I am a Proprietor of my Houſes, and poſſeſs them not *formally*, but *cauſally*. This kind of Poſſeſſion is the Cauſe of Property, and Property is the Cauſe of this Poſſeſſion; *viz.* as I am Proprietor of my Houſes, I am therefore in Poſſeſſion, and becauſe I am in Poſſeſſion of them, I am therefore ſaid to be the Owner of them. Lo! that is called *cauſal* Poſſeſſion, which is always joined with Property; and without Property regularly it cannot be. Thus we have a *cauſal* Uſufruct, which every Proprietor has, when he makes uſe of that which is his own: which Uſufruct is not ſeparated from the Property, but is one and the ſame thing with it: And the ſame thing we alſo ſay of *cauſal* Poſſeſſion. I ſhall only in this Title ſpeak of *formal* Poſſeſſion, which tends to the Acquiſition of Property, without further mention of *cauſal* Poſſeſſion, becauſe it is confounded with Property it ſelf, unleſs (perchance) I ſpeak of it by way of Incident.

We are ſaid to poſſeſs an Heirſhip or Inheritance two ſeveral ways, or, which is the ſame thing, an hereditary Poſſeſſion is two-fold. *Firſt*, we are ſaid to be in poſſeſſion of an Inheritance in the Place and Stead of an Heir, *viz.* when we believe ourſelves to be the Heirs, and poſſeſs it as Heirs: And then an Interdict of *Quorum Bonorum* is frequently made uſe of. *Secondly*, we are ſaid to have an Inheritance as Poſſeſſors *malæ fidei*, *namely*, when we invade and occupy an Inheritance, by way of Uſurpation, in a perfidious and fraudulent manner, without any juſt Title thereunto, or being able to give any good reaſon why we poſſeſs it. For if ſuch Perſon ſhould be asked, why he poſſeſſes the Inheritance, he can give no good account thereof, but only ſay, *I poſſeſs it becauſe I do poſſeſs it:* And
[q] D.5.3.25.3. hence theſe Perſons are in our Books ſtiled *Prædones* [q], and Poſſeſſors *malæ fidei*. For he is ſaid to be a Poſſeſſor *malæ fidei*, who in his own Conſcience knows himſelf to be in poſſeſſion of that which belongs unto another Man.

[r] D.41.2.29. The acquiring of *natural* Poſſeſſion is a Matter of Fact [r]; and, therefore, a Perſon may acquire the ſame to himſelf by the means of any Perſon whatſoever, even by a Ward or Pupil that has Underſtanding: But it is otherwiſe in reſpect of ſuch Wards, *&c.* as want Underſtanding, as Infants, Madmen, and the like do. A Perſon diſſeized, or thrown out of Poſſeſſion by force, may be reſtored within a Year, by the help of an Interdict, ſtiled *unde vi:* But this Interdict does not lie againſt the Heirs of

the Diſſeiſor, unleſs it be ſo far as ſuch Poſſeſſion has come to their hands [f]. An Interdict of *undè vi & armatâ manu* is that, which the *Prætor* or Judge granted for the ſake of defending a Man's Eſtate againſt a forcible Entry, or violent Seizure thereof; it being given to him that has been by unlawful means ejected out of poſſeſſion of an immoveable Eſtate, to the end that he might recover the Poſſeſſion thereof again [s]: But it did not extend to the Ejectment of a Perſon caſt out of the Poſſeſſion of a moveable Eſtate or Goods, unleſs ſuch Goods were upon the Eſtate, or in the Houſe, from whence he was ejected [t]. This Interdict accrues to every one that is thus diſpoſſeſſed by an *expulſive*, but not by a *compulſive* Force [u]. I call that an *expulſive* Force or Violence, which does not proceed from a Court of Law, and has not the Conſent of the Party expelled: whereas a *compulſive* Force, though it has not the Party's Conſent, yet it proceeds from a lawful Authority, as the Judge, Magiſtrate, *&c.* This Interdict lies not only againſt the Diſſeiſor himſelf [v], but likewiſe againſt him who orders or abets any ſuch Force or Diſſeizing [w], and alſo againſt the Agent of ſuch Diſſeiſor [x]; and *fourthly*, againſt him who has again loſt the Poſſeſſion of the Eſtate, from whence he has thus expelled the Poſſeſſor, though he has loſt it without any Fault or Colluſion of his own [y]: And *laſtly*, it lies even againſt the Perſon diſſeized himſelf, if he ſhall (perchance) by Force of Arms, at ſome Length of Time, and not immediately after ſuch diſſeizing, diſpoſſeſs the Diſſeiſor himſelf [z]. He that has the Benefit of this Interdict, ſhall be reſtored to the Poſſeſſion of his Eſtate with all the Profits which the Perſon ouſted or deſpoiled had therein, as if he had never been ejected [a]. A violent Poſſeſſion cannot be confirmed and made valid even by the Sentence of the Judge.

[f] C. 8.4.3.
[s] D.43.16.1. pr. & 31.& 32.
[t] D.43.16.1. 6.& 7.
[u] D.43.16.3. 15. D.43.16.1.9. & 23.
[v] D.43.16.1. pr.
[w] D.43.16.1. 2.
[x] D.43.16.1. 13.
[y] D.43.16.1. 34. 35. & 36.
[z] D.43.16.1. 30.
[a] D.43.16.1. 31. & 32.

In contra-diſtinction to a *violent* or *forcible* Poſſeſſion, we meet with *clandeſtine* Poſſeſſion, ſaid to be that which a Perſon obtains by ſecret and diſhoneſt means, without any juſt Title accruing to him: As when the true Owner does not know that ſuch a Perſon has got the Poſſeſſion of his Goods or Eſtate. But it is otherwiſe, if the Owner has Knowledge thereof, and ſuffers it, or if the Poſſeſſor has a good Title thereunto. Again, 'tis to be noted, that ſuch Poſſeſſion which was not clandeſtine in the beginning, may become ſo *ex poſt facto*. Now in order to render Poſſeſſion *clandeſtine*, three things are required: *Firſt*, that it be void or empty at the time when the Eſtate is occupy'd, whether this be only *natural* or *civil* Poſſeſſion, or both: And this may happen three ſeveral ways, of which hereafter. For if there be no Voidance of Poſſeſſion, the Perſon cannot acquire it by any Entry. *Secondly*, that ſuch a Poſſeſſion be made, there muſt be an actual Seizing or Apprehenſion of the Thing itſelf. And *thirdly*, it muſt be made againſt the Knowledge, or through the Ignorance of the Perſon that has an Intereſt in the Eſtate or Goods, or it may be even with his Knowledge if he dares not oppoſe the ſame. *Clandeſtinity*, regularly ſpeaking, according to *Albericus de Roſate* [b], is a Fault or Vice rather in the *Perſonalty*, than in the *Realty*; becauſe no Theft or Violence is committed, but only dark Dealings are pretended, as when a Thing is done in hugger-mugger, as we ſay; and Things ſo done, come under the Notion of a perſonal Fault [c], if Theft or Violence be not committed.

[b] In l. 2. D. 41. 3.
[c] I. 2. 4. 7. 7.

That is ſaid to be *vacua Poſſeſſio*, or an empty and void Poſſeſſion, when no other Perſon is in poſſeſſion of the Thing, either *animo* or *corpore*: For as the Poſſeſſion of incorporeal Things is not acquired, without an Intent of poſſeſſing, which is ſaid to be when one does an Act in virtue of his own Right; ſo neither is the Poſſeſſion of corporeal Things acquir'd without Seizing or Apprehenſion, as before obſerved. Poſſeſſion is ſaid to be *vacant* three ſeveral ways, *viz.* either if the former Poſſeſſor be abſent; or *ſecondly*, if he neglects an Eſtate, or dies without a Succeſſor; and *thirdly*,

thirdly, if another Perſon detains that vacant Eſtate in the Name of a Proprietor or Poſſeſſor, the Poſſeſſion of which is vacant; for ſuch Poſſeſſion ſhall be ſaid to be vacant in Law. Hence it is, that if a *Colonus*, or Tenant for a Country Eſtate, detains an Eſtate, which has no Poſſeſſor, or which the Poſſeſſor has neglected, and the *Colonus* ſhall remain in the Eſtate, it ſhall be ſaid to be a *vacant* Poſſeſſion in Law. And the ſame may be ſaid of an *Inquilinus*, or Perſon that rents an Eſtate in the City: For tho' he detains the ſame, yet it is a *vacant* Poſſeſſion in Law.

A Perſon that is let into poſſeſſion of another's Goods, by virtue of a ſecond Decree, acquires a *legal* Poſſeſſion, and ought to be defended in it by the Judge that admits him thereunto. But when I ſay, that a Judge is bound to defend him, whom he has admitted into Poſſeſſion, by his firſt or ſecond Decree, I only mean againſt him, againſt whom ſuch Admiſſion is decreed. For if ſuch Perſon diſturbs me in my Poſſeſſion, I may apply to the Judge without any Libel, and upon Oath or other Proof made hereof, the Judge ought *ex officio* to interdict ſuch Diſturber from all manner of Violence, either under a Penalty, or elſe by an Interdict of *nè vis fiat*: But againſt a third Perſon, againſt whom no ſuch Decree has been interpoſed, he is not obliged to defend him in this Method, but ſuch Perſon ought to exhibit a Libel, and proceed in the ordinary way either upon an Interdict of *uti poſſidetis*, or *undè vi*[d]. But in the Caſe of a private Man, though poſſeſſion be acquired by Delivery, which is made by a private Hand, yet ſuch private Perſon is not bound to defend the Poſſeſſor therein, unleſs the Perſon thus in poſſeſſion has ſome trouble given him on the ſcore of ſome Matter previous to the Delivery. For the Seller is bound to make good the Title of the Thing ſold[e], and to deliver to the Buyer a clear and empty Poſſeſſion, *viz.* ſuch a Poſſeſſion as no other Perſon lays claim to it.

[d] D.42.1.15.6. D. 12.2.11. pr. Bart. ib.

[e] D. 19.1.2.

Though, by a Man's taking on himſelf the Heirſhip, all the Rights which the Teſtator deceaſed had, and which were not extinguiſhed by his Demiſe or Death, do *ipſo jure* paſs to the Heir, yet Poſſeſſion does not: Becauſe though this Poſſeſſion be a Right, yet by the Death of the deceaſed this Poſſeſſion ceaſed in him; and, therefore, it is neceſſary that the Heir ſhould make a new Seizure of Poſſeſſion, and then it becomes a new Poſſeſſion, and not the old one which was veſted in the deceaſed. And the reaſon why the Poſſeſſion of the deceaſed is extinguiſhed by his Death, and not other Rights (as Property and Actions are not,) is, becauſe Poſſeſſion, though it be a Right, yet it has much of the Nature of a Fact in it, ſince it is not retained, unleſs it be by the Body and Mind, as already remembred. As he who loſes the Poſſeſſion of a Thing does not ſeem to have loſt it, if he has an Action or Interdict to recover it[f]. So he that has acquired Poſſeſſion, does not ſeem to have acquired it, if he be obliged by ſome Action or Interdict to refund it. In all doubtful Caſes, thoſe Things ought to be preferr'd, which favour the Perſon in poſſeſſion. Poſſeſſion is not called a Proof, but only relieves the Poſſeſſor from all kind of Proof: Which leads me to conſider how Poſſeſſion may be proved.

[f] D.41.2.17.

A Witneſs proves Poſſeſſion by depoſing, that he ſaw *Titius* in poſſeſſion of ſuch a Houſe or Eſtate: And if he depoſes, that he ſaw him in poſſeſſion, he ought to be underſtood to mean the corporal Poſſeſſion thereof, and that he detains the ſame, becauſe a Witneſs ought to anſwer and depoſe *per verba facti*, and not by Words or Terms of Law; the word *Poſſeſſion* being a Term of Law. Witneſſes depoſing that they ſaw *Titius*, to *hold and to have*, do ſufficiently prove Poſſeſſion; for Poſſeſſion is preſumed to be from the detaining or holding of a Thing. Poſſeſſion is alſo proved by a ſimple De-ambulation over a Field or an Eſtate, if a Man has been frequently wont to walk over the ſame without Interruption from

from another[g]: But a Man's paſſing through another's Field or Eſtate, believing a publick Way to lie there, does not thereby gain him the Poſſeſſion thereof. Poſſeſſion, in ſhort, is thus proved, *viz. ex rei Inſiſtentiâ*, or by an Entry made on the Eſtate, if the Thing be void and not in another's Poſſeſſion, (for 'tis not neceſſary a Man ſhould walk round the ſame[h].) But Poſſeſſion is not proved from hence, *viz.* becauſe the Wife or Son did ſome Acts of Poſſeſſion on the Husband or Father's Eſtate: Becauſe the Wife and Son, that make uſe of Things belonging to the Husband or Father, are preſumed to uſe them in Right of their being of the Family; but after the Father or Husband's Death, the Wife and Son ſeem to be in poſſeſſion thereof.

[g] D. 41.2.3.1.

[h] D. ut ſup.

He that was in poſſeſſion heretofore of a Thing, is preſumed to be ſtill the Poſſeſſor thereof: And this is true, if the Perſon in poſſeſſion alledges the ſame. But this Preſumption has not place, if ſuch poſſeſſion be not pleaded. Yet *Alexander* thinks it not neceſſary to plead ſuch Poſſeſſion, becauſe Poſſeſſion once acquired is not loſt, unleſs the Perſon changes his Mind; and ſuch a Change of Mind ought not to be preſumed, though a Perſeverance be not alledged. But this Reaſon does not ſeem to be concludent; becauſe it is a Rule in Law, that Preſumptions deſcending from a Man's own proper Fact ought to be alledged, in order to give him aid. And though ſuch an Allegation be not made in the Acts of Court, yet it ought to be made after it is concluded in the Cauſe, and at the time of Allegations or Informations in Law; and that is ſufficient. A Perſon that poſſeſſes a Thing, is always in a doubtful Caſe rather preſumed to poſſeſs it on his own account, than in the Name of another Man; and, therefore, the *onus probandi* is incumbent on him that aſſerts the contrary. Hence, no one is preſumed to poſſeſs an Eſtate as a Vaſſal, an *Emphyteuta*, or an Uſufructuary, who poſſeſs their Eſtates in the Name of other Perſons, ſince every one is preſumed to poſſeſs an Eſtate as his own Freehold, and as the Proprietor thereof.

Every Perſon that is found in poſſeſſion of a Thing, is preſumed to poſſeſs that Thing by virtue of ſome precedent Title. Thus if a Perſon buys a Thing, and be found in poſſeſſion of it, he is preſumed to poſſeſs it by virtue of ſuch previous Title of Bargain and Sale. And this holds good, whether he purchaſed it of the true Proprietor, or not: For ſuch a Perſon is preſumed to have poſſeſſed it by ſuch precedent Title, though the ſame be only an invalid and putative Title; yet the contrary may be proved. The Proof of Right in *civil* Poſſeſſion is incumbent on him, who defends himſelf in ſuch Poſſeſſion, and alledged himſelf to have a Right thereunto. But Property cannot be proved, unleſs *civil* Poſſeſſion be alſo proved; nor Property be acquired by an indirect Poſſeſſion. *Civil* Poſſeſſion can only be proved by Acts, whereby ſuch Poſſeſſion is had and acquired. And thus *civil* Poſſeſſion paſſes to a Perſon by Delivery of the Keys: As when a Perſon has ſold Goods repoſited in a Warehouſe, the Poſſeſſion and Property of the Goods paſs to the Buyer, as ſoon as the Seller has delivered him the Keys of the Warehouſe[i]. But,

[i] D. 41.1.9. 3 & 4.

Poſſeſſion is proved ſeveral ways: As *firſt*, by receiving of the Fruits and Profits of an Eſtate[k]: For if a Witneſs ſays, that he ſaw *Titius* receive the Fruits from ſuch an Eſtate, it is a Proof that he was poſſeſſed of ſuch an Eſtate for that Year. Nay, Poſſeſſion is even proved by receiving of the Fruits of an Eſtate without any other Act[l]. But receiving of the Fruits of an Eſtate does not prove the Poſſeſſion of it, when the Fruits were received by a Perſon *Jure Familiaritatis*; that is to ſay, by a Perſon of the Family, as a Son, Servant, *&c.* for ſuch Perſons gain not poſſeſſion by ſo receiving, nor does the receiving of the Fruits prove a poſſeſſion, where there is a *Conſtat*, that another Perſon was really poſſeſſed

[k] D. 4.6.3.

[l] C. 11.47.19.

of ſuch Eſtate, or when the Fruits do not belong to the Perſon that received them, as being only an Agent or Proctor. In Eſtates and Things of a barren Nature, which yield no Fruits, Poſſeſſion is proved by the Uſe of the Thing or Eſtate alone. By Fruits here I mean the civil as well as the natural Fruits thereof. For,

Poſſeſſion may alſo be proved by the receiving of a Rent or Penſion, which is a civil Profit againſt the Perſon paying ſuch Rent or Penſion, according to *Bartolus*, and the Gloſs on the Law here cited [n]: For if a Witneſs ſays, that *Mævius* received a Rent or Penſion from *Seius*, in the Name of *Titius*, it is a Proof that *Titius* was poſſeſſed of ſuch an Eſtate. And it is the ſame thing, if a Perſon confeſſes, that he has paid a Rent or Penſion out of ſuch an Eſtate unto ſuch a Perſon as the Proprietor of the Eſtate: For it is ſufficient Proof, that the Receiver had then the Poſſeſſion of the Eſtate; becauſe a Rent or Penſion ſucceeds in the place of the *natural* Fruits and Profits of the Eſtate. And Poſſeſſion is proved by the Payment of a Rent or Penſion even in prejudice of a third Perſon. Thus the Payment of a Rent or Penſion continued to be made by the Tenant unto the Heir, proves the Poſſeſſion of the Heir himſelf even againſt a third Perſon, who ſhall enter on the Poſſeſſion of ſuch Eſtate deſcended to the Heir. Poſſeſſion is likewiſe proved by the Delivery of the Keys of a Houſe unto any one [o]: For by the Keys, a Perſon enters into poſſeſſion, and the Keys are ſaid to be part of the Thing poſſeſſed; and he who has ſuch poſſeſſion, ſeems to have acquired the Poſſeſſion of the whole Thing. But a Delivery of the Keys is no proof of Poſſeſſion, if the Perſon who delivers them was not in the Poſſeſſion of the Thing [p], unleſs ſuch Delivery ſhall be made by way of Proxy: For no one delivers a Thing, of which he himſelf is not poſſeſſed. The receiving of the Keys of a Houſe, *&c.* is a proof of the Poſſeſſion of the Thing, unto which the ſaid Keys delivered do belong [q]: For by a Delivery of the Keys, the Poſſeſſion of all thoſe Things which are under thoſe Keys, ſeems to be delivered, according to *Baldus* [r]. Poſſeſſion is not transferred by way of a *feigned* Delivery, unleſs the Perſon who gives ſuch Delivery be in poſſeſſion of the Thing. By a *feigned* Delivery, I mean certain artificial Acts introduced by a Diſpoſition and Order of Law, as it happens in the Caſe of *Induction*, &c. And there are ſeveral Caſes in Law, wherein Poſſeſſion may be transferr'd and convey'd by the help of thoſe Acts, even without any corporeal Seiſin or Delivery of the Thing transferr'd, as in the Poſſeſſion or Buſineſs of all incorporeal Rights.

[n] D. 41. 2. 30. 5.

[o] I. 2. 1. 44.

[p] Ordr. Conſ. 209.

[q] D. 18. 1. 74.

[r] In L. 2. C. 6. 38.

Theſe incorporeal Rights, as Services, Juriſdiction, *&c.* are only the Objects of a *quaſi* or an *improper* Poſſeſſion [s]; that is to ſay, they may be improperly poſſeſſed after the Manner and Likeneſs of corporeal Things: For only corporeal Things are the proper Object of Poſſeſſion, as already related. And hence an Advocate, who ſpeaks of the Poſſeſſion of incorporeal Rights, ought to take care, that he does not call this by the Name of *true* Poſſeſſion, but always to ſtile it a *quaſi* or an *improper* Poſſeſſion. But an Advocate would not loſe his Cauſe, though he ſhould ſay, *incorporeal Rights are poſſeſſed*, becauſe the Lawyer ſtiles them thus in the Law here quoted [t]: And *poſſeſſory* Interdicts lie, if any one diſturbs me in ſuch an *improper* Poſſeſſion, as that of Services, Juriſdiction, *&c.* But to return to the Proof of Poſſeſſion.

[s] D. 41. 2. 43. 1.

[t] D. 8. 1. 15. fin.

Which may alſo be made by planting of Trees, or ſowing of Corn upon Land, if the Perſon be ſuffer'd to do it without Moleſtation from another. See *Baldus* and the Doctors [u] that wrote after the Gloſs. Again, Poſſeſſion may be proved by a Perſon's ſetting his Mark or Signature upon Goods as deliver'd to another's Uſe [w]. And laſtly, Poſſeſſion may be proved by Inveſtiture againſt the Perſon that gives ſuch Inveſtiture, but not againſt a third

[u] In l. 3. C. 4. 39.

[w] D. 18. 6. 14.

third Perſon. Nor is Poſſeſſion ſimply proved by Inſtruments or Deeds, tho' made on the delivery of a Thing [v], but a Notary and Witneſſes are neceſſary thereunto: For by ſuch Deeds and Inſtruments only, a Power of poſſeſſing is underſtood to be granted. Witneſſes depoſing that *Titius* has had an Eſtate for ſix Months laſt paſt, do prove him to have poſſeſſed it for the whole Year.

[v] D. 41. 2. 48. Bart. ib.

Poſſeſſion may be loſt various and ſeveral ways. As *firſt*, when the Poſſeſſion of an immoveable or real Eſtate is taken away from a Perſon by a violent and forcible Entry [w], and the Poſſeſſion of a moveable Thing by Theft and Fraud [x]; or *ſecondly*, when a Thing is occupy'd by an Inundation [y], or becomes ſacred and religious [z], or is changed into another *Species*; and laſtly, if the Judge puts another Perſon thereinto by his firſt and ſecond Decree [a], and the like. If a Poſſeſſor rents or hires a Thing of a Perſon that is not the Poſſeſſor, he transfers the Poſſeſſion on the Perſon that has it [b]. *Titius*, *bonâ fide*, purchaſed an Eſtate of one that was not the true Owner or Proprietor, and rented the ſaid Eſtate of the true Owner: In this caſe he is ſaid to ceaſe to poſſeſs it. Poſſeſſion is more eaſily loſt than Dominion and Property: For *civil* Poſſeſſion is loſt through a courſe of ten Years time: but the Perſon that alledges the loſs thereof, is obliged to prove the ſame. A Perſon loſes the *civil* and *natural* Poſſeſſion of a Thing, if he by whom he poſſeſſes it be diſſeiſed or put out of poſſeſſion of it, equally as if he had deliver'd the Poſſeſſion itſelf: But this does not extend to a Pupil or the Exchequer. The *civil* Poſſeſſion of a moveable Thing is alſo loſt, when a Man cannot acquire the *natural* Poſſeſſion of it [c]: As when Goods are thrown into the Sea, and cannot be recover'd; but if they may be recover'd, the *civil* Poſſeſſion ſtill remains with the Owner. In a doubtful caſe, no one is preſum'd to have loſt his *civil* Poſſeſſion of a Thing; for ſuch Poſſeſſion is retain'd in the Mind of the Perſon poſſeſſing.

[w] D. 41. 2. 30. 1.
[x] D. 41. 3. 5.
[y] D. 41. 2. 3. 17.
[z] D. 41. 2. 30.
[a] D. 41. 2. 30. 1.
[b] D. 41. 2. 19.
[c] D. 41. 2. 13.

He that is out of Poſſeſſion, if he brings his Action to recover, muſt be ſure to make a good Title: For where one Man would recover any thing from another, it is not ſufficient for him to deſtroy the Title of him in poſſeſſion, ſince the Perſon claiming muſt recover by his own Strength, and not by the Weakneſs of the adverſe Party. And thus the Perſon in poſſeſſion may be in a better Condition than the Perſon claiming [d]: And a prior Poſſeſſion is a good Title, againſt him who has none at all. Another effect of Poſſeſſion, is, that it is a ſufficient Cauſe to maintain an Action againſt a Wrong-doer: And in a doubtful Caſe, a Perſon in Poſſeſſion is always preſumed to be in Poſſeſſion rather in his own Right, than on the account of another; and he that avers the contrary, is bound to prove his Averment, as before remembred. And he is preſumed to be in poſſeſſion rather in virtue of his own Right and Title, than by the Right and Title of another, when a Cauſe appears whereby ſuch a Perſon may probably be in Poſſeſſion in his own Right, as that he has a precedent Title by Gift, Bargain, and Sale, *&c.* Immemorial Poſſeſſion has the Force of a Title and a Privilege.

[d] D. 22. 3. 2.

To *detain* a Thing is one thing, and to *poſſeſs* it is another: For it may happen that one Perſon may be the Tenant, and another may have the Poſſeſſion. As when a Renter is the Tenant, and holds it in actual Tenancy, and the Proprietor has the Poſſeſſion of it by his Tenant or *Colonus* [e]: And this laſt we may ſtile *civil* Poſſeſſion. In retaining Poſſeſſion, the Mind of the Perſon alone is ſufficient [f]: But in acquiring Poſſeſſion it is otherwiſe; for then there muſt be both an Intent of poſſeſſing [g], and a corporal Seiſin [h], as aforeſaid. But a Thing which is in my Poſſeſſion by Contract, becomes mine by the Conſent of the Owner, without any Delivery. A Perſon that is a Poſſeſſor *malæ fidei*, by Conteſtation of Suit, is not only bound to the Payment of ſuch Fruits as he himſelf acknowledges to have received, but

[e] D. 41. 2. 9.
[f] D. 41. 2. 25. 1. D. 41. 2. 6. 1.
[g] D. 41. 2. 25.
[h] D. 41. 2. 3. pr.

even

even to pay thoſe which he might have received: And his Heir on his Death is accountable for the ſame, if not paid; for that the ſame Fate attends him for his Teſtator's Fault[i].

[i] C. 7. 51. 2.

TIT. XI.

Of Alienations, *and who may alienate, and what may be alienated, and what is prohibited to be alienated.*

THE Word *Alienation* in Law is taken in a twofold Senſe, *viz. firſt*, properly and ſtrictly: And *ſecondly*, improperly, or in a large Senſe thereof. In a ſtrict Senſe, according to *Alciatus*[k], it is only the loſs or transferring of Property. But, in the improper Senſe of the Word, it comprehends every Action, whereby we transfer the Right and Property of a Thing unto another: Which may be done ſeveral ways; as by Uſucapion, the granting of an Uſufruct, by the remitting of a Service which is due, by the mortgaging of an Eſtate, and the like[l]. And thus the Word *Alienation* is a Term of a large Signification: For it not only relates to the transferring of a *direct* and an *utile Dominium*, called an Uſufruct, but even to Uſucapion, and the plighting of Pawns and Mortgages[m], as aforeſaid. And this, whether ſuch Alienation be forbidden by a Law, or in ſome Contract, or in a Laſt Will and Teſtament. But then ſome Perſons will have this to be only true, when the Word is taken in a large Senſe: For, in a proper Senſe of the Word, an Alienation only extends itſelf to the transferring of the *direct* Properties of Eſtates. Thus an Alienation, in the general Senſe of the Word, is a transferring or parting with ſome Right, which was mine before ſuch Alienation made unto another Perſon, who is by this means made the Proprietor thereof: So that the Right and Property of the Thing, departs and goes from me to him, as the now Lord and Owner of it.

[k] In L. 28. D. 50. 16.

[l] C. 4. 41. 7. X. 3. 13. 5.

[m] C. 4. 51. 7. C. ut ſup.

There are ſome Perſons, that are the Proprietors of a Thing, who cannot alienate the ſame, as being only Tenants for Life; and others, who are not the Proprietors of a Thing, may alienate the ſame: And in both theſe Caſes we recede from the common Rules of Law. Wherefore, I ſhall here under this Title *firſt* conſider, when the Proprietor of a Thing cannot alienate that which is his own: For it ſometimes happens, that he who has the Dominion and Property of a Thing, cannot transfer the Property of it to another. As the Husband has the Property of the Wife's Dower, as long as Marriage ſubſiſts, but yet he cannot transfer the Property of it to another: And in this ſenſe he cannot alienate his own; becauſe he is only Tenant for Life, and the Thing is not capable of Alienation. And, *ſecondly*, it ſometimes happens, that he who is not the Proprietor, may alienate the ſame on the account of the publick Advantage. And, *thirdly*, I ſhall conſider, when an Alienation is prohibited, in reſpect of the Perſon alienating, or elſe in reſpect of the Perſon to whom ſuch Alienation is made, as in the caſe of a Pupil.

'Tis

'Tis a known Rule in Law, that a Vaſſal or Feudatary is at this day forbidden to alienate a *feudal* Eſtate, without the Lord's Conſent[n]. So that he cannot ſell or leaſe out the ſame for any length of Time, nor can he grant it by way of Dower, nor *in emphyteuſin*, nor deviſe or impawn the ſame, nor even give it to the Church *pro ſalute animæ*, nor to any Hoſpital or Place of Piety, according to the *Feudiſts:* Becauſe in *feudal* Matters the Word *Alienation* is a Term of a very large extent, and includes all the Premiſes; denoting every Act whereby Property is transferr'd. Therefore ſince a *Fief* cannot be alienated without the Lord's Conſent, it is not only forbidden to be ſold, but alſo to be given by Grant or Legacy, and likewiſe to be exchanged, *&c.* For it properly paſſes by all theſe ways. For tho' the Property, in ſome of theſe caſes, be not loſt or gone to another; yet the Condition of the Eſtate may be rendred worſe thereby[o]. If Children, pointed out by their Names, are forbidden to alienate an Eſtate, ſuch Prohibition is not extended beyond ſuch Children; and, conſequently, it is not extended unto the Grand-children: But a Prohibition of an Alienation, made in order to eſtabliſh the Perpetuity of an Eſtate in a Family, and that it ſhould never go out of the Name of ſuch Family, is underſtood to be made unto Grand-children, and unto the Heir of an Heir. But, according to *Bartolus*[p], it is not extended beyond the fourth Generation: For the laſt of ſuch Family ſurviving, may alienate ſuch an Eſtate unto any Perſon, when it comes into his hands.

[n] F. 2. 52. 1. F. 2. 55. cap. un.

[o] C. 4. 51. l. ult.

[p] In l. 114. D. 30. 1. 14.

The Law forbids a Thing, which is *litigious*, to be alienated: And a Thing is ſaid to be *litigious*, when there is any diſpute about the Property thereof[q], whether ſuch Diſpute be by convening the Party into a Court of Judicature, or by a Supplication made unto the Prince. But a bare Proteſtation, or Notice given unto a Buyer that he ſhould not buy a Thing, becauſe the Property is in diſpute, does not hinder a Contract of Alienation, nor make a Thing to be *litigious*[r]. For if I go to buy an Eſtate of *Titius*, and you come and tell me, that I ſhould not buy it, becauſe you will ſue for the Eſtate as yours; ſuch Notice or Proteſtation avails nothing, in reſpect of interrupting the Contract, but I may ſecurely buy it notwithſtanding ſuch Commination. Nay, if I ſhall purchaſe an Eſtate of you, touching which *Titius* and *Sempronius* are at Law, and I have notice given me of this Controverſy of theirs; yet I may ſafely buy it, becauſe no one is at Law with you about it. Hence, if I am caſt out of Poſſeſſion of the Thing purchaſed, and upon ſuing for the Poſſeſſion have the *vitium litigioſi* objected to me, becauſe theſe two Perſons are at Law about the Eſtate purchaſed, I may be relieved againſt an Exception *rei litigioſæ*, that it ſhall not affect me, becauſe ſuch foreign Suit does not prejudice me. But tho' the Law forbids a *litigious* Thing to be alienated; yet a Diviſion may be made of ſuch *litigious* Thing, between the Heirs on the death of the Litigants. And ſuch *litigious* Thing may be bequeath'd by the Teſtator, and the Legatary may carry on the Suit. But an Eſtate or Thing mortgaged by a Debtor, does not become *litigious* by a Suit commenced on the Thing mortgag'd; nor is the Alienation thereof prohibited: But yet, I think, the Creditor ought to be conſulted herein.

[q] Nov. 112. c. 1.

[r] D. 44. 5. 1.

A Prohibition of Alienation, without a reaſonable Cauſe aſſigned, is not valid; becauſe the Law abhors Perpetuities: But if a juſt Cauſe be added or underſtood, ſuch Alienation is then valid. A Perſon prohibited to alienate a Thing, cannot conſent to a Perſon alienating that Thing; for to alienate, and to conſent to an Alienation, are Things equal, whenever there is the ſame Reaſon ſubſiſting: But tho' to alienate, and to conſent to an Alienation, are Things equal, as aforeſaid; ſo that he may alienate, who may conſent to an Alienation; and, on the other hand, he who is forbidden to alienate, is alſo forbidden to conſent to an Alienation[t]: Yet where the Reaſon ſubſiſting is different, to alienate is one Thing, and to conſent to an Alienation is another[u].

[t] D. 50. 17. 165.

[u] D. 50. 17.

As for example, the Seller is liable to an Eviction, tho' no Agreement be made touching the ſame; yet if one Perſon ſells, and an extraneous Perſon has conſented to the Sale, he is not liable to the Eviction, unleſs he has received the Purchaſe-Money. If thoſe Perſons conſent to an Alienation, whoſe Intereſt it is that the Thing ſhould be alienated, ſuch Alienation cannot afterwards be revoked for lack of Conſent [t].

[t] D. 30. 1. 120. 1.

An Alienation *in fraudem Legis* is invalid *ipſo Jure*, and needs no declaratory Sentence: But an Alienation *in fraudem Hominis* is valid, though it may be afterwards annulled or reſcinded by a Sentence of Revocation [u]. No one can transfer more Right unto another Perſon than he has in himſelf, and is known to him [v]. As for inſtance, I ſell you a Horſe, and in virtue of ſuch Sale I deliver the Horſe to you: Now the ſame Right which I the Seller had in ſuch Horſe, paſſes unto you the Buyer. Wherefore, if I had the *direct* Property of that Horſe, the *direct* Property paſſes unto you the Buyer: But if I had only the Uſufruct thereof, then only the *utile Dominium* or Uſufruct paſſes, or is transfer'd to you the Buyer [w]. But this Rule is otherwiſe in a Tutor, Curator, and likewiſe in a Proctor, Judge, Executor, Creditor, and a Seller *malæ fidei*. That Thing is not properly ſaid to be alienated or transfer'd, which ſtill remains in the Property of the Seller; but yet it may be rightly ſaid to be ſold [x]. If a Perſon ſhall attempt to alienate any Right of the Church, and to bring Damage thereon by ſuch Alienation, he is by the *Canon* Law deemed an impious Perſon, if he has not already confer'd an Eſtate on the Church: For by that Law the Alienation of Eccleſiaſtical Goods and Eſtates is not valid and binding, without ſuch a Diſpoſition: And ſuch as receive the ſame, as well as thoſe that make ſuch Alienation, do incur the Cenſure of Excommunication [y]. But even by that Law, Eccleſiaſtical Eſtates may be alienated by the Conſent of the Chapter [z].

[u] D. 37. 14. 16.

[v] D. 50. 17. 54.

[w] D. 19. 1. 10. pr.

[x] D. 50. 16. 67.

[y] X. 3. 13. 6.

[z] X. 3. 13. 8.

It has been already hinted, that there are ſeveral *Species* of Alienation, *viz.* By Grants; letting to hire or farm beyond the Term of three Years; by Hypotheques, vulgarly called Mortgages; by Infeudation; and by a Contract of *Emphyteuſis*, unleſs it be in Caſes allow'd of by Law: And this ought to be of ſuch Eſtates, as have been anciently accuſtom'd to be granted by way of *Emphyteuſis*, and ought to be for a Term of Years. For as the making and conſtituting a Mortgage, and the giving of a Pawn or Pledge are both compriſed under the Word *Alienation*, ſince the Mortgagee has a Right in the Thing mortgag'd or the hypothecated Eſtate, and the giving of a Pawn transfers the Poſſeſſion of ſuch Pawn to the Creditor: So the making and conſtituting an *Emphyteuſis* [a], or any *feudal* Tenure, is a *Species* of Alienation; ſince the Right of Poſſeſſion, and the Uſufruct of theſe Things, *viz.* of an *Emphyteuſis* and a Fief, are convey'd to the Party accepting thereof. A Perſon prohibited to alienate a Thing, cannot make a *Tranſaction* thereon; becauſe a *Tranſaction* comes under the Name of an Alienation [b]: And this is true, according to *Bartolus*, if the Thing be deliver'd; but is otherwiſe, if the Thing be retain'd by the *Tranſaction*. A *Tranſaction* is an Agreement about an uncertain and doubtful Suit, both the Litigants yielding up part of their Pretences on each ſide. He that is prohibited to alienate a Thing, cannot promiſe that Thing to another [c]: Becauſe to pay and to promiſe *quoad hoc* are the ſame thing, theſe being equivalent Terms in Law [d]. And by a Prohibition of Alienation every thing is prohibited, whereby we come at an Alienation [e]: And, therefore, ſince by a Promiſe we come at an Alienation, a Promiſe of Alienation is adjudged to be prohibited; becauſe Promiſes ought to be kept and obſerved [f]. But at this day, a Promiſe does not include under an Alienation. And as a Mortgage is a *Species* of Alienation, a Perſon forbidden to alienate a thing cannot mortgage it, or engage it any other way either generally [g] or ſpecially. By the word *Alienation* we alſo underſtand a *Sale*, whether ſuch

[a] C. 4. 66. 3.

[b] D. 38. 5. 1. 9.

[c] C. 4. 42. 2.

[d] C. 6. 49. 19.

[e] D. 23. 1. 16.

[f] C. 4. 3. 1. un.

[g] Bart. Conſ. 36. vol. 2.

Alienation has been forbidden to be made by the Teſtator or any other Perſon. If an Alienation be permitted, *Uſucapion* is alſo permitted; and ſo *vice versâ:* And where an Alienation is prohibited, every *Species* of ſuch Alienation is deemed to be prohibited. When an Alienation is prohibited either by Law, or by a Teſtator, *Uſucapion* is alſo deemed to be prohibited.

He who alienates all his Goods and Eſtate, though he does not ſay, that he does it in fraud of Creditors, is yet by that very Act preſumed to do it in fraud of Creditors [h]; and ſuch Alienation may be revoked by the Office of the Judge, eſpecially if it be made pending a Suit: But an Alienation made in fraud of future Creditors cannot be ſo revoked by ſuch Creditors, according to *Bartolus* [i]. An Alienation prohibited for a time only, ſeems to be permitted after the Expiration of the ſaid Term. *Seius* made his Son his Heir, and in the ſame Will wherein he made him his Heir, he forbad him to ſell, give, or impawn his hereditary Eſtate at *Tuſculum*, adding theſe Words, *viz. If my ſaid Son ſhall act contrary to my Will, I would have my Eſtate go to the Exchequer, ſo that my ſaid Eſtate ſhall never go out of the Name and Family.* After the Teſtator's Demiſe the ſaid Heir retained the Eſtate to the Time of his Death, and at the Time of his Death he gave the ſaid Eſtate, with other of his Goods, unto a certain extraneous Perſon. *Quære*, Whether the ſaid extraneous Perſon may hold the Eſtate, or whether it ought to go to one of the Teſtator's Family, or to the Exchequer? And it ſeems, that ſuch extraneous Perſon could not hold the ſaid Eſtate; becauſe *Seius* the Teſtator ſaid, that he would never have the Eſtate go out of his Name or Family.

[h] D. 6. 2. 17. D. 42. 9. 17.

[i] In l. 9. D. 42. 8.

There are ſeveral Perſons that are forbidden to transfer or alienate their own Eſtates, beſides thoſe already remembred; as a Prodigal, Ideot, Madman, Minor, a Perſon under the Power of his Father, a Perſon guilty of Treaſon, and a Perſon that oppoſes the Chriſtian Faith, called an Heretick; nor can the Church alienate its Lands. For by a Novel Conſtitution [k] the Church cannot alienate or mortgage a real Eſtate even unto another Church, if it received ſuch Eſtate from the Grant of the Emperor: But if the Church received ſuch real Eſtate from the Gift of a private Hand, it might alienate the ſame, if the Debts of the Church required ſuch Alienation [l]. Again, though a baniſh'd Perſon cannot alienate his Goods or Eſtate during the Time that ſuch Baniſhment continues; yet he may perſonally oblige himſelf in ſuch a manner, that after the Removal of ſuch Bann, ſuch Alienation ſhall be valid [m]; and thus an Alienation prohibited for a time only, ſeems to be permitted after ſuch Time is expired, as aforeſaid. As a Religious Place cannot be alienated or mortgaged, which is a kind of Alienation; ſo this Law is alſo extended to every College or Society of Men that has been founded on the ſcore of Piety; for ſuch Society are hereby prohibited to alienate or mortgage their Eſtates [n]. If a Thing, ſacred, or dedicated to Religious Uſes, be alienated by Sale, Mortgage, *&c.* the ſame may be recovered from ſuch Perſons, as ſhall preſume to receive the ſame, by all lawful ways and means; and the Biſhop, as well as the Treaſurer of the Church, may have a real Action for the ſame [o].

[k] Nov. 120. c. 7.

[l] Nov. 120. c. 6. & 7.

[m] D. 6. 1. 1.

[n] Nov. 120. c. 6. & 7.

[o] C. 1. 2. 21.

Though a Creditor be not the Proprietor of the Thing impawned or mortgaged to him; yet if he alienates ſuch Pawn or Mortgage either by Pact or Law, (for he may do either) he transfers the Property to another; but then he ought to obſerve the Mode and Form preſcribed by Law [p]. For if there be a Pact made about ſelling it, then the Creditor ought to give the Debtor notice of his Intention, that he may redeem it, if he pleaſes; and after two Years expired, he may ſell it. For in this caſe, he ſeems to do it by the Will and Conſent of the Debtor, who covenanted that the Creditor might ſell it, if the Money was not paid within the time

[p] I. 2. 8. 1.

time appointed. He ſeems, according to *Bartolus* [q], to have alienated a Thing, who has pawned or mortgaged it for ſo much Money, that it is not likely that he will ever be able hereafter to redeem it. Though a Perſon be ſaid to alienate a thing, who transfers any Right of Property therein: yet he who ſells a thing, transfers no Right of Property, (for the Properties of Things ſold are transferr'd by Delivery:) And, therefore, he is not rightly ſaid to have alienated a thing, who can only be convened in a *perſonal* Action. An Alienation, made by an Heir touching a thing prohibited to be alienated, cannot be revoked during the Heir's Life-time, but after his Death it may. If an Alienation be forbidden, ſuch Prohibition does not extend itſelf to a *neceſſary*, but only to a *voluntary* Alienation; for we have this diſtinction of Alienations.

[q] In l. 9. D. 33. 10.

TIT. XII.

Of Succeſſion *by Laſt Will and Teſtament, and the manner of ordering Wills; of the ancient Way of making Teſtaments, according to the* Civil *Law; and of the ancient Way of diſpoſing, according to the* Prætorian *Law; and of the Solemnities added by* Juſtinian: *Who may be Witneſſes to a Will, and who not; and of the manner of expounding Wills,* &c.

PERSONS at the Time of their Death do uſually diſpoſe of their Eſtates in writing, by one of theſe two ways, *viz.* either by *Teſtament* or by *Codicils:* And between theſe two there is a wide difference, as I ſhall hereafter remark in the following Sheets. I ſhall here ſpeak of Succeſſion by Laſt Will and Teſtament: For there is a twofold kind of Succeſſion unto Eſtates, ſtiled *Teſtate* and *Inteſtate*; the firſt is by Teſtaments and Codicils; and the latter, when a Perſon dies without a Teſtament, or (at leaſt) ſuch as is valid in Law. That kind of Succeſſion, which flows from a Laſt Will and Teſtament, is what we term *Civil* and *Prætorian* Succeſſion. The firſt of theſe is, when a Man does either by a Laſt Will or a Codicil become a Succeſſor unto the whole Subſtance of a Perſon deceaſed, or unto any Part thereof. And this kind of Succeſſion is properly ſtiled *Hæreditas* in our Books, or the Heirſhip unto an Eſtate. The *Honorary* or *Prætorian* Succeſſion is that, which is in other Terms called the *Bonorum-Poſſeſſio:* Wherefore, thoſe are named *Heirs*, who ſucceed by the *Civil* Law; and thoſe are ſtiled *Bonorum-Poſſeſſores*, or Poſſeſſors of the Goods, who ſucceed by the *Prætorian* Law. Having premiſed thus much touching Succeſſion in general, for the better Illuſtration of the preſent Title, I ſhall under this Title enquire, *Firſt*, what a Teſtament is, and how it differs from a Laſt Will or Codicil. *Secondly*, I ſhall conſider the ancient way of ordering and making Teſtaments among the *Romans*, according to the *Civil* Law, and the ancient way of diſpoſing of Eſtates, according to the *Prætorian* Law, and diſcourſe of the Solemnities added by *Juſtinian*. *Thirdly*, I ſhall examine what Perſons may make

make Wills and Teſtaments, and who may be Witneſſes thereunto, and who not. *Fourthly*, I ſhall ſpeak of ſolemn or perfect Wills, and likewiſe of leſs ſolemn or imperfect Wills. And laſtly, I ſhall lay down the manner of expounding Wills or Teſtaments, with many other Particulars relating to this Title.

Now a Teſtament, as *Ulpian* defines it [r], is a Sentence or Declaration of the Teſtator's Mind, touching what he would have to be done after his deceaſe: And it is ſo called, becauſe it is a *Teſtatio Mentis* [s], a teſtifying of the Mind. Indeed, *Aul. Gellius* [s] laughs at this Etymology as ridiculous; and ſo does *Laur. Valla* [t]: But neither of them have given us a better. Both by the ancient and modern Law, Teſtaments, properly ſo called, are ſuch Deeds as are made in writing during the Teſtator's Life-time; and, improperly ſpeaking, a *nuncupative* Will may be ſtiled a Teſtament. But to the end that we may not be ignorant of the ancient Law touching this Buſineſs, it will be neceſſary to obſerve, that heretofore there were two ſorts of Teſtaments in uſe, one of which the *Romans* made uſe of in time of Peace and Tranquillity, and this they called *Teſtamentum Calatis Comitiis*, becauſe it was made in the Aſſemblies of the *Roman* People: And the other being made when they went to War, was ſtiled *Teſtamentum Procinctum*, or a Military Will. But in proceſs of time, another ſort of Will was introduced, which was termed a Teſtament *per Æs & Libram*, becauſe it was made by Emancipation, *viz.* by a certain kind of imaginary Sale before five Witneſſes, and in the preſence of one Man who held a Balance in his Hand, and alſo in the preſence of him who was the Purchaſer of the Succeſſion, in *Latin* called *Emptor Familiæ* [u], (for the word *Familia* ſignifies an Inheritance, as well as a Family of Perſons:) And all theſe Perſons were to be *Roman* Citizens or Subjects of the Male-kind, and ſuch as were arrived at the Age of Puberty. But the former kinds of Teſtaments were aboliſhed and grew into diſuſe through Length of Time. And though the laſt, which was made *per Æs & Libram*, continued much longer in being than the other two; yet the laſt in Tract of Time alſo partly ceaſed to be in uſe. The ſecond ſort was called *Teſtamentum Procinctum*, or *in Procinctu*; becauſe it could only be made by Soldiers when they were girt and ready to go out to War, *quaſi accincti & parati ad pugnandum*, namely, when they were drawn out to fight, or marching in ſome military Expedition. In reſpect of the third ſort of Teſtament, the Teſtator ſold the Succeſſion by an imaginary Sale unto him, whom he intended to make his Heir, in the preſence of the aforeſaid Number of Witneſſes, and of him whom he deſigned for his Heir, and who purchaſed the ſame at a ſmall Value, which being the Price of the Succeſſion, the Teſtator received. Theſe five Witneſſes were to be preſent in the Behalf of the Heir, and he who held the Balance was to be preſent to ſee that the Price, which the Heir paid the Teſtator, was a juſt Price for the Succeſſion which he ſold him. Theſe three *Species* we derive from the *Civil* Law: But afterwards the *Prætor* by his Edict introduced another Form of making Teſtaments.

For by the *Prætorian* Law, Teſtaments were made without any Emancipation: And, according to this Form, there ought to be ſeven Witneſſes [v], who ought to ſet their Seals thereunto, which the *Civil* Law did not require. But the *Civil* and *Prætorian* Law being ſoon after reduced to an Agreement herein, as well by Uſage, as by the Imperial Conſtitutions, it was at length ordered, that the Will ſhould be atteſted by the Number of ſeven Witneſſes, without any other Solemnity in reſpect of the Form thereof, which the *Civil* Law in ſome meaſure required; and thoſe Witneſſes were to be preſent together at one and the ſame time on the Day of ſubſcribing themſelves, as appears from the Imperial Conſtitutions; and by

[r] D. 28. 1. 1.
[s] I. 2. 10. pr.
[s] Lib. 6. c. 12.
[t] Lib. 6. c. 36.
[u] I. 2. 10. 1.
[v] I. 2. 10. 3.

an Edict of the *Prætor*, they were to ſet their Seals thereunto. So that the Form and Validity of a Will was eſtabliſhed upon a tripartite kind of Law. For as the Neceſſity of Witneſſes, and their Preſence at one and the ſame time, was founded on the *Civil* Law, and the Subſcriptions of the Teſtator and the Witneſſes on the Imperial Conſtitutions: So was the Sealing and the Number of Witneſſes built on the Edict of the *Prætor*. But in order to verify the Will, and to prevent the Commiſſion of any Fraud or Forgery; beſides theſe Formalities above-mentioned, the Emperor *Juſtinian* by a Conſtitution of his added another Solemnity, enjoining, that the Name of the Heir appointed ſhould be expreſs'd either in the Hand-writing of the Teſtator himſelf, or of one of the Witneſſes; and ordered, that all theſe Formalities ſhould be obſerved according to the Diſpoſition of this Conſtitution. But this Law was afterwards repealed and ſet aſide by a Law in the *Novels* [w]. All the Witneſſes may make uſe of one and the ſame Seal to ſtrengthen the Will: And if all the Seals ſhall be engraved after the ſame manner, as it is poſſible, the Witneſſes may in ſuch a caſe uſe the Seal of another Perſon to ſeal the Will; and ſo they may if this does not happen. And thus though the making of a Laſt Will and Teſtament was invented by the Law of Nations, and not introduced by the *Civil* Law; yet the Solemnities thereof owe their Riſe to the *Civil* Law.

[w] Nov. 129. c. 9.

By the Imperial Conſtitutions, there are only two kinds of Wills now in uſe: The one ſtiled *Teſtamentum Paganicum*, and the other a *military* Will. The *Paganicum* is either a *ſolemn* Will in writing, or elſe a *nuncupative* Will. To render a ſolemn Will in writing valid, ſeveral things are required according to the Imperial Conſtitutions. *Firſt*, that it be written either by the Teſtator himſelf, or by ſome other Perſon, in Words at length [x], in order to prevent any doubt about the ſame. *Secondly*, that there be an Heir expreſſly named or appointed therein by the Teſtator [y]. And *thirdly*, that it be ſubſcribed and ſigned by the Teſtator, or by ſome other Perſon in his Name and Stead [z], but yet in the Teſtator's Preſence, and before ſeven Witneſſes, who were all to be Citizens of *Rome*, ſolemnly requeſted hereunto. The Witneſſes were either to ſubſcribe the ſame in their own Perſons [a]; or, if ſo many Perſons could not be found as could write, one Perſon might ſubſcribe for another [b]: And if they had not Seals of their own, they might ſeal it with the Seals of other Men [c]. If another Perſon wrote the Will, then the Teſtator was to ſubſcribe it himſelf [d]. But if the Teſtator could not write, then an eighth Witneſs was to ſubſcribe the Will in his Name. But though, regularly ſpeaking, ſeven Witneſſes were required beſides the Notary; yet in ſome Caſes, a leſſer number of Witneſſes were ſufficient, as in a Teſtament *inter Liberos* [e], and in a Will made to *charitable Uſes* [f], and likewiſe in a Will made in the time of any Plague or War, and when it was regiſtered at the Acts of Court, tho' this was done in a private manner [g]. For thoſe things are ſaid to be done *apud acta* (eſpecially in things which are Matters of *voluntary* Juriſdiction, as the making of a Will is,) when they are ſped before the Judge, though they be not ſped in open Court [h].

[x] C. 6. 23. 21. 1.
[y] C. 6. 23. 19.
[z] C. 6. 23. 29.
[a] C. 6. 23. 21.
[b] C. 6. 23. 31.
[c] D. 28. 1. 22. 2.
[d] C. 6. 23. 12.
[e] C. 6. 23. 21.
[f] X. 3. 26. 10.
[g] C. 6. 23. 19. & 21.
[h] C. 1. 13. 1.

As a Teſtament is a juſt and ſolemn Declaration of a Man's Will touching what he would have to be done after his natural Death, with a direct Appointment of an Heir [i]; it is therefore neceſſary in him who makes a Teſtament, that he ſhould be of ſound Mind and Memory at the time of making the ſame; but Sanity of Body is not required [k]. The making of a Teſtament is not a matter of a private, but of a publick Right: And, therefore, the Form of it cannot be injured by the Pacts of private Men [l]. Nor can the Teſtator in his Will command any thing in Derogation of the publick Law, or of any Statutes or Juriſdiction whatſoever. In a Queſtion touching the Validity of a Will, we ought firſt to conſider, whether he who makes a Will had the Power of doing it (for no one has this active

[i] D. 28. 1. 1.
[k] D. 28. 1. 2.
[l] D. 28. 1. 3.

Power but whom the Law permits [m]:) And then if he had this Power, we ought to enquire whether he made it according to the Rules of the *Civil* Law [n]; though ſome of theſe Rules are ſince antiquated, as I ſhall note in the Sequel of this Title.

[m] D. 50. 16. 120.

[n] D. 28. 1. 4.

Now all Males that are not prohibited by Law, may make their Wills at fourteen Years of Age, and Females at twelve: And in regard to this Age, a Day begun is reckoned as a Day complete [o]. As when a Perſon is born on the Calends of *January*, he may on his Birth-day, being arrived at Puberty, make his Will; for he ſeems to have compleated the laſt Day of his fourteenth Year: And it is the ſame thing in reſpect of a Woman, that is come to Age the laſt Day of her twelfth Year. Nay, if the Perſon made it before the ſaid Calends, after ſix a-clock in the Evening, the Will is valid [p]. Perſons that are deaf, dumb, and blind may make their Teſtaments, but then it ought to be according to the Form delivered by *Juſtinian* [q]. But though it be permitted unto ſeveral Perſons to make a Teſtament; yet all Men are not allowed this liberty: For Perſons that are ſubject to the Power of another, as Bondmen, Captives, and Children under the power of their Fathers, *&c.* Wherefore, ſince all Perſons may make a Will that are not prohibited by Law ſo to do, it will be better known what Perſons are capable of doing it, by knowing what Perſons can by Law to do it. Now *Bartolus* [r] reduces theſe Perſons to five Claſſes. For ſometimes a Perſon is prohibited to make a Will through a Defect of Power in himſelf, as a Son under the power of a Father, an Hoſtage, Monk, Bondman, *&c.* ſometimes a Defect of Mind and Underſtanding, as a Perſon under the Age of Puberty, an Ideot, Madman, Prodigal [s], *&c.* ſometimes through a Defect of bodily Senſe, as a Perſon blind, deaf, dumb, *&c.* unleſs it be according to the Form preſcribed by *Juſtinian* [t], as aforeſaid. Sometimes on the ſcore of Puniſhment, as a Perſon condemned to death: And ſometimes in reſpect of ſome Doubt, as when there is a Doubt touching the State of the Teſtator.

[o] D. 28. 1. 5.

[p] D. ut ſup.

[q] C. 6. 23. 8. & 10.

[r] In l. 4. D. 29. 3.

[s] I. 2. 12. 2.

[t] I. 2. 12. 5.

Firſt then, a *Filius-familias*, or Perſon under the power of the Father, is forbidden to make a Will, having a Father alive, in whoſe power he is: For though ſuch a Perſon ſhould be a hundred Years of Age, yet he can neither make a Will, nor a Codicil; nay, he cannot make a Will even by the Permiſſion of his Father or Grandfather [u]. And this is, according to *Paulus de Caſtro*, becauſe a Laſt Will ought to proceed from the free Will of the Teſtator, and not depend on the Will of another Perſon. And *ſecondly*, becauſe the making of a Will is a matter of publick Right. And thus he who has not a Power *à jure publico*, cannot obtain that Power from a Thing inferior to it. But though a *Filius-familias* can neither make a Will of a *profectitious* or *adventitious* Eſtate; yet he may make a Will touching thoſe Goods which he has gained in the Wars, or of his *Peculium quaſi Caſtrenſe*, becauſe in reſpect of ſuch Goods he is in the Place of a *Pater-familias*. For if he be in an Expedition, he may then make a Will according to the Privilege of a Soldier; and if he be at home getting Money by his Learning or Induſtry, he may then make a Will of his *Peculium quaſi Caſtrenſe*, according to the Diſpoſition of the common Law. But a Son in the power of the Father may make a Donation *mortis causâ* by the Permiſſion of his Father, provided this be done by expreſs Premiſſion [w]. For, beſides Teſtaments, properly ſo called, there are other Laſt Wills, among which we may reckon a Donation *mortis causâ*, or in Contemplation of Death; as it plainly appears from the *Code* [x], *Digeſts* [y], and *Inſtitutes* [z].

[u] D. 28. 1. 6.

[w] D. 39. 6. 25. 1.

[x] C. 6. 36. 8.

[y] D. 39. 6. 32.

[z] I. 2. 7. 1.

Secondly, A Perſon under the Age of Puberty is forbidden to make a Will, though he has no Father living, in whoſe power he is, whether ſuch Perſon be Male or Female [a]: And this through want of Judgment and Diſcretion,

[a] I. 2. 12. 1.

Diſcretion, which is not preſumed to be in a Perſon before the Age of Puberty. And this Rule in Law is extended even to a Soldier, that is under the Age of Puberty. Nay, a Perſon under the Age of Puberty cannot make a Will, though he ſhould have the Conſent and Authority of his Tutor to this End and Purpoſe, becauſe the Laſt Will of a Perſon ought not to depend on the Will of another, as aforeſaid; and alſo, for that a Tutor is aſſigned to take care of his Pupil in his Life-time, and not at the Time of his Death.

Thirdly, A Perſon taken Priſoner by the Enemy, could not make a Teſtament, becauſe he became a Vaſſal or Bondman unto the Enemy: And it is manifeſt, that a Bondman by the *Civil* Law could not make, nor could a Will of this kind made by a Perſon in the Hands of the Enemy be confirmed by the Right of *Poſtliminy*, ſince it had no ſound beginning at firſt. But a Teſtament made before ſuch Captivity, was always valid, whether the Perſon thus taken return'd home or not. For if he return'd, it was ſupported by the Right of *Poſtliminy*, which feigns him always to have been in the State or City: And this was founded upon Equity. For in ſtrictneſs of Law, a Teſtament was defeated by Captivity, as a Captive is a Bondman unto the Enemy. But if he died in the Enemies Hands, it was valid by the *Cornelian* Law, which feigns him never to have been in the power of the Enemy, but to have died the Hour immediately before he was taken Priſoner[z]. Heretofore Eunuchs could not make a Will, till they were eighteen Years of Age: But now it is enacted, that they may make a Will at this day after the example of other Perſons. If a Perſon becomes delirious, or loſes his Underſtanding by the means of bodily Sickneſs, he cannot make a Will during that Time. Nor can a Madman or Lunatick make a Will: But if his Madneſs intermits, he may make a Will during the Time of his lucid Intervals. And ſo may a Prodigal, if he returns *ad bonos mores*, and to a Soundneſs of Mind, though he be otherwiſe forbidden.

[z] I. 2. 12. 5.

A Perſon that is blind in both Eyes, either by Nature, or thro' ſome Accident, may make his Will by *Nuncupation*, (as we call it) wherein he ought to obſerve the following Solemnities, according to the *Civil* Law[a], viz. *Firſt*, he ought to call unto himſelf ſeven Witneſſes and a Notary, and in their Preſence to declare that he has a mind to make a *nuncupative* Will, and then he ought to name ſome certain Perſon to be his Heir, and likewiſe mention how many Parts he would have him be his Heir to, (for the Inheritance by the *Roman* Law was divided into twelve Parts,) and what he would have each Legatary to receive from him: Which Things being reduced into Writing by the Notary, and ſigned and ſubſcribed by the Witneſſes, ſuch Writing ſhall have the Strength of a Will. But tho' he has only a mind to make Codicils, and to appoint no Heir, but only to leave ſome Legacies; yet all the aforeſaid Solemnities ſhall be obſerved, except the number of Witneſſes: In which caſe eight Witneſſes are required, if a Notary cannot be found. After the Will is reduced into Writing, it muſt be read over to the Teſtator and Witneſſes; and then the Witneſſes, in the preſence of each other, muſt ſet their Seals thereunto, having ſubſcribed the ſame[b].

[a] C. 6. 22. 4.

[b] C. 6. 22. 4.

A Teſtament may be divided in a twofold manner, *viz.* into what we call a *perfect* Teſtament; and that we term a Codicil, or an *imperfect* Teſtament: Which Diviſion may be admitted without any Abſurdity, eſpecially on account of informing the Mind; and *Albericus Gentilis* thinks, that ſuch a Diviſion of Teſtaments is not diſagreeable to Law. I call it a *perfect* Teſtament of the Will, which has the Appointment of an Heir contained; it being neceſſary that an Heir ſhould be appointed in expreſs Terms[c]. For as a Teſtament was null and void without the Inſtitution of an Heir; ſo from ſuch an Inſtitution, Teſtaments receive Strength and Vigour: And hence

[c] C. 6. 23. 29.

hence the Inſtitution of an Heir may be ſaid to be the chief Foundation of the whole Teſtament [c]. And this becomes a *perfect* Teſtament, either ſolemnly, or not ſolemnly; and both of theſe either by *Writing* or *Nuncupation*. A *written* Teſtament, is, when the Teſtator reduces his Laſt Will into Writing, by obſerving ſome due Solemnities of Law, and then offers the ſame to be corroborated by Witneſſes; which makes it a *ſolemn* Teſtament: But a *nuncupative* Will, is, when the Teſtator does, in the preſence of ſeven Witneſſes, name and declare his Will without Writing, whether ſuch Will be afterwards reduced into Writing or not, as I ſhall hereafter obſerve. And in this laſt kind of Teſtament, the Teſtator reveals his Will unto Witneſſes, as he conceals it from them in a written Teſtament. In a *written* Teſtament, great Caution ought to be taken, that the Will be made not only by the Teſtator himſelf, in his own proper Hand-writing, but that it be alſo made in ſecret, upon two accounts. *Firſt*, leſt ſuch Perſons as have any expectation of getting ſomething by ſuch Will ſhould be provoked by Hatred to the Teſtator, on finding themſelves to have nothing left them in the Will. And, *ſecondly*, leſt thoſe that are appointed Heirs, or to whom any Thing is bequeathed, ſhould attempt or procure the Teſtator's Death, in order to hinder him from changing his Mind, or making another Will. But after a Will is made, (be it *written* or *nuncupative*) the Cuſtom of the Country ought to be regarded about keeping thereof, *viz.* whether it ought to be committed to the Cuſtody of Friends, or lodged in ſome publick Place of Record, or the like. Ruſticks and Countrymen, in Places where Learning is rare, may make their Wills according to their own way and the Cuſtom of ſuch Places; provided they have a competent Number of Witneſſes [d].

[c] I. 2. 20. 34.

[d] C. 6. 23. 31.

I ſhall next ſpeak of the Witneſſes to a Will, and of the ſolemn Number thereof; and who may be Witneſſes thereunto, and who not. It has been already obſerved, that a Teſtament ought to be made and executed in the preſence of ſeven Witneſſes, according to the *Civil* Law; who, together with the Teſtator, ought to ſign and ſubſcribe the ſame; and that if the Teſtator cannot write, or be ſo unacquainted with Letters, that he cannot ſubſcribe it, an *eighth* Witneſs is made uſe of as a Subſcriber in his room [e]. To render a Teſtament valid, all theſe Witneſſes ought to be proper and idoneous Perſons, otherwiſe the whole Will is rendred null from the diſability of one of the Witneſſes [f]; unleſs a codicillary Clauſe be added, *viz.* that if it be not valid as a Will, it ſhall be valid as a Codicil. The Witneſſes made uſe of to ſupport a Will, ought to be idoneous Perſons at the Time of the Will made [g]; and it is enough, if they were deemed ſuch in the common Eſtimation and Opinion of Mankind [h]: For every one is preſumed to be an idoneous Witneſs, unleſs the contrary hereunto appears [i]. Perſons prohibited to be Witneſſes to a Will, according to the *Civil* Law, are a Woman [k], a Perſon under the Age of Puberty, as not knowing what he does [l]; a Bondman, who is a dependent Perſon [m]; a Madman, Prodigal, and the like; a Perſon deaf and dumb [n]; a Perſon that is in the power of the Teſtator; the Teſtator's Domeſticks [o]; and laſtly, all infamous and inteſtable Perſons [p]; that is to ſay, ſuch Perſons as cannot make a Will: But a Legatary and an Executor may, according to *Angelus*, be a proper Witneſs to a Will, tho' the Heir cannot. If a Perſon propounds a ſimple Exception againſt Witneſſes, *viz.* that they were not idoneous at the Time of the Will made, ſuch Exception (*Bartolus* ſays) ſhall not be admitted, unleſs it be with this Addition, *viz.* that they were commonly deemed not to be proper Witneſſes. No Perſon ought to be ſet aſide from being a Witneſs to a Will, whom the Law has not expreſſly prohibited; unleſs it be under ſome Quality; as a Legatary, who is to gain by ſupporting a Will, *&c.*

[e] C. 6. 23. 21.

[f] C. 6. 23. 12. D. 22. 5. 14. & 15.

[g] D. 28. 1. 22. 1.

[h] C. 6. 23. 1.

[i] D. 22. 5. 2.

[k] D. 28. 1. 20. 6.

[l] I. 2. 10. 6.

[m] D. 28. 1. 20. 7.

[n] I. 2. 10. 6.

[o] I. 2. 10. 9.

[p] D. 28. 1. 26.

Witneſſes do belong to the intrinſick Solemnity of a Will; and, therefore, a certain Number of Witneſſes is requir'd, as being a Solemnity: For in thoſe Things, which ought neceſſarily to be done by Witneſſes, a ſolemn and certain Number is required. But this ſolemn Number of Witneſſes, is only the accidental, and not the ſolemn Part of a Will, ſince this laſt Part cannot be changed by any Law or Cuſtom [q], as the accidental Form may. For the Number of Witneſſes may be increaſed by a Law or Statute [r]. The Solemnity of Witneſſes was introduced in order to prevent Forgery in Wills. And hence the Doctors infer, that a Will without ſuch Solemnity is an unjuſt Will, as liable to admit of Forgery; and, therefore, ought not to be obſerved even ſo much as *in foro Conſcientiæ*. At this day, Laſt Wills and Teſtaments are made in the preſence of a Notary and two Witneſſes, according to the Law of Nations, unleſs a Perſon by Will diſinherits his Children: For then, by an Edict of *Charles* the Vth, Emperor of *Germany*, the Scabins are required to be Witneſſes thereunto. In *Holland* Wills thus made are firm and valid, though neither the Teſtator nor the Witneſſes ſubſcribe themſelves thereunto [s]. Nor is it neceſſary at this day, that the Name of the Heir ſhould be expreſſed either by the hands of the Teſtator or Witneſſes; but it is enough, if the Teſtator exhibits his Will in writing before a Notary and two Witneſſes, and the ſame be marked with the Cypher of the Notary. In *England*, a Will atteſted by two Witneſſes, where only a perſonal Eſtate is given, is valid without the Aid of a Notary; but if a real Eſtate be deviſed, then the Atteſtation of three Witneſſes is required [t].

[q] C. 6. 21. 18.
[r] D. 29. 1. 24. C. 6. 21. 15.
[s] Groenv. de ll. abr.
[t] 29 Car. 2. c. 10.

By the *Civil* Law, Women might be made uſe of as Witneſſes unto Codicils, though not to Teſtaments; and therefore the ſame obtains at this day, the difference between Codicils and Teſtaments being now grown in a manner out of uſe: Wherefore, I think, that Women may be Witneſſes at this day even unto Teſtaments, though it is otherwiſe in *Holland*, unleſs (perhaps) it be a Teſtament *inter Liberos*. By the *Civil* Law alſo Legataries and Feoffees, called *Fidei-Commiſſarii*, might be uſed as Witneſſes to Wills, becauſe they are Succeſſors of Right unto the Inheritance: But this Reaſon diſpleaſes many of the Doctors. For though Legataries are not Succeſſors *univerſi Juris*, as Heirs are: For as Legacies are not the conſtituent Part or Form of a Will, and though the Buſineſs of the Will does not belong to Legataries; yet it muſt be confeſſed, that Legataries have in ſome meaſure (at leaſt) to do with a Will, as it reſpects a Legacy bequeathed; and therefore are called particular Succeſſors. In *England* Legatees cannot be produced as Witneſſes to ſupport a Will, unleſs they have actually received their Legacy from the Executor, or do renounce their Legacy, becauſe they ſwear *in commodum ſuum*.

A Father, and he that is in the power of a Father, as two Brothers that are under the power of one and the ſame Father, may be Witneſſes unto the ſame Will; becauſe there is nothing in Law that hinders a Perſon from making uſe of ſeveral Witneſſes of the ſame Houſe or Family, provided it be in Affairs that relate not to that Houſe or Family: But he that is in the power of the Teſtator, cannot be a Witneſs to the Teſtator's Will [t], as already related. And 'tis the ſame thing, if a Son under the power of a Father, makes a Will, and thereby diſpoſes of his military *Peculium*, or Eſtate got by private Induſtry, after he has obtained his diſcharge; for he cannot make his Father a Witneſs thereunto; nor him that is in the power of the ſame Father, becauſe domeſtick Teſtimony is never admitted in Affairs of this Nature [u]. And from the Premiſes we may conclude, by a contrary Argument, that a Son, who is not in the Father's power, might be a Witneſs unto his Father's Will; and, on the other hand, ſuch a Father might be a Witneſs unto his Son's Will, there being no reaſon for any

[t] I. 2. 10. 6.
[u] I. 2. 10. 6.

Obſtruction

Obſtruction hereunto. But if in the foregoing caſe a *Filius-familias* makes a military Teſtament, he may aſſume his Father as a Witneſs, and the Act ſhall be valid [v]; becauſe a military Teſtament has no regard to Formalities [w]. If any one of the Witneſſes, that has paſſed for a Freeman at the time of making the Will, be afterwards found to be a Bondman, the Will ought in ſuch a caſe to have favour ſhewn unto it, not only according to the Anſwer of *Adrian* the Emperor, given unto *Cato*, but even by the imperial Reſcripts of *Severus* and *Antoninus*, which were afterwards delivered: And ſuch a Will ſhall be valid, as if it had been made according to the proper Solemnities required thereunto; ſince at the time of making thereof, this Witneſs paſſed for a Freeman, according to the concurrent Belief of the Perſons preſent, there being no one then that doubted his State or Condition.

[v] D. 28.1.20.
[w] D. 29.1.1. & 40.

If a written Will has been once publiſhed or proved before an ordinary Judge, who has the Probat thereof, it gives credit to the regiſtred Copy, though the original Will in writing be loſt [x]. *Titius* made his Will in writing, and then died. His Heir dreading the Death of ſome, or all of the Witneſſes, or becauſe the Matter on which it was written was damaged, or likely to periſh in a little time, and fearing the Conſequences thereof, cauſed the ſame to be publiſhed and regiſtred before a competent Judge, and alſo cauſed the Witneſſes to ſwear, that all Things therein contained were true, and a publick Writing or Probat thereof was made. And the Queſtion was, whether ſuch a Probat or Publication ſhould give Credit or Evidence unto ſuch regiſtred Will? And it was hereupon reſolved that it ſhould. The Publication or Probat of a Will ought to be made before a competent Judge, as juſt now hinted; and in *Rome*, ſuch Judge was the *Magiſter Cenſûs*, if he were preſent; and nothing was to be paid to him for proving and regiſtring a Will, if the Inheritance did not exceed the Sum of a hundred *Aurei* or Nobles [y]. If the Will was proved before any other than a competent Judge, ſuch Probat was not valid as being made before an incompetent Judge [z]: But though a Will be proved before an incompetent Judge, yet it does not prejudice the Will itſelf, but that it may be proved *de novo* before a competent Judge [a]. With us in *England*, the Biſhop of the Dioceſs, or any other proper Ordinary, is a competent Judge for Chattels, unleſs the Deceaſed had *Bona Notabilia*, viz. above the Value of a hundred Shillings in ſeveral Dioceſſes.

[x] C. 6.23.2.
[y] C. 6.23.23.
[z] C. 6.23.18.
[a] C. 6.23.23.

The ancient Lawyers held, that a Teſtament ought to be made *uno contextu*, without any foreign Act intervening: But *Juſtinian* has limited this Concluſion, ſaying, that if the Teſtator (perchance) after he has begun his Will, ſhould be obliged to retire for ſome ſmall time, either on the account of taking Phyſick, or going to Stool, *&c.* he may afterwards return and perfect the Remainder of his Will [b]. And Witneſſes may do the ſame, provided they are not long abſent: But if a Witneſs be long abſent, or cannot return, and the Teſtator be in danger, then another Witneſs ought to be ſubſtituted. But all the Witneſſes, however the Will be begun, yet ought to ſign it at the ſame Time, and in the ſame Place, and in the ſight of each other; and thus a Will ought to be finiſhed at one Act, or (as ſaid) *uno contextu* [c]. A Teſtator is always preſumed to bequeath that which is his own; and he may diſpoſe of his own as he pleaſes. If a Teſtator, who could formerly ſpeak articulately, ſhould now thro' ſome Infirmity be diſabled to expreſs himſelf in that manner; yet he may (notwithſtanding) deviſe and bequeath Legacies by giving a Nod, and other Signs [d]. Old Age or Infirmity of Body is no Impediment to the making of a Will, as before hinted, in a Perſon that is of ſound Mind and Memory.

[b] C. 6.23.27.
[c] C. 6.23.28.
[d] C. 6.22.10.

It

It has been a frequent Doubt, by what Conjectures and Preſumptions it may be inferred, that a Man has been willing to make a Laſt Will and Teſtament, and not a Codicil. Now the firſt Conjecture, whereby the Will of a dying Perſon may be inferred, is, when he has appointed Heirs, or has therein diſinherited his Children or Grand-children: For then it is a high Preſumption, that he deſigned to made a Teſtament, and not a Codicil; and, according to *Alexander*, this is a ſtronger Preſumption in reſpect of its Operation, than all other Preſumptions about the ſame. *Firſt*, this Conjecture is extended and ſaid to have place, even when a Teſtator by calling the Witneſſes together, and appointing Legacies, ſays unto the Witneſſes: *Be ye Witneſſes unto theſe Codicils, and my Intention is, that my Will ſhall be valid by the Right of Codicils:* For he is ſtill preſumed to have an Intent of making this his Laſt Will and Teſtament; becauſe he has named an Heir therein. For an Act is not judged from the nude and ſimple Denomination of the Perſon, but from its Effect. And hereunto may be referred the Opinion of *Baldus* and *Salycetus*, viz. that if a Teſtator ſhould ſay before ſeven Witneſſes, *Be ye Witneſſes to my Contract*; yet he is preſumed (notwithſtanding) to have deſigned the making of a Will thereby. And 'tis the ſame thing, when a Teſtator appoints Heirs, and the Notary ſays, *viz. ſuch a Man being willing to make Codicils:* for he is hereby preſumed to intend the making of his Teſtament.

If a Teſtator, that has made a juſt Will, ſhall afterwards in proceſs of Time ſimply ſay, That *he would not have ſuch Will to be valid*, the Will ſeemed to be rendred infirm or defeated, after the manner of Legacies, which are revoked even *nudâ voluntate* by expreſs Adoption. But here *Juſtinian* decides on the contrary, *viz.* that a Will that is juſt and has been rightly made, ſhall not be ſubverted by the nude and ſimple Words of the Teſtator. And *Theophilus* ſubjoins the Reaſon hereof, *viz.* becauſe thoſe things which are done according to Law, ought alſo to be deſtroy'd by Law. I here ſpeak of defeating the Inſtitution of the whole Will, which cannot be done by naked Words. For Wills ought not to be reſcinded with Temerity; becauſe if they were, Perſons ſucceeding *ab inteſtato* might eaſily ſuborn ſome Perſons to aſſert, that the Teſtator had revoked his Will. Moreover, it is a received Maxim in Law, that no Credit ſhall be given to the Averment even of ſeven Witneſſes againſt a Will, unleſs it be after a Lapſe of ten Years from the time of the Will made, or unleſs it appears the Teſtator had added, that he would therefore change his former Will, whereby he might die inteſtate; for then by the Addition of ſuch like Words, a Change of the former Will is confirmed. But this Doctrine, though frequently received, yet is in ſome Places diſputed. But if it appears by any Acts pointing out a Change of the Teſtator's former Purpoſe, that he would impugn his former Will, as becauſe he blots, cuts, or cancels the ſame, or tears off the Seals, ſo that the Will is hereby rendred ineffectual; ſuch Acts have, without doubt, a greater force than Words have.

There are three Things or Faults, which entirely defeat a Will, or render it infirm, *viz.* when a Will is *unjuſt*, *rupted*, or *irritated*. For tho' we ſay, that a Will is *rupted* which is *irritated* or made void; and that a Will, which is *unjuſt*, is *rupted* and *irritated*; theſe Words being often uſed promiſcuouſly without any difference: yet it ſeems more commodious to diſtinguiſh the particular Cauſes, whereby Wills are rendred invalid; wherefore, I ſhall in this Paragraph conſider theſe Diſtinctions. Now a Will is ſaid to be *unjuſt*, when the neceſſary Solemnities are wanting thereunto, or when it is not made according to Law[e]: And, on the contrary, a Will is ſaid to be *juſt*, when it is made according to Law, with the Solemnities which the Law requires. A Will is properly ſaid to be *rupted*, which

[e] D. 28. 3. 1. pr.

which was valid from the beginning, but *ex poſt facto* is rendred infirm or defeated, the Teſtator remaining in the ſame State: whereas an *unjuſt* or *null* Will is properly termed that which was not valid from the beginning; becauſe not made according to Law. A Will is properly ſaid to be *irritated*, which is alſo valid from the beginning, but has loſt its Force and Power on the account of the Teſtator's changing his State; and thus is reduced to nought by a Contingency in the Perſon of the Teſtator: As when the Teſtator, after making a lawful Will, ſuffers a Diminution of his Liberty, or the Rights of the City, by way of Puniſhment, or is condemned to a natural Death [f]. But the Will of a Perſon condemned is not made void, if it be appealed from the Sentence of Condemnation, whether ſuch Appeal be received or not, unleſs Execution be not deferr'd by ſuch Appeal: nor is it made void, if his Condemnation be ſuſpended by the Reſcript of the Prince, though the Perſon dies, unleſs being conſcious of his Crime, he lays violent Hands on himſelf [g]. Though the Will of a Perſon be made void, who has loſt his Life, Liberty, or the Rights of the City by a Sentence, as aforeſaid: yet this is otherwiſe in a Soldier, if the Judge has in his Sentence reſerved unto him the Rights and Privileges of making a Will [h]. But ſome Perſons reckon up five ways of voiding a Will, which may be well enough admitted. *Firſt*, when a Will is not made according to Law, as above remembred, *viz.* when the proper Solemnities of Law have not been apply'd thereunto [i]; as when there are no Witneſſes, Seals, or the like, made uſe of. *Secondly*, it is ſaid to be null and of no moment, when a Son in the power of a Father is paſſed by [k]; but it is otherwiſe, if he has been emancipated. *Thirdly*, it is ſaid to be made void by another Will [l], wherein there is an Heir appointed, who may have the Exiſtence of an Heir. *Fourthly*, it is rendred void by the Agnation of an Heir: As when a Perſon has by Arrogation adopted a Son [m], or has a poſthumous Son born after making of his Will. And *laſtly*, a Will is ſaid to be irritated by the Heir's refuſing or not taking on himſelf the Heirſhip [n]. But a Soldier may die with two Wills made; and, therefore, his Will is not rupted or defeated by another Will [o]. But a former Will is only rupted, when a latter or ſecond Will is perfected as it ought to be, by having an Heir appointed therein, unleſs (perhaps) the latter Will be made *Jure Militari*, or an Heir be written therein who may be an Heir *ab inteſtato*, with us called an Adminiſtrator; for then the former Will is rupted, though the latter be not perfected [p]. A Will cancelled by a Perſon that is not *compos mentis*, is not rupted [q].

[f] D.28.1.8.1.
[g] D. 28.3.6. 4. & 5.
[h] D. 28.3.6.3.
[i] D. 28. 3. 1.
[k] D. 28.2.30.
[l] D. 28. 3. 1.
[m] I.2.17. pr.
[n] I. 3. 1. pr.
[o] D. 29.1.20.
[p] D. 28. 3. 2.
[q] D. 28. 3.3.

A Man may reſcind his Will as to one Part thereof, and the other Part ſhall remain valid: or in other Words, a Perſon may *ex poſt facto* die teſtate as to one Part, and inteſtate to another Part of it [r]. If a Perſon impeaches a Will of Forgery, he ſeems thereby to renounce the Buſineſs and Intention of becoming Heir or Executor in virtue of ſuch a Will which he alledges to be forged: But yet he may be an Adminiſtrator or Heir inteſtate of the Goods of the Deceaſed, according to *Bartolus* [s]. A Raſure, Interlineation, or a Cancellation of a Part of a Will, is not ſaid to be a Defect of a Solemnity, though ſuch Raſure or Interlineation may render the Will ſuſpected. But if it becomes a Queſtion, whether it makes that Part of the Will defective, which is found cancelled, we muſt diſtinguiſh herein, *viz.* whether it was cancelled by the Teſtator on purpoſe, and then it renders it defective: But it is otherwiſe, if it was cancelled through Inadvertency, or by a Stranger [t]. A Will that is found cancelled in the hands of the Teſtator, is, according to *Jaſon* and others [u], preſumed to be cancelled by the Teſtator himſelf, or (at leaſt) through his Conſent and Order: And a Will is ſaid to be cancelled, when the Seal affixed thereunto is torn off, or elſe the Teſtator's Name ſubſcribed thereunto, and by ſeveral other

[r] D.5.2.15.3.
[s] In l. 30. D. 49. 14.
[t] C. 6.23.12.
[u] In l. 12. C. 6.23.

ways, as by drawing a croſs with the Pen on the ſame; by drawing the Pen over the Letters lengthwiſe, called *Induction*; and by drawing the Pen round the Letters, ſtiled *Circumduction*. But all theſe Words denote the ſame thing.

Since the Will of the Teſtator is beſt infer'd and made known from the Words of the Teſtament itſelf, I ſhall next conſider after what manner the Words of Teſtaments are to be underſtood: Wherefore, in the firſt place, I ſhall lay it down for a Truth, that the Words of the Teſtament ought to be inſpected and well conſider'd. For Maſters and Scholars are often deceived, and eſpecially when they do not weigh and ponder the Words of a Will as they ought to do, which have great Weight and Force in them, a great Efficacy conſiſting even in the minuteſt Expreſſion. For the Words of a Teſtament are properly the intrinſical and eſſential Form of the Diſpoſition: wherefore, when the Matter in Controverſy is touching the Interpretation of the Teſtator's Will, we ought to have recourſe to the Tenor of the Will itſelf, and if the Words of it are ſo far obſcure, as that they do not, or cannot admit of any Meaning, they ought to be deemed and taken *pro non ſcriptis*. But, in the Conſtruction of Laſt Wills and Teſtaments, the Law will have the Mind and Meaning of the Teſtator, if known, to be purſued, whatever the proper Signification of Words be. For ſays the Law, in Queſtions about Wills, we muſt not fly to what the Words will bear in Extremity, ſince moſt Men ſpeak improperly, and they are but few that can deliver themſelves in apt and proper Expreſſions[v]. And therefore *Mantica* remarks, we muſt take heed that we do not ſo preciſely obſerve the Words, as to diſappoint the true Intentions of him that utter'd them by too great a Subtlety. From whence it clearly ſeems, that no Words, Forms, Niceties, or Proprieties of Language are of any regard in the *Civil* Law, in compariſon of Truth, Faithfulneſs, and Integrity. For Words were made as Inſtruments to ſerve and expreſs the Mind, and not to command or controul it.

[v] D. 32.1.69. 1.

There is no Maxim more commonly received in Law than this, *viz.* That the Wills of all Teſtators ought to be interpreted according to a Diſpoſition of the Laws; and, according to *Bartolus*, that every one is preſumed to have willed that which the Law itſelf ordains. Hence a Teſtator, even in a doubtful Caſe, ſeems to have made a Diſpoſition of his Eſtate according to Law, and not contrary thereunto. And that Interpretation, whereby the common Law is beſt preſerved, ought to be favour'd and embraced: and every Diſpoſition, which is ſimply expreſſed, is clothed with the Senſe of the Common Law, and ought to be reſtrain'd and extended accordingly. And hence it is clear, that doubtful Words ought to be referred to the Underſtanding of the Common Law; for that is ſaid to be moſt probable and likely, which beſt agrees with the Common Law. Nor is it likely, that a Teſtator, eſpecially one skilled in the Law, would make a Diſpoſition contrary to the Rules of Law. An Ambiguity or Tranſpoſition, or inverting the Order of Writing, by mentioning Legacies before the Appointment of an Heir, does not vitiate a Teſtament, if any of theſe Things happens thro' the Fault or Unskilfulneſs of the Notary, or him that writes the Will[w]; for Wills ought to be interpreted in the moſt favourable manner. When two Wills are found to be made by one and the ſame Perſon, and it is not known which was made firſt, and which was the latter Will, then neither of them (according to *Bartolus*[x]) is valid. It is a general Rule in Law, in favour of Teſtaments, that they ought to be ſupported by all poſſible ways and means. So that in a doubtful Caſe, a Sentence ought to be pronounced in favour of a Will[y]: For ſince a Laſt Will ought to be preſerved by all poſſible Ways and Means, in a doubtful Caſe, an Interpretation ought to be made in favour of a Will[z], leſt it ſhould drop. And *Juſtinian* has enacted ſeveral

[w] C.6.23.24.

[x] In l. 6. D. 27. 1.

[y] D. 5.2.10. pr.

[z] D. 28.4.2.

ſeveral Laws, in order to aid and ſupport Laſt Wills of Teſtators, that they may not be defeated, and made void by too great a Subtilty of Law. Thus in a doubtful Caſe, a Preſumption always lies in favour of a Will, unleſs the contrary be proved: For he who impugns it, ought to ſhew cauſe why it is not valid [b]. The Teſtator's Mind is not only conſider'd from the Words of the Will, but likewiſe from ſuch Words as he has utter'd at ſundry Times out of the Will, and eſpecially in the Time of his laſt Sickneſs.

[b] C. 4. 19. 11.

The Execution of Laſt Wills and Teſtaments not only belongs to the Biſhop, but alſo to him who has Epiſcopal Juriſdiction, excluſive of the Biſhop, tho' he be not a Biſhop: For it often happens, that Abbots and Archdeacons have Epiſcopal Juriſdiction, either by Privilege or Preſcription [c]. For theſe Perſons, according to a noted Gloſs on the *Clementines*, have this Right [d]. For tho' we have another Gloſs on another Part of the *Clementines*, ſaying, That only a Biſhop is included under the Name of a *Dioceſan*, and no other inferior Perſon; yet this has only a reſpect to ſuch Matters as rather require the Office of a Biſhop, than his Juriſdiction. For, in ſuch Matters as rather require Juriſdiction, an Inferior having Epiſcopal Juriſdiction may be ſtiled a *Dioceſan*.

[c] X. 2. 26. 15.
[d] X. 5. 31. 12. In c. un. Clem. 2. 2. v. *Dioceſanis*.

[Though the Common Law of *England* has, for the moſt part, left Teſtamentary Cauſes to the Eccleſiaſtical Court, to be adjudged according to the Rules of the *Civil* and *Canon* Law: Yet it has ordained certain Peculiarities touching Lands and Chattels real, which it will have to be decided (as it were) at his own Tribunal. And according to the *Engliſh* Laws, no one can rightly deviſe Lands or Tenements, who is not in poſſeſſion of them at the time of the Will made [e]: Which is true, if another Perſon does not poſſeſs them in his Right and Name; for if there does, a Man may well enough bequeath the Reverſion of them. By the ancient Law of *England*, no one could bequeath Legacies of feudal Eſtates, but the ſame did of neceſſity deſcend unto the next Heirs, unleſs the particular Cuſtom of ſome City or Town did permit this, contrary to the Common Law; ſee *Glanvil* [f] and *Bracton* [g]; or the Heir (at leaſt) conſented to ſuch a Legacy: But this Law is alter'd, and Perſons may freely diſpoſe of their Fee-ſimple Eſtates by Will, by proper Deviſes. Thus though a Husband cannot in his Life-time make a Grant of Lands unto his Wife, becauſe during Matrimony they are adjudged to be but one Perſon; yet he may by his Will deviſe Lands to her, becauſe Legacies before the Teſtator's Death, which diſſolves the Conjunction of Marriage, have not any effect.]

[e] 32 & 34. H. 8.
[f] Lib. 7. c. 1.
[g] Lib. 2. c. 26.

TIT. XIII.

Of a Nuncupative *Will, and what Solemnities are neceſſary thereunto: What is to be thought of thoſe things which are found to be blotted out, or interlined in a written Will.*

A *Nuncupative* Will is that which is made without the Solemnity of writing, in oppoſition to a written Will, *viz.* when the Teſtator in the preſence of ſeven Witneſſes, according to the *Civil* Law, names his Heir, and declares his Laſt Will [h]: yet this kind of Will may be reduced into writing; and by a Statute of the Realm here in *England*, it is neceſſary ſo to do, to prevent Frauds and Perjuries, as I ſhall note by and by. It is called a *Nuncupative* Will, becauſe there is no occaſion of any writing therein, but all Things may be ordered by the Nuncupation and

[h] C. 6. 23. 21.

[i] C. 6. 23. 21. 2. living Voice of the Teſtator [i]. For the word *Nuncupare* denotes the ſame as to declare a Man's Will, and expreſſly to name his Heir before Witneſſes: nor is it ſufficient for the Heir to be named before Witneſſes by another Perſon, and then to be ſimply approved of by the Teſtator himſelf, as *Baldus* obſerves [k], ſince the Form hereof ought to be obſerved (as we ſay) to a Cow's Thumb, or very exactly [l]. *Alciatus*, in his *Parergon Juris* [m], thinks, that a *nuncupative* Will is ſo called, becauſe the word *Nuncupare* is the ſame as *nomina capere*; that is to ſay, becauſe in ſuch a Will there is no need of any other Solemnity than taking the proper Names of the Witneſſes.

[k] In l. 29. C. 6. 23.
[l] D. 12. 2. 33.
[m] Lib. 2. c. 32.

A *nuncupative* Will chiefly differs from a written Will in this, *viz.* becauſe in a written Will the Teſtator may conceal his Purpoſe and Intention, but in the other he is obliged to reveal the ſame, as already related in the foregoing Title. Heretofore in a *nuncupative* Will it was cuſtomary to make uſe of ſeven Witneſſes eſpecially requeſted hereunto, and then upon the Teſtator's Death theſe Witneſſes were by the Heir preſented unto the Judge, unto whom they declared and gave an account of the Laſt Will of the Perſon deceaſed [n]: But at this day, a *nuncupative* Will is almoſt ever reduced into writing by Notaries after the Teſtator's Death; and this being done, the Will remains valid, though the Witneſſes ſhould afterwards die, or be rendred uncapable of giving their Evidence in other reſpects. Nor is it now neceſſary that the Witneſſes ſhould declare the Teſtator's Will unto the Judge, but (according to *Bartolus* and the Doctors [o]) the ſame may be proved by a publick notarial Inſtrument. Nor does a Will, therefore, ceaſe to be a *nuncupative* Will, becauſe it is drawn into writing; ſince this Writing does not relate to the Subſtance thereof, but is only made to perpetuate the Memory of it [p]. All Perſons of the Age of Puberty, and being Freemen, may be Witneſſes unto ſuch Will: unto which great Favour and Indulgence is given by the Laws, for that Men are ſometimes ſeized with a ſudden Apprehenſion and Fear of Death.

[n] D. 28. 1. 21.
[o] In l. 2. D. 29. 3. C. 8. 54. 31.
[p] Arg. D. 20. 1. 4.

By the *Lex Regia* in *Spain*, a nuncupative Will ought to be made before a Notary and three Witneſſes, if a Notary may be had; otherwiſe before five Witneſſes: But if ſo many Witneſſes cannot eaſily be procured, then three Witneſſes are ſufficient [q]. And the ſame Number ought to be obſerved in Codicils, and in a Will *inter Liberos*. By a Statute of the Realm of *England* [r], no *nuncupative* Will ſhall be good, where the Eſtate bequeathed exceeds the Value of thirty Pounds, that is not proved by the Oaths of three Witneſſes, that were preſent at the making thereof; nor unleſs the Teſtator bid them, or ſome of them to bear witneſs, that ſuch is his Will: nor unleſs it were made in the laſt Sickneſs of the Deceaſed, and in the Houſe of his Dwelling, or where he had been reſident for ten Days or more; except where he was ſurprized from his own home, and died before his return. After ſix Months paſſed, after ſpeaking the pretended teſtamentary Words, no Teſtimony ſhall be received of ſuch *nuncupative* Will, unleſs the ſaid Teſtimony were committed to writing within ſix Days after making the ſaid Will. No Letters teſtamentary, or Probate of any *nuncupative* Will, ſhall paſs the Seal of any Court till fourteen Days after the Teſtator's Deceaſe: nor ſhall any *nuncupative* Will be proved, unleſs Proceſs have iſſued out to call in the Widow, or next of Kindred to the Deceaſed, to conteſt it, if they pleaſe. By this Statute, no Will in writing of any perſonal Eſtate ſhall be repealed by Words only, except the ſame be in the Teſtator's Life-time committed to writing, and read to him, and allowed by him, and that proved by three Witneſſes. Soldiers in actual military Service, and Mariners at Sea, may diſpoſe of their perſonal Eſtates as before the making of this Act.

[q] L. 1. Tit. 5. Ord.
[r] 29 Car. 2. cap. 3.

TIT.

TIT. XIV.

Of military Teſtaments, in oppoſition to a ſolemn Will: and what Privileges Soldiers have in making their Wills.

I Have in the two foregoing Titles treated of a ſolemn Will, in *Latin* called *Teſtamentum Paganicum*, whether it be in writing or a nuncupative Will: wherefore, I ſhall here ſpeak of a military Will, *viz.* that which a Soldier makes, reckoned among privileged Wills: For no Perſons had more or greater Privileges granted them in the making Wills, than Soldiers: ſince a Soldier, being in actual Service, might make his Will without any Solemnity at all [f]; yea, and without the Application of Witneſſes, if he made his Will in writing [s]. But if he made it by Nuncupation or *vivâ voce*, then two Witneſſes (at leaſt) were ſufficient to prove, whether he made a Teſtament or not [t]: For it ſufficiently appears from the Letters of the Will, and his own Hand-writing, whether it was written or not [u]; and if his Hand-writing be denied, then it may be proved by a compariſon of Hand-writing [v]. Thus a Soldier in the Camp, or in a military Expedition, might make a Will as he pleaſed, tho' he was deaf and dumb, or emancipated, and the like [w]: But if he made his Will out of the Camp at his own Houſe, or in other Places, then he ſhall not enjoy the Privilege of a Soldier in reſpect of making a Will, at the time when he was not on Duty, but ought to make it, according to the Diſpoſition of the common Law, by an Application of all Solemnities required in a ſolemn Will. For a Privilege granted unto Soldiers only laſts or holds good during the time that they are in Service; as a Privilege granted unto Scholars is underſtood to continue whilſt they are Students in the Univerſity, otherwiſe it is not [x]: And, therefore, when a Soldier ceaſes to be in the Wars, his Privilege is at an end. But a Will, made by a Soldier in an Expedition *Jure Militari*, is valid at any time within a Year after ſuch Expedition ended, if the Teſtator has received an honourable Diſcharge from the Service [y]: But if he has been diſcharged upon any ignominious Account, his military Will immediately falls to the ground [z].

A Soldier may die partly teſtate, and partly inteſtate [a]: And though he ſhould be condemned to undergo ſome capital Puniſhment, yet he may make a Will, and it ſhall be good in Law [b]. He may alſo appoint a Perſon who ſuffers Deportation or perpetual Baniſhment, to be his Heir [c]; and may likewiſe appoint an Heir *ex die*, or *ad diem* [d]. He may, moreover, die with the Privilege of ſeveral Wills, and his former does not rupt or invalidate his latter Will, or his latter his former Will, contrary to the Courſe of the common Law [e]; and he may likewiſe appoint an Heir in his Codicils, which no other Perſon may do [f]. He may write his Will in Characters or Cyphers, and likewiſe in literal Abbreviations [g], which otherwiſe ought not to be done, but ought to be written *per extenſum*, or in Words at length. If the Heir declines or refuſes the Heirſhip, or if he accepts of the Heirſhip, and ſhall afterwards die before he has executed the Will, a Soldier may in ſuch a caſe ſubſtitute a Stranger, or an extraneous Perſon [h]:

[f] D. 29. 1. 1.
[s] I. 2. 11. pr.
[t] I. 2. 11. 1.
[u] C. 6. 21. 15.
[v] Nov. 49. c. 2. §. 1.
[w] I. 2. 11. 2.
[x] C. 6. 21. 16.
[y] I. 2. 11. 3.
[z] D 3. 2. 2. 2.
[a] D. 29. 1. 6.
[b] D. 29. 1. 11. pr.
[c] D. 29. 1. 13. 2.
[d] D. 29. 1. 15. 4.
[e] D. 29. 1. 19. pr.
[f] D. 29. 1. 36. pr.
[g] D. 29. 1. 4. pr.
[h] C. 6. 21. 6.

And a Soldier's Will is valid, wherein he paſſes by his Son, and cannot be reſcinded by a *Querela inofficioſi Teſtamenti*[i], viz. if he willingly paſſes him by; for if he has done ignorantly, the Will is not reſcinded, but is null and void *ab initio*[k].

[i] D.5.2.27.2.

[k] C. 6.21.9.

But though the Solemnities of the *Civil* Law are remitted unto Soldiers being in the Service of the Wars; yet the Solemnities required by the Law of Nations are not remitted to them: And, therefore, according to the Law of Nations, two Witneſſes are neceſſary unto ſuch a Will; but yet it is not required that theſe Witneſſes ſhould ſubſcribe themſelves, or ſet their Seals thereunto, as the Doctors note on the Law here quoted in the Margin[l]. A Soldier cannot bequeath any Thing to his Strumpet or Trull[m], becauſe this is contrary to good Manners and Chaſtity; as a Clergyman or Scholar cannot do. The Law of *England* has given no Privilege almoſt unto military Teſtaments, which it has not given unto ſolemn Wills and Teſtaments; but has thrown all the Subtleties of the *Roman* Law about the ſame, into the ancient Obſervation of the Law of Nations.

[l] D. 29. 1. 1.

[m] D. 29.1.41.

The Reaſon why a Soldier had ſo many Privileges granted him by the *Roman* Law in reſpect of making his Will, *&c.* proceeded not only from his Unskilfulneſs in the Laws themſelves, as this ſeems to be the only Reaſon aſſigned by the *Inſtitutes*[n]; but the *Romans* ſhowed greater Favour and Indulgence unto their Soldiers, than any other Nation, in this, as well as in other reſpects. For a Soldier could not be arreſted for Debt; nor was he liable beyond his Subſtance or Abilities, in caſe he was condemned for Debt[o]; nor could he be put to the Rack or Queſtion[p]. But what procured their Soldiers this Privilege in Regards, was chiefly, becauſe they expoſed themſelves in Battle[q]. But theſe Privileges in ſome reſpects accrue unto Women, who are deemed to be leſs ignorant than Soldiers in the Law, and very often labour againſt their own Advantages[r]. I ſaid in *Battle*, becauſe it is only there that Soldiers have the Uſe of this Privilege, or (at leaſt) in Camps which are expoſed to the daily Incurſions of Enemies[s]; and thus it has been adjudged by the Senate of *Utrecht*, *December* 20, *A. D.* 1590. This Privilege was firſt granted unto Soldiers by *Julius Cæſar*, and then continued to them by ſeveral ſucceeding Emperors.

[n] I. 2.11. pr.

[o] D.42.1.6.pr.

[p] D.49.16.3. 1.

[q] C.6.30.22.

[r] C. 5. 1. 4. C. 8. 18. 12.

[s] I. 2.11. pr. & 3.

TIT. XV.

Of Heirs *or* Executors; *how they are to be inſtituted or ſubſtituted in Wills, and under what Conditions they may be inſtituted or ſubſtituted in the ſame*; *and* laſtly, *what time an Heir has to deliberate after the Teſtator's Death, before he proves the Will.*

HEIRSHIP, in *Latin* ſtiled *Hæreditas*, is a Succeſſion to that univerſal Right which the Perſon deceaſed had at the time of his Death[s]; that is to ſay in other Words, Heirs ſucceed to all that Right which repreſents the Perſon of the deceaſed[t]: This Right retaining the Name of *Hæreditas jacens*, till ſuch time as the Heir takes the Heirſhip

[s] D.50.16.24.

[t] D.50.17.43. D. 5. 1. 34. D.2.13.9.1.

on himſelf. But after he has accepted of the Heirſhip, it loſes the Name of *Hæreditas*, the Teſtator's Goods being blended with the Goods of the Heir. Wherefore, it is now no longer a *naked* Right, but the Perſon's Heir begins to tread in the Place of the Deceaſed. But an Heir by the common Law of *England* differs from an Heir in the Senſe of the *Civil* Law; for that he only ſucceeds to Freehold and Real Eſtates [u], and not unto Chattles, being the next of kin to the Perſon deceaſed. There are alſo ſome other Perſons that are reckoned in the Place of Heirs by the *Civil* Law, who, being excluded by the *Civil* Law from the *proper* Heirſhip, are by the *Prætorian* Law admitted to the *Bonorum-Poſſeſſio*. For though the *Prætor* cannot directly make an Heir (Heirs being only ſo by the Laws, the Decrees of the Senate, and the Imperial Conſtitutions [v];) yet when he grants the *Bonorum-Poſſeſſio* to any one, ſuch Perſon is reckon'd in the Place of an Heir, and effectually obtains the ſame Right as the Heir has. What I ſay of Heirs is not only meant of Succeſſors *primi gradûs*, but even of Succeſſors in a remoter degree: For a Legacy or annual Truſt left to an Heir, is ſuppoſed to be left to his Heir *in infinitum*. And as the Heir has the ſame Right and Power as the Perſon deceaſed had in his Goods and Eſtate: ſo the effect of this Rule is, that all Advantages and Diſadvantages, Profits and Diſprofits, which were in the Deceas'd, do paſs to his Succeſſor *in infinitum*.

[u] Glanv. lib. 7. c. 1.

[v] I. 3. 10. 4.

But before I proceed to ſpeak any further of Heirs, I will premiſe ſomething touching the Etymology of the word *Heir*, in *Latin* called *Hæres*, and then treat of the Quality and Difference of Heirs. Now ſome derive the word *Hæres* from the *Latin* word *Herus*; and hence they would have it to be written with a ſingle (*e*): For the Ancients (ſay they) according to *Feſtus*, call an Heir by the Name of *Dominus* or Maſter; and, according to the old Lawyers, to act as an Heir, is to act as a Maſter [w]. Others fetch the word *Heir* from the Verb *Hæreo*, to adhere or cleave to; becauſe the next Adherent to the Perſon deceaſed has a Property in all his Goods. *Thirdly*, ſome derive it from the word *Æs* [x], which ſignifies Money; becauſe, according to a Law of the twelve Tables, a Man's whole Subſtance ſometimes is denoted by the word *Pecunia* or Money. But *Hotoman* thinks him to be ſo called from the word *Era*, which ſignifies Land: And hence we meet with the word *Heredium* in *Varro* [y], to denote the ſame thing. But theſe are only the Conjectures of Etymologiſts; and it matters not much from whence the Word is borrowed, ſince we know the Meaning of it.

[w] D. 49. 17. 19. 3.

[x] Iſid. Etym. lib. 9. c. 5.

[y] De Re Ruſt.

According to *Cujacius* and the Text [z], there are ſeveral kinds of Heirs. The firſt are ſaid to be *neceſſary only*; the ſecond are ſaid to be *ſui & neceſſarii*, (for thoſe that are *ſui Hæredes* are alſo neceſſary;) and the third ſort are termed *extraneous* or *voluntary* Heirs [a]. An Heir *neceſſary only* is, when the Teſtator appoints his Bondman to be his Heir: And he is ſo called, becauſe he does immediately after the Teſtator's Death become a Freeman, and a neceſſary Heir, whether he will or not. Hence it came to paſs, that ſuch Perſons as ſuſpected the Ability of their Subſtance, uſually appointed their Bondmen to be their Heirs in the firſt or ſecond degree, or even in a further degree, to the end that if they did not leave Aſſets to ſatisfy their Creditors, the Creditors might rather poſſeſs themſelves of the Goods of the Heir than of the Teſtator himſelf, and ſell and divide the ſame among themſelves [b]. And as an Amends for this Diſadvantage, the Bondman had this Advantage given him, *viz.* that ſuch Acquiſitions as he had made to himſelf, after his Patron's Death, ſhould be reſerved to himſelf. And though the Goods of the Deceaſed were not ſufficient for the Payment of Creditors; yet the Eſtate, which he afterwards purchaſed to himſelf by this means, ſhould not be ſold [c]. Children, that are in the neareſt degree to the Father of the Family, were ſtiled *Hæredes ſui & neceſſarii*, becauſe they

[z] I. 2. 19. pr.

[a] I. ut ſup.

[b] I. 2. 19. 1.

[c] I. ut ſup.

they obtain the Heirſhips of their Father's Subſtance as their own Right. They are ſtiled *Neceſſarii*; becauſe by the ancient Law they were obliged to retain the Heirſhip[d]. Theſe ſecond kind of Heirs termed *ſui & neceſſarii*, ought to have theſe two Requiſites, *viz.* They ought *firſt* to be in the Power of the Father: And *ſecondly*, they ought to be in the next degree of Kindred to the Teſtator. Again, they are called *ſui*; becauſe they are in the Teſtator's Life-Time, in ſome meaſure, Maſters of his Subſtance, and, as it were, domeſtick Heirs. And they are alſo termed *neceſſary* Heirs; becauſe by a Law of the Twelve Tables, they became Heirs to the Inteſtate, as well as to the Teſtator, whether they would or not. But after the *Prætor* had granted them a Power of declining the Heirſhip, they ceaſed to be *neceſſary*, and only remained *ſui Hæredes*[e]. Wherefore, ſuch as are *ſui Hæredes*, are not ſaid in our Books *adire Hæreditatem*, but *ſe immiſcere*[f], ſince they become Heirs *ipſo Jure* without any Act of Man, even tho' they are ignorant of it[g]. *Extraneous* Heirs, are all ſuch Perſons as are not *ſui* or *neceſſary* Heirs, but become ſo by their own choice[h]. Theſe do not acquire the Heirſhip *ipſo Jure*, and without their Knowledge, but ought to declare their Will either by Words, which are called *Aditio Hæreditatis*; or elſe they ought to expreſs their Intention by ſome Act or Thing done, which is called *Acting as an Heir*[i]. And again, Strangers or extraneous Perſons do not acquire the Heirſhip, unleſs they are qualify'd Perſons, both at the Time of the Will made, at the Time of the Teſtator's Death, and at the Time of taking the Heirſhip on themſelves[k]. But ſince Bondage and the Power of the Father, as exerciſed among the *Romans*, has ceaſed, this Diſtinction of Heirs has grown into diſuſe, and is out of doors; and it is in the Election of every Perſon to be an Heir, whom the Teſtator pleaſes to appoint. Heirs, in the Senſe of the Law of *England*, were heretofore neceſſary, in reſpect of the Inheritance derived unto them from their Anceſtors, by being neareſt of Kin unto them[l]: (As they are even at this day, in reſpect of Part of the Inheritance, by the 32 *H.* 8. *cap.* 1.) And as they ſucceed to the Fee or Inheritance, they ſhall be obliged to pay the Debts of the Deceaſed, if bound thereunto by a Contract in Writing: But anciently they were bound hereunto, without any ſuch Obligation in Writing, as *Bracton* obſerves[m].

[d] D. 28. 2. 11.
[e] I. 2. 19. 2.
[f] I. 2. 19. 5.
[g] I. 3. 1. 3.
[h] I. 2. 19. pr.
[i] I. 2. 19. 6.
[k] I. 2. 19. 4.
[l] Glanv. lib. 7. c. 1.
[m] Lib. 2. c. 16. n. 1.

I ſhall next diſcourſe of the Inſtitution or Appointment of an Heir, which is the *Baſis* and Foundation of the whole Will[n]; becauſe the Will or Teſtament receives its Force and Validity from hence. Now the Inſtitution of an Heir, is nothing elſe but the Deſignation of a fit and proper Perſon to the whole Right of the Eſtate, which the Deceaſed had at the Time of his Death[o]: And that Perſon is ſaid to be Heir by Deſignation and Appointment, who is in a written Will named to be the Heir, or who is named Heir in a Will made without Writing. I ſay, *in a Will*; becauſe an Heir cannot be appointed by Codicils, or otherwiſe than by a Will. And this Inſtitution the *Civilians* divide into a *voluntary* and *neceſſary* Inſtitution. The firſt is an Appointment of thoſe Perſons, which the Teſtator may inſtitute, or paſs by as he pleaſes: And the ſecond is an Appointment of thoſe Perſons, who ought either to be inſtituted or diſinherited; as Children, Parents, and in ſome Caſes Brothers and Siſters. Teſtators may appoint not only Freemen, but even Bondmen to be their Heirs, as already hinted: And this they may do not only in reſpect of their own Bondmen, but alſo in regard to the Bondmen of other Perſons[p]. But, by the ancient Law, they could not inſtitute their own Bondmen, according to the moſt received Opinion of the Doctors, without giving them their Freedom and Liberty at the ſame time. But, by an Ordinance or Conſtitution of *Juſtinian*[q], they are permitted to inſtitute them, even without giving them their Liberty[r]. He, that had a Son in his power, ought either to make him his Heir, or elſe by Name

[n] I. 2. 20. 34.
[o] D. 50. 17. 62. Arg. 50. 16. 24.
[p] I. 2. 14. pr.
[q] C. 6. 27. 5.
[r] I. 2. 14. pr.

to

to diſinherit him: For if he paſſed him by in ſilence, his Will was deemed ineffectual. So that if the Son died during the Father's Life, the Father by ſuch a Will had left no Heir exiſting; becauſe the Will had not a Subſiſtence *ab initio*[f]. But afterwards, by the *Civil* Law, this did not obtain in emancipated Children; becauſe they were not *ſui Hæredes*[s]. If there were no Perſons extant, whom the Law would have to be appointed Heirs, or rightly to be diſinherited, the Teſtator might appoint any extraneous Perſons whatſoever to be his Heirs, according to his own Will and Pleaſure, unleſs they were *ſimply*, or for ſome other Reaſon, or *ad certum modum* forbidden to be appointed. The Children of Apoſtates[t], Hereticks[u]; Foreigners[v], and Traitors to their Country[w], are *ſimply* prohibited to be appointed Heirs. Among ſuch as are prohibited *ad certum modum*, we may reckon the Prince, on the account of a Law-Suit with the Teſtator[x]; and not only Adulterers and Inceſtuous Perſons[y], but alſo natural Children[z] and Wives[a]. Beſides theſe Perſons that are thus excepted, the Teſtator may appoint whom he pleaſes to be his Heirs. And it matters not, whether the Teſtator was acquainted with the Perſon whom he has made his Heir or not: For the Teſtator's Ignorance of this kind does not render his Inſtitution ineffectual[b]. Yea, even uncertain Perſons may be appointed Heirs; provided ſuch Perſons may be aſcertain'd at preſent, or by ſome future Event[c], tho' by the ancient Law it was otherwiſe[d].

[f] I. 2. 13. pr.
[s] I. 2. 13. 3.
[t] C. 1. 7. 3.
[u] C. 1. 5. 4 & 5.
[v] D. 28. 5. 6. 2.
[w] C. 9. 8. 5. 1.
[x] I. 2. 17. 8.
[y] C. 5. 5. 6.
[z] C. 5. 27.
[a] C. 5. 9. 6.
[b] C. 6. 24. 11. I. 2. 14. 8.
[c] I. 2. 20. 27.
[d] I. 2. 20. 25.

But the uncertain Inſtitution or Appointment of an Heir avails ſo little, that it is the ſame thing to him as if he was not appointed at all, unleſs ſuch Inſtitution may be rendred certain ſome way or other: Wherefore, I ſhall conſider, when and by what Conjectures ſuch an Inſtitution may be ſo aſcertain'd, that it may be valid; wherein I ſhall, with *Bartolus*, diſtinguiſh and lay down ſeveral Caſes. And the firſt is, when a Perſon has been inſtituted, who is altogether uncertain, and cannot be pointed out by any means whatſoever: In which caſe ſuch Inſtitution does not ſubſiſt. And this is extended not only to have place in an Inſtitution; but alſo in a *Fidei-commiſſary* Subſtitution, or a Subſtitution founded upon a Truſt. But, in favour of a Will made to charitable Uſes, this does not obtain: For tho' the Appointment of an Heir be uncertain therein; yet the Inſtitution is valid; and, according to *Tiraquel*, the ſame may be ſaid touching an uncertain Legacy, which is valid in favour of pious Uſes. The ſecond Caſe is, when ſome certain Perſon is or has been appointed Heir, but it becomes a doubt who this Perſon is: And even in this caſe ſuch an Inſtitution is not valid, unleſs it certainly appears, whom the Teſtator meant and thought of. For it may happen, that the Teſtator had ſeveral Friends of the ſame Name: And, therefore, for the Manifeſtation of the Perſon from the Name, he ought to have uſed ſome particular Deſignation or other, as *Titius* of ſuch a Place; unleſs it ſhall be diſcover'd by other plain and open Proofs, whom the Teſtator meant. The ſame we ſay of Tutelage, which is vitiated, if two Perſons of the ſame Name are declared, and it appears not who is the Tutor or Guardian aſſign'd[e]. And ſo 'tis ſaid in a Legacy, which is not due, if it does not appear, to which of theſe two Perſons the Legacy is bequeathed[f]. But when one of the two Perſons of the ſame Name is ally'd in Blood unto the Teſtator, and the other is not, it is preſumed that the Teſtator meant to appoint him, who was thus related to him[g]: But if there be two Perſons of the ſame Name, and both of them related to him, then he is preſumed to have deſigned him for his Heir by ſuch an Appointment, as is moſt nearly related to him[h].

[e] D. 26. 2. 30.
[f] D. 33. 2. 18.
[g] D. 34. 5. 10.
[h] Jaſ. in l. 40. D. 28. 5.

The Inſtitution or Appointment of an Heir, may be made by any Words whatſoever, either *directly* or *obliquely* utter'd, and ſuch an Inſtitution is valid, if the Intention of the Will appears by thoſe Words[i]; becauſe the

[i] C. 6. 23. 15.

Law does not allow of a ſcrupulous Nicety and Obſervation of Words, provided there be a *Conſtat* of the Teſtator's Meaning: And, therefore, in favour of Inſtitution, we may recede from the proper Signification, according to *Jaſon*[k]; for it is the Concern of the Publick, that a Will ſhould be valid that depends on the Appointment of an Heir. But yet ſuch Inſtitution ought to be declared by ſuch fit and proper Words, as it may be eaſily underſtood, who the Heir appointed is. For a *tacit* Inſtitution of an Heir, is entirely diſallow'd of by Law; and ſo likewiſe is an Inſtitution made by the nodding of the Head: For the Emperor will have the Name of the Heir to be expreſſed, that the Appointment may be certain; which would not be ſo, if it were made by Nods or Signs. But if there be a *Conſtat* from any foregoing Part of the Teſtator's Will, who before was interrogated by the Notary, or has for ſome little Time before declared his Will to the Notary, or to the Witneſſes, and then being of ſound Mind and Memory, and willing to make his Will, but his Speech is ſo obſtructed by ſome ſudden Hap, that he cannot expreſs himſelf in Words; an Inſtitution of an Heir is then in ſuch a caſe valid, if he points out and demonſtrates his Heir by Signs: Becauſe, in favour of Laſt Wills, an Interpretation ought to be made in a favourable manner, leſt many Perſons ſhould die inteſtate. And thus the Appointment of an Heir, generally ſpeaking, ought to be aſſiſted with a benign Interpretation, as it is much favour'd in Law[l]. And hence it is alſo extended to the like Caſes, wherein the Mind and Intention of the Teſtator is the ſame. It matters not, whether the Teſtator ſhall expreſs himſelf *thus*, viz. *Let* Titius *be my Heir*; or ſhall ſay *thus*, viz. *Let him be my Heir, whom I point out by my Finger*, or by any other Sign. But touching the *oblique* Deſignation of an Heir, I ſhall ſpeak in the next following Paragraph.

k In l. 3. C. 6. 14.

l D. 28. 2. 19. & 4. ib. Bart.

Firſt, by a benign Interpretation, the Appointment of an Heir is preſumed to be made, if the Teſtator, without any expreſs Appointment of him, bequeaths all his Eſtate to ſome College, and the like: For he ſeems hereby to have appointed ſuch College, and the like, to be his Heir, according to *Baldus*[m]. *Secondly*, An Appointment of an Heir is deemed to be made, if in a Will, after Legacies given, it is thus written; *viz. As to all other Goods, moveable and immoveable, let* Titius *take them:* Here *Titius* is made Heir, as *Paul de Caſtro*[n] notes: For in the Appointment of an Heir, the Conſtruction is more full and favourable, than of a Legacy. And, generally ſpeaking, the Appointment of an Heir ought to be underſtood in ſo favourable a manner, that the ſame may be valid; unleſs the Error be ſuch as ſhews the Folly of the Teſtator[o]. *Thirdly*, If a Teſtator ſhall ſay, *I appoint* Titius *to be Legatary to all my Goods*; he is hereby, as *Baldus*[p] and *Jaſon*[q] relate, underſtood to be made univerſal Heir; for there are univerſal and particular Heirs. *Fourthly*, It is to be obſerved, That tho' no one can be appointed, unleſs he be ſhewn and pointed out in certain[r]; yet it is not neceſſary, that an Heir ſhould be called by his proper Name; but it is ſufficient if he be pointed out by ſome certain Sign or Token, as aforeſaid[f]. And in the like manner it is not to be doubted, but that Brothers may be appointed Heirs by their appellative Name, tho' their proper Name be not expreſſed[s]. At this day a ſolemn Form of Words is not required in the Appointment of an Heir or Executor, but all Words that expreſs the Teſtator's Will, whether they be *direct* or *oblique*, or of the Indicative or Imperative, are ſufficient to this end and purpoſe[t]. The ancient Lawyers thought, that, if *Titius* the Teſtator ſhould ſay, *viz. Let* Sempronius *be the Heir of* Photius; ſuch Inſtitution was valid, ſince the Teſtator only erred in his own proper Name, and had named *Sempronius* to be his Heir. But this Opinion does not pleaſe *Juſtinian*, becauſe no one is ſo ſupine and negligent as not to know his own proper Name, as to ſay

m In l. 1. D. 28. 1.

n In l. 7. C. 6. 23.

o C. 6. 24. 14.

p In. l. 24. C. 1. 3.

q In l. 25. D. 29. 2. 7.

r D. 28. 5. 9. 9.

f D. 28. 5. 8.

s D. 28. 5. 9. 1. & l. 2.

t C. 6. 23. 15.

Photius for *Titius*, when he ſpeaks of himſelf. Wherefore he declares, that ſuch an Inſtitution as this ought not to be admitted, unleſs it be in two Caſes[u]. The firſt, is, when the Teſtator ſhall be an Heir unto any one by Name, or is named *Photius*: For then the Inſtitution is underſtood in this ſenſe, *viz.* As if the Teſtator order'd *Sempronius* to be his Heir, as he was the Heir to *Photius*. Which Interpretation is well defended by this Rule in Law, *viz.* That which dictates the Heir of an Heir, dictates him alſo to be Heir of the Teſtator[v]. The other Caſe is, if the Teſtator appoints *Photius* to be his Heir, and afterwards writes thus, *viz. Let* Sempronius *be the Heir of* Photius; the Teſtator ſeems to have ſubſtituted *Sempronius* after the vulgar manner, if *Photius* will not be his Heir. And thus *Sempronius* ſeems to be called, by the Right of Subſtitution, into the Place and Part of *Photius*, who is appointed in the firſt Degree and Place. And ſuch Subſtitution is ſupported with ſuch a benign Interpretation, that *Sempronius* may be ſaid to be Heir unto *Photius*, or rather called into the Place of *Photius* not accepting of the Heirſhip; becauſe he is not only Heir unto the Deceaſed, but alſo Heir to him, who is firſt called unto the Heirſhip, by way of Subſtitution. Unleſs it be in theſe two Caſes, the Appointment of *Sempronius* is of no moment, nor can it be ſupported by any Interpretation of Law; becauſe the Teſtator was miſtaken in his own Name[w].

[u] C. 6. 24. 14.

[v] D. 50. 16. 70. & 170.

[w] D. 31. 1. 3. 1.

Hence it is plain, that, in order to ſupport the Inſtitution of an Heir, it is not only neceſſary that ſome one ſhould be appointed, but it is moreover required, that the Teſtator himſelf ſhould appoint him, whom he deſigns to make his Heir. And this is ſo far true, that the Inſtitution ought not to be confer'd on the Nomination and Diſcretion of another Perſon[x]: For *Caius* ſays, That this is a vicious Inſtitution if the Teſtator refers the choice of an Heir unto the Will of *Titius*; becauſe this is not a juſt Declaration touching that, which the Teſtator would have to be done after his death, but only a Declaration of what *Titius* would have. But it is otherwiſe, if ſuch an Inſtitution be *tacitly* confer'd: As when it is ſaid, *Let* Mævius *be my Heir, if* Titius *ſhall aſcend the Capitol*[y]. For here the Purpoſe of the Teſtator is certain and firm, ſince he would have *Mævius* to be his Heir, and *Titius* aſcends the Capitol: And tho' *Titius* refuſes, yet *Mævius* ſhall be Heir, provided he aſcends the Capitol. Therefore, ſuch Inſtitution is not committed to the Will of a third Perſon; though it has not its entire Effect, unleſs the Condition be fulfilled. Yet ſome think, that by the *Canon* Law[z], ſuch Inſtitution may be left to the Diſpoſition of a third Perſon; ſaying, That a Perſon dies teſtate, as to *charitable Uſes*, who thus makes his Will, and the Teſtator's Goods ſhall be laid out on *pious Uſes*. But this Opinion of *Covarruvias* and others[a], I conceive, merely depends on Conjecture; and therefore it is better to ſay, that, ſince that Text does not mention a *pious* Cauſe, the Deceaſed does not die teſtate, but only has a Perſon (in excluſion of the Biſhop) to execute the Will as to *pious* Cauſes[b].

[x] D. 28. 5. 32.

[y] D. 28. 5. 68.

[z] X. 3. 26. 13.

[a] Ad h. tit.

[b] X. 5. 40. 18.

It has been noted, that the Appointment of an Heir is the making of a Perſon, in ſome meaſure, Maſter of all the Teſtator's Eſtate and Subſtance: For after the Heir has accepted of the Heirſhip, he immediately acquires the Property of all the Goods of the Perſon deceaſed. And hence ſome will have it, that ſuch Heir acquires to himſelf the ſame Dominion and Property therein as the Deceaſed himſelf had. But, by their leave, this is a falſe Doctrine in Law; becauſe, according to the truth of the matter, all the Rights which accrued to the Teſtator deceaſed, do ſurely die and come to an end with him; for *mors omnia ſolvit*. But, by a Fiction of Law, thoſe and the ſame Rights which accrued to the Deceaſed, do, in virtue of the Will, accrue even to the Heir after the Teſtator's Death; becauſe by ſuch a Fiction, the Heir is the ſame Perſon as the Teſtator deceaſed: And therefore, the ſame numerical Rights which accrued to him, do now by ſuch Fiction

Fiction accrue to the Heir. Thus the ſame Right of Exception accrues to the Heir, which did belong to the Perſon deceaſed. And as the Heir repreſents the Perſon of the deceaſed, ſo that is not lawful for the Heir to do, which was not lawful for the Perſon deceaſed to do. But tho' an Heir is by a Fiction of Law ſuppoſed to be the ſame Perſon with the deceaſed; yet he is preſumed to be unacquainted with the Fact of the Deceaſed: And, therefore, he does not ſucceed the Perſon deceaſed in penal Caſes[c]. The Heir, in all Matters relating to Heirſhip, follows the Court and Juriſdiction of the Perſon[d]; and makes uſe of the ſame Right in bringing of Actions, which the Deceaſed had at the Time of his Death[e].

[c] D. 39. 1.
[d] D. 5. 1. 19.
[e] D. 5. 1. 19.

Hereditary Actions, or Actions againſt Heirs, are divided among the Heirs according to the ſeveral Portions of the Inheritance, in ſuch a manner that each of the Heirs may be convened *ſeparately*, according to his *Quota* of the Heirſhip, which was divided into twelve Parts, or *Ounces*, as it was called[f]: And this is true, if the Obligation be *dividual*; as when Money or any certain *Species* is promiſed. But when the Obligation is *individual*, or conſiſts in thoſe Things, which are in their own nature indiviſible, as a Road or Way, Services, and the like, the Obligation in this caſe is not divided among the Heirs, but every one of the Heirs of the Perſon who made the Promiſe, are ſeverally bound *in ſolidum* for the Performance of the Service[g], *&c.* For thoſe things which cannot be divided into Parts, are due from each of the Heirs *in ſolidum*; and each may be ſued in the whole. If the Teſtator ſhall order his Heirs or Executors to build a Chapel, or the like, one of them may be compelled *in ſolidum:* But yet, according to *Paul de Caſtro*[h], ſuch Heir or Executor may recover Part of his Expences from the other Heirs or Executors. Heretofore, when any perſonal Action was brought againſt a Man as being Heir, Interrogatories were held neceſſary, leſt the Plaintiff ſhould not know in what Portion of the Inheritance the adverſe Party was Heir unto the deceaſed, and by that means ſhould ſuffer Damage in demanding more than the Perſon was Heir to[i]. And in this ſenſe an Interrogatory Action was propounded to him: But at this day we do not make uſe of theſe Actions to pump the Truth of the adverſe Party, becauſe no one is compelled, before a judicial Proceſs is begun, to give an Anſwer touching his own Right: And, therefore, theſe Actions are leſs common, and grown into diſuſe[k]. A Creditor has not a perſonal Action againſt Legatees, but only the Heir of the Perſon deceaſed[l]; becauſe by a Law of the Twelve Tables, only Heirs are liable to a perſonal Action; and it does not lie againſt a particular Succeſſor, as a Legatee is. A Creditor ſucceeding his Debtor, as to one Part of his Eſtate, may have his Action againſt the Heirs, in reſpect of the other Parts thereof. For Illuſtration-ſake take the Caſe; *Titia*, the Mother, owing her Son *Sempronius* thirty Pounds, made *Sempronius* and two other Perſons her Heirs, and then died. *Sempronius* in this caſe may have his Action for two Parts againſt the other two Perſons as Heirs bound to him: But as to the third Part, it is extinguiſh'd by *confuſion* of Subſtance[m], as we call it. But if the Mother had impawned Goods or an Eſtate unto her Son, and it be found in the Poſſeſſion of one of the Co-Heirs, *Sempronius* may have an *Hypothecarious* Action againſt him *in ſolidum*[n]. *Hereditary* Incumbrances ought to be divided among the Heirs, according to the Portion of their Inheritance, tho' there be an Inequality in the Legacies that are left them[o].

[f] I. 2. 14. 5.
[g] D. 50. 17. 192.
[h] Inl. 5. D. 45. 1.
[i] D. 11. 1. 1. 1.
[k] D. ut ſupr.
[l] C. 4. 16. 7.
[m] C. 4. 16. 1.
[n] C. 4. 16. 1.
[o] C. 4. 2. 1.

Creditors may convene him, unto whom the Heirſhip is given, to declare, whether he will prove the Will, and take the Heirſhip on himſelf, or not[p]: And this is daily Practice. The Heir by accepting of the Heirſhip, which we in *England* call proving the Will, or taking out Letters of Adminiſtration, transfers all Actions both *active* and *paſſive*, on himſelf: For before he has taken the Heirſhip on himſelf, he can neither bring an Action,

[p] C. 6. 30. 9.

Action, nor ſue for the hereditary Goods; and by taking the Heirſhip on himſelf, he becomes liable to the Creditors of the Deceaſed, and to Legatees. 'Tis neceſſary, according to *Bartolus* [q], that the Heir *ab inteſtato* ſhou'd take the Heirſhip on himſelf, by proving the Will if there be any Will made, for the confirming of ſuch Matters as are bequeathed in the Will; and ſuch Heir the *Engliſh* Lawyers call an Adminiſtrator *cum teſtamento annexo*. Heretofore the Heir of a Perſon deceaſed could not be moleſted for the Debts of the Deceaſed, till nine days after the Debtor's Death [r]: But now it is during the Time allowed him for making an Inventory, that he cannot be called into Judgment, nor moleſted by Creditors or Legatees in any reſpect [s]. So that the Exception of an Inventory hinders Conteſtation of Suit, in ſuch a manner that the Heir is not obliged to anſwer to the Plaintiff's Libel, if by his Exception he alledges, that it is within the time of making an Inventory. But this admits of a Limitation: *Firſt*, when the Heir is convened, as any other Poſſeſſor of a Thing, claimed by a real Action on the account of ſomething found among the Goods of the Perſon deceaſed, provided the Suit be not touching Legacies; becauſe in reſpect of them the Law impoſes ſilence in the *Interim*, by whatever Action they be ſued for. *Secondly*, in reſpect of Legacies left *pro Animâ*; becauſe they do not admit of any Delay of Payment. By a Conſtitution of *Lewis* the XIVth [s] King of *France*, the Heir has forty Days allowed him to deliberate whether he will accept of the Heirſhip, and three Months afterwards to make an Inventory. But an Heir, during the time of making an Inventory, may convene other Perſons. An Heir commanded by the Teſtator to take an Oath, that he will pay all Legacies given by a Will that is leſs ſolemn, is obliged to take ſuch an Oath: For it is a frequent thing for a Teſtator to onerate his Heirs with the Religion of an Oath for the Payment of Legacies [t]. In *England*, there is no occaſion for it, becauſe the Law impoſes an Oath for this End and Purpoſe, and likewiſe a Bond on Adminiſtrators [u].

[q] In l. 2. D. 40. 5.

[r] Nov. 115. c. 5.

[s] C. 6. 30. 22.

[s] A. D. 1667.

[t] D. 31. 1. 77. 23.

[u] 22 & 23 Car. 2. c. 10.

As an Heir is preſumed to be the ſame Perſon with the Deceaſed, it is from hence concluded, that the Heir cannot reſcind the Act or Contract of the Deceaſed, though the Rule is otherwiſe in penal Actions; theſe Actions being not in force againſt Heirs. But by the *Civil* Law, the Heirs of a Perſon accuſed of a Crime are condemned *in ſolidum* on the ſcore of a Fine, if Suit was conteſted in the Life-time of the Deceaſed: But 'tis otherwiſe, if any thing of advantage comes to the hands of ſuch Heirs by the Crime of the Deceaſed: For then ſuch Heirs may be convened in their own Perſon, though Suit was not conteſted in the Life-time of the Deceaſed, leſt one Perſon ſhould be enriched by the Iniquity of another [v]. But by the *Canon* Law, the Heir is bound to repair the Damage done by the Perſon deceas'd, even though nothing ſhould come to his hands by the Fraud and Knavery of the Deceaſed: And this, they ſay, obtains in civil Courts among the *French*, through the Equity thereof. See *Paponius* of Arrets [w]. And tho' the Parliament of *Paris* indiſtinctly condemned an Heir only in that which came to his hands, without conſidering whether Suit was conteſted or not [x]: yet it is to be noted, that this only proceeds, when Suit is criminally commenced by a Fiſcal Proctor, and in a Penal Action [y].

[v] C. 4. 17. 1. un. 1.

[w] 4. Tit. 11. Arr. 3.

[x] Morn. in l. un. C. 4. 17.

[y] D. 50. 17.

It has been already related, that the Appointment of an Heir is the making of a Perſon to be the Proprietor of another Man's Goods and Subſtance, which is done by a Laſt Will and Teſtament; for a Teſtament is not valid without ſuch an Appointment [z]. And thus all Rights and Actions, together with the Goods which the Teſtator had at the time of his Death, do both *actively* and *paſſively* paſs to the Heir. But an Heir cannot be ſaid to have the Poſſeſſion of the Teſtator's Subſtance, unleſs he be naturally

[z] I. 2. 20. 34.

[c] D.41.2.23. naturally ſeized thereof [c]; becauſe Poſſeſſion is a Matter of Fact, and the ſame is acquired not only by the Mind, but an Act of the Body is alſo [d] D.41.2.3.pr. required hereunto [d]. But as ſoon as the Heir has poſſeſſed himſelf thereof by ſuch a corporeal Seizing, the Teſtator's whole Eſtate is immediately ſaid to deſcend from the Perſon deceaſed, to his Heir. A Man averring himſelf to be the Heir of any one, is in a doubtful Caſe underſtood to [e] D.11.1.9.2. be Heir *in ſolidum*, unleſs it be limited by a precedent Obligation [e]. If a Perſon ſhall compel another to make his Will, and to appoint him his Heir, ſuch Will is not valid; and the Perſon thus compelling him ſhall be puniſh'd in a criminal manner, and ſet aſide as Heir: But the Appointment of an Heir made by a Teſtator, who has been wheedled hereunto, is not deemed vicious. In the like manner ſhall an inteſtate Heirſhip be taken from him, who has forbid or hindred the Perſon deceaſed from making his Will, as being an unworthy or an unfit Perſon to be his Heir [f]. A Perſon [f] C.6.34.1.& 2. who appoints an Heir, ſeems to ſhew an Intention or Inclination of making [g] C.6.23.14. a Will [g]: or, as *Baldus* phraſes it, he who appointed an Heir, or diſinherited a Son, is preſumed to have ſhown a Diſpoſition of making a Teſtament, and not a Codicil: And thus the Quality of the Thing demonſtrates the Intention of the Agent, or of him who does it.

If an Heir ſhall be proved to have tranſmitted the Heirſhip or Inheritance unto a Subſtitute, in order to defraud Perſons of their Legacies, an Action in Equity will lie againſt him, who is guilty of ſuch foul Practices, or who has conſpired with the Subſtitute hereupon: And this is more eſpecially true, if he has omitted to take the Heirſhip on himſelf, by receiving a Conſideration in Money; for in this caſe he ſhall be compelled to pay all [h] C.6.39.1. ſimple Legacies, and Legacies in Truſt [h]. An Heir is obliged to pay all Legacies, though there be a Diſpute in Law touching the Heirſhip: But then the Legataries ought to give Caution or Security to him to refund, in [i] D.5.3.6. caſe he be pronounced not to be the lawful Heir [i]. If an Heir removes or conceals any part of the Inheritance, *&c.* he ſhall be puniſhed in two-[k] C.6.30.22. 10. fold [k]. An Heirſhip cannot be tranſmitted to Heirs or Deſcendants, unleſs the Heir appointed, or the firſt Heir accepts of the Heirſhip, and proves [l] C.6.50 1.5. the Will [l]: And a Perſon that is above ſeven Years old, may by the Decree [m] C.6 30.18. of the Judge take the Heirſhip on himſelf [m]. As a Donation or Giſt is not made unto a Perſon againſt his Will; ſo no one can be compelled to be an [n] C.6.30.16. Heir unto another [n]: But this Law in the *Code* has a View to extraneous, and not to neceſſary Heirs, according to the *Roman* Law.

An Heir, whether it be by Teſtament, or *ab inteſtato*, or in the Whole or in Part, may without an Inventory take the Heirſhip on himſelf; and the Effect hereof is ſuch, *viz.* that he who thus takes the Heirſhip on himſelf, becomes liable to the Creditors of the Deceaſed, ſince he acts thus of [o] C.6.30.22. 1. his own accord [o]. But if an Heir appointed does not thus haſtily accept of the Heirſhip, he cannot be convened by Creditors and Legatees [p] C.6.30.22. 11. (as aforeſaid) within the Time allowed for making an Inventory [p]: And the Time allowed for making an Inventory, if the Effects are at hand, and in the City, is the Term of three Months; but if they are abſent, as in the Provinces, then the ſpace of a Year was allowed by the *Roman* Law. But if the Heir be ſuſpected of running away, or of waſting the Eſtate of the Deceaſed, then he might be convened within that Time. And ſo likewiſe he may for Alimony bequeathed to *pious Uſes*, and for funeral Expences. The Puniſhment of an Heir not making an Inventory within the Time, is, that he is liable *in ſolidum*. After an Heir has made an Inventory, he may deduct the *Falcidian* Portion; and this Portion he may plead againſt [q] C.6.30.22. 8. Legataries, but not againſt Creditors [q]. A Soldier becoming an Heir is only convened for thoſe Things which are in the Inheritance, and which he [r] C.6.21.12. does as Heir [r].

There is one kind of Heirſhip which is ſtiled a *direct* Heirſhip; and another which is only in Truſt, called *Hæreditas Fidei-Commiſſaria*, but this is improperly ſuch [f]. Again, there is one kind of Heirſhip which is *univerſal, viz.* when the Perſon is Heir to the whole Inheritance; and another, which is termed *particular, viz.* when a Perſon is only Heir to ſome Part thereof. *Thirdly*, there is one kind which is ſtiled *Teſtamentary*, of which I have been here principally ſpeaking; and another, which is termed *legal* or *inteſtate* Heirſhip; of which hereafter under a particular Title. *Teſtamentary* Heirſhip may be either *pure* or *conditional*: For an Heir may be appointed either *ſimply*, or under a Condition, or elſe *in diem incertum* [s], but not from a certain Time, or to a certain Time [t]. And a Teſtator may either appoint one, or as many Perſons as he pleaſes [u]: But if he appoints ſeveral, he is underſtood to have appointed them unto equal Parts, unleſs he has expreſs'd himſelf as to unequal Parts [v]. A *particular* Heir does not repreſent the Perſon of the Deceaſed in any further Sum or Act than he is Heir to: So that an Action cannot be brought againſt him for any Sum or Act further than he is Heir [w].

[f] D. 5. 6. per tot.

[s] D. 28. 5. 38.
[t] D. 28. 5. 34.
[u] I. 2. 14. 4. & 6.
[v] D. 28. 5. 2. I. 2. 14. 6.
[w] D. 5. 3. 6.

All Perſons may be appointed Heirs, who have the Power of making a Will, or who may take from a Will, unleſs they are expreſſly prohibited by Law [x]. And it matter'd not, whether they were Bondmen or Freemen; under which Diſtinction all Men are comprehended [y]. Nay, even thoſe whom we ſtile *proper* Bondmen might be made Heirs, though their Freedom was not expreſſly left them: For by the very Act of making them Heirs, they became Freemen after their Maſter's Deceaſe [z], as already remembred. And he was ſaid to be a *proper* Bondman, in whom the Teſtator had a *nude* Property, and another Perſon had the Uſufruct [a]. But a *proper* Bondman, that committed Adultery with his Miſtreſs, could not be manumiſed by her in her Laſt Will after an Accuſation commenced; and, conſequently, could not be made her Heir [b]. But a Bondman, in whom a Man had an Uſufruct, was not called a *proper* Bondman, but another's Bondman; and, therefore, he could not be ſo appointed by the Uſufructuary as to have his Freedom [c]. When a *proper* Bondman was appointed Heir, he received his Freedom from himſelf, and became a *neceſſary* Heir; becauſe he might be compelled to be an Heir [d]. But if a Bondman was made an Heir, and manumiſed by his Maſter in his Life-time, he became not a *neceſſary* Heir, but might take the Heirſhip on himſelf, if he thought fit. If a Bondman was made Heir by his Maſter, and was afterwards alienated, he could neither obtain his Freedom, nor the Heirſhip, but by the Order of his new Maſter he ought to take the Heirſhip on himſelf, which his new Maſter had purchaſed by ſuch a Bondman [e]. Laſtly, 'tis to be noted, that even another's Bondman might be made an Heir, who acquired the Heirſhip for his Maſter's Benefit: which held true, when ſuch Maſter was capable of being made an Heir.

[x] I. 2. 14. pr. & 2.
[y] I. 1. 3. pr.
[z] I. 2. 14. pr.
[a] I. ut ſupr.
[b] D. 28. 5. 48. 2.
[c] I. 2. 14. pr.
[d] I. 2. 19. 1.
[e] I. 2. 14. 1.

Though, regularly ſpeaking, an Action which does not accrue to the Deceaſed, does not lie for his Heir, the Condition of the Heir and the Teſtator being the ſame; yet a Caſe may be found wherein the Heir may have an Action, though the Teſtator could not, as may appear from the Law here quoted [f]. Again, though an Heir may in ſome Caſes do that which the Perſon deceaſed could not do; yet there are ſome Things which the Perſon deceaſed might do, and which the Heir cannot do. He who takes the Heirſhip of a Debtor on himſelf, does hereby contract with the Creditors of the Perſon deceaſed [g]. It has been ſaid, that if a Perſon has not accepted or taken the Heirſhip on himſelf, he cannot tranſmit the ſame to his Heir: But the Right of Subſtitution, or of a *Fidei-Commiſſum*, may well enough be tranſmitted, according to *Baldus* [h]. But an Infant may tranſmit

[f] D. 35. 2. 84.
[g] D. 42. 4. 4. D. 42. 4. 3. fin.
[h] Conſ. 28. 8. par. 1.

tranſmit the Heirſhip without any ſuch Acceptance, becauſe he cannot accept thereof, as being under ſeven Years of Age.

The Law has not appointed any certain or definite Time, within which the Heir ought to take the Heirſhip on himſelf, but has left this Matter to the meer Will and Diſcretion of the Heir himſelf, unleſs the Teſtator has in his Will expreſſed a Day certain for this End and Purpoſe [i]; or unleſs ſome other Perſon has already poſſeſſed himſelf of the Teſtator's Goods, and has acted for ſome time as Heir, and then the Law appoints the ſpace of three Years; or unleſs the hereditary Creditors do urge and preſs the Heir thereunto: In which Caſe it is neceſſary, that the Heir ſhould deliberate with himſelf, whether it be expedient for him or not to take the Heirſhip on himſelf, or to renounce the ſame [k]. And if he ſhall think fit to accept of the Heirſhip, he ought to make an Inventory to ſecure himſelf thereby, that he does not become liable, beyond what the Inheritance admits of [l], which we call *Aſſets*. Heretofore no one could take the Heirſhip on himſelf, till ſuch time as the Will was opened in the Preſence of the Judge [m]; and from hence ſuch an Aperture or Recital was neceſſary: But yet Perſons were ſaid to be Heirs in Law, before the Tables of the Will were opened in the Judge's Preſence.

[i] D. 29.2.72.
[k] I. 2. 19. 5.
[l] C. 6. 30. 22.
[m] C. 6. 51. 1. 1. & 2.

If a Teſtator ſhall appoint the *Venter* of his Wife to be his Heir, and after ſuch Will made, ſhall have ſeveral Children by the ſame Wife at one Birth, or otherwiſe, or by another Wife, and thus ſhall have at different times ſeveral Children: In this Caſe, if he dies with ſuch Will, all the Children thus born ſhall be ſaid to be appointed. For the Teſtator ſeems to have appointed not only him, who was born in the Womb, but even all others that ſhall be deſcended from the ſame Wife, and alſo from another: So that neither of them ſhall ſay, that he is paſſed by in order to rupt the Will. Now to appoint a *Venter* to be Heir, is nothing elſe but to appoint a poſthumous Child: And he who appoints a poſthumous Child, ſeems to appoint every poſthumous Child whenſoever he ſhall be born.

I ſhall next conſider *Executors* as aſſigned in Laſt Wills and Teſtaments, and how they came to be ſo. Theſe Perſons were appointed in caſe the Heirs were negligent in the execution of Wills: But to the end that ſuch Perſons ſhould be conſtituted on the Negligence of Heirs, it was neceſſary that the Heirs ſhould be firſt admoniſhed to execute the Will of the Deceaſed within a certain time. This Admonition was adminiſtred by the Judge of the Place, where the Teſtator died, and who had the Super-intendance of the Will of the Deceaſed. If the Executors named by ſuch Judge, or even by the Teſtator himſelf, were negligent in their Office, the Biſhop was permitted to execute what the Teſtator himſelf had ordered in his Will: And this is agreeable both to the *Civil* [n] and *Canon* Law [o]. If the Executors died in the *Interim*, the Execution in reſpect of its Cauſe did devolve to the Biſhop himſelf [p]. And thus a Devolution was to the Biſhop either by Death or Negligence. So that this ſacred Care of ſeeing Laſt Wills and Teſtaments duly executed, was for a time in the hands of the Biſhop, according to the *Civil* Law, even though the Teſtator had not fully and clearly expreſſed the ſame: And thus it came into uſe here in *England* at firſt from the *Civil*, and ſo then from the *Canon* Law, as ſome have imagin'd. But at this day through all the Cities and Provinces in *France*, the King's Proctors or Attorneys have this care committed to them, and Wills are proved before them, and the King's Judges have this Cognizance of Diſputes ariſing hereupon.

[n] C. 1. 3. 28.
[o] X. 3. 26. 3. & 6.
[p] C. 1. 3. 28.

By the *Civil* Law, a Biſhop is an Executor of a Laſt Will and Teſtament made to *charitable Uſes* [q]; becauſe in the primitive Church the chief care of Captives and Paupers was lodged with him, as we may read in the

[q] C. 1. 3. 28.

the *Canon* Law [r]: But he did not administer this Charge or Office in his own Name, but by the means of his Deacons [s]. But in *Holland*, the Care of Paupers chiefly belongs to the Deacons: And, therefore, a Legacy left to Captives and Paupers, by the Usage and Custom of that Country, is to be sued for from the Deacons; and ought to be fulfilled according to the Testator's Will. See *Groenvegen de ll. Abrogatis*. Executors assigned in a Last Will, are in the Place of *universal* Heirs, when the Testator, without appointing any Heir, orders his Goods to be sold and distributed *inter Pauperes* [s]. And an Executor, who has accepted of a Legacy left him, cannot afterwards renounce the Office of an Executor; for if he should wave such Office, he shall (according to *Bartolus* [t]) be set aside from having such Legacy paid him.

[r] Dist. 82. c. 1. pr.
[s] Dist. 88. c. 7.
[s] Bart. in l. 49. C. 1. 3.
[t] In l. 5. D. 34. 9. 2.

The Law takes notice of three kinds of Executors. For *first*, some are stiled *testamentary* Executors, or Executors of Last Wills and Testaments [u]: And here the Law observes, that Bishops are the Executors of Testaments made to *pious Uses* [v], who are stiled *lawful* or *ordinary* Executors from their Care of Captives and Paupers, as mentioned in the foregoing Paragraph. But a *testamentary* Executor, properly speaking, is he who is deputed by the Testator himself to bring the Will of the Deceased to its due Effect, or to see it done; and hence arose Executors in Trust: And such Executor by the *Civil* Law has only *nudum ministerium facti*; for by this Law the Right of the Inheritance is vested in the Heir, as *Bartolus* [w] remarks. A second sort of Executors are those that execute the Sentences of Judges, after they have passed *in rem judicatam* [x]; that is to say, after the time of appealing is lapsed: And of these we meet with several *Species* in our Books, too many to be here enumerated. And the third are those that execute Citations, who are sometimes stiled *Viatores*, sometimes *Beadles*, and sometimes *Apparitors*: Of the two last I meddle not with them here, having treated of them under their proper Titles.

[u] Bald. in l. 24. C. 1. 3.
[v] C. 1. 3. 28.
[w] In l. 24. D. 31. 1. n. 11.
[x] C. 7. 53. 8.

Executors of a Will made *ad pias causas*, ought to execute the same according to the Purport thereof, and to distribute the Goods and Chattles in the presence of the Heirs, or (at least) they ought to be asked to be present, that they may see what Things are sold and distributed [y]. These Executors assigned in a Will for the Distribution of an Estate *inter Pauperes*, are in Law stiled *Fidei-Commissarii universales*, or universal Feoffees: And such an Executor, named in a Will for a Distribution among *Paupers*, may either distribute the particular Things themselves, or else by selling them distribute the Price and Value thereof [z]. By the *Civil* Law, it does not seem necessary to grant Administration to an Executor, when he is deputed such by the Will of the Testator, in order to fulfil and execute the same; for he may fulfil it by an Inducement of his own Conscience: And, as to the Oath touching rendring a faithful Account of his Office, it seems sufficient if he takes the same at the end of his Office; but it is otherwise by the Laws of *England*. Whenever there are several Executors assigned in a Will, one Person cannot act without another, unless it be in three Cases, *viz. First*, if one or more of them are dead, and only one survives, who then may execute the Will of the Deceased alone. *Secondly*, if the rest renounce or refuse the Executorship. And *thirdly*, if the rest are absent or hindred by any long Impediment. And thus I have done with Heirs and Executors, according to the Sense of the *Civil* Law. I shall next consider, what the common Law of *England* says touching these Persons: For the word *Heir* is taken in a different manner by the *Civilians*, and our common Lawyers here in *England*, as already noted.

[y] D. 45. 1. 4.
[z] C. 7. 3. 49.

For our common Lawyers do not stile him by the Name of an *Heir*, whom the Testator has named in his Will, as the *Civilians* do, but him who is next of kin in Blood unto the Person deceased, unto which Heir the

[a] Glanv. lib. 7. c. 1. Fee or Inheritance belongs after the Death of his Anceſtor by way of Right [a]: So that they aſſert an Heir not to be made by the Act of Man, but by God himſelf; and he is called an Heir from the Inheritance unto which he ſucceeds by Right of Blood [b]. By the word *Inheritance* our Lawyers do not mean an univerſal Right unto the Teſtator's Subſtance, but have only a View to his Lands and Tenements, and other corporeal and incorporeal Rights, which the Teſtator held in Fee, or by a perpetual Right. For the Diſpoſition of their Chattles, Teſtators name Executors, who are in the Place of an Heir in reſpect to the perſonal Eſtate of the Deceaſed, and do repreſent the Perſon of the Deceaſed, after they have taken the Executorſhip on themſelves. See *Brooks* his Title of *Executors*. So that they acquire all the Teſtator's Goods, not otherwiſe bequeathed, and may take unto themſelves the Apparel of the Teſtator's Widow, if they are more delicate and coſtly, than her Husband's Condition did admit of. *Brooks* as before cited. For the Diſpoſition of Chattles, Men with us may name what Perſons ſoever they pleaſe [c], provided they be not expreſſly forbidden to be ſuch by Law [d].

[b] Brit. c. 118. & 119.

[c] Glanv. lib. 7. c. 6.

[d] Ut ſupr.

An Executor may be conſtituted either *ſimply* or *conditionally*, and either from a certain Time, or after a certain Time, and either *univerſally* or *particularly* [e], and in the firſt and ſecond degree by way of Subſtitution; and there may be either one or more Executors [f]. I ſay, that a Teſtator may make whom he pleaſes, provided they be not forbidden by Law to be Executors, whether they be Parents or extraneous Perſons, the next of kin, or more remote [g]; yea, not only Freemen, but alſo Bondmen, whether they are in our Property, or in the Property of another [h]: And likewiſe Women and Infants, according to *Brooks*, Tit. of *Executors*. But no one can be compelled to undertake this Office, but that he may refuſe it, if he pleaſes: yet he who has refuſed it, may (notwithſtanding) repent, and accept of the ſame, according to the Doctrine of ſome Perſons [i], provided he does it in the Life of his Co-Executor, but not afterwards [k]. If he has once accepted of this Office, he is always bound to retain it, and cannot then renounce the ſame: And he ſeems to have accepted of it as ſoon as he has poſſeſſed himſelf of the Goods of the Teſtator on this account [l]: If a Perſon ſhall appoint one to be his Executor, who dies before he has proved the Will, the Adminiſtration of Goods ſhall be committed by the Ordinary to the Teſtator's Widow, or neareſt of kin in Blood, as in the Caſe of an Inteſtate, which Adminiſtrator ought to diſpoſe of the Goods of the Deceaſed according to the Tables of the Will, unleſs he ſhall be a reſiduary Legatee: In which caſe his Executors may rightly claim the Adminiſtration *cum Teſtamento annexo* [m]. Thus the Perſon, whom our *Engliſh* Lawyers call an *Executor*, is he whom the Teſtator appoints by his Laſt Will and Teſtament to adminiſter his Goods and Chattles for him after his Deceaſe: For without naming of Executors, or if they all refuſe the Executorſhip, it is no Will at all [n]; yet the Legacies ſhall be paid in both Caſes, and the Teſtament ſhall be annexed to Letters of Adminiſtration.

[e] Dyer. Rep. fol. 3. & 4.

[f] Brook's Tit. Exec. 155.

[g] Bract. lib. c. 26. n. 2.

[h] Littl. lib. 2. c. 1.

[i] Perk. Tit. Deviſ. 485.

[k] Dyer. Rep. fol. 160. n. 42.

[l] Dyer Rep. fol. 166. n. 10. 11.

[m] Dyer Rep. fol. 372. n. 8.

[n] 37 H. 8. B. Teſt. 20.

But in reſpect of Land, the Will is good with us by the common Law, though no Executor be named; becauſe Land in *England* by the common Law is not Teſtamentary, according to *Finch*'s Treatiſe of the Law [o]. It is Adminiſtration as well as Appointment that makes an Executorſhip: For if a Man makes three Executors, and wills that none ſhall adminiſter but one, this one is ſole Executor [p]. Again, it is to be obſerved, that this Adminiſtration is for the Teſtator and his Uſe: So that the Executors themſelves cannot at their will make a Diſpoſal of theſe Goods [q]; nor divide them among themſelves to their own Behoof and Advantage [r]; nor ſhall the Husband who marries a Wife that is an Executrix, have theſe Goods by Intermarriage with her; nor ſhall the Executors forfeit them by an Outlawry,

[o] Lib. 2. c. 15.

[p] 3 H. 6. 7.

[q] 19 Eliz. Pl. 325.

[r] 17 H. 8. 22.

Outlawry [r]. And Outlawry, Excommunication, *&c.* is no Diſability in an Executor to bring an Action as an Executor (though ſuch Perſon outlaw'd, *&c.* cannot be rightly appointed,) becauſe Executors repreſent the Teſtator's Perſon. If there are never ſo many Executors named in a Will, they are all but one Perſon in Law: Hence it is, that a Releaſe of one binds both or all of them. And in an Action brought againſt them for the Teſtator's Debt, or upon a Covenant, and the like, one cannot anſwer without the other by the courſe of the common Law; though 'tis now otherwiſe by the Statute-Law [f]. They cannot have every one of them by himſelf a ſeveral Plea in Abatement of a Writ [s], *&c:* Yet their Power both for the Time when, and the Thing which they ſhall adminiſter, may well enough be divided [t]. As a Man may appoint *A.* and *B.* his Executors, or make one his Executor touching his Goods in *D*, and the other his Executor touching his Goods in *S.* By the Statute of *Weſtm.* [u] Executors ſhall have a Writ of Account, and a like Action and Proceſs in the ſame Writ, as their Teſtator ſhould have, if he had lived. And by the fourth of *Edw.* III [v], Executors ſhall have an Action for a Trepaſs done to their Teſtator, as of his Goods and Chattles carry'd away in his Life-time, and recover Damages in like manner, as the Teſtator ſhould have done, if he had lived. Executors muſt prove the Will (to be a true one) in the ſpiritual Court [w], and be ſworn to ſee it performed. If many Executors be made, and one refuſes [x], yet he may afterwards adminiſter at his pleaſure [y], and the others muſt name him in every Action for any Duty due to the Teſtator; and his Releaſe ſhall be a bar to the whole Duty. And if he ſurvives the other Executor or Executors, he ſhall have the Action, and not the Executor of him that died: But 'tis otherwiſe if they all refuſe, for then the Teſtator dies inteſtate [z].

[r] 10 E. 4. 1.
[f] 9 Edw. 3. c. 3.
[s] 36 H. 6. 17.
[t] 32 H. 8. B. Ex. 155.
[u] Weſtm. 2. c. 23.
[v] Cap. 7.
[w] 21 E. 4. 24.
[x] 21 El. Pl. 544.
[y] 21 E. 4. 23.
[z] 36 H. 6. 5.

TIT. XVI.

Of Vulgar *and* Pupillary Subſtitution; *of the Number of Degrees, and Number of Heirs in the particular Degrees*, &c.

HAVING in the foregoing Title treated of an Heir, and the Inſtitution of an Heir in the firſt degree; I ſhall in the enſuing Title diſcourſe of Subſtitutions, which are made in a ſecond or a more remote degree: For a Teſtator may in his Laſt Will and Teſtament make as many degrees of Heirs, as he ſhall think fit [a]; and this is done by *vulgar* and *pupillary* Subſtitution. Now *Subſtitution* is nothing elſe but the Inſtitution or Appointment of an Heir in the ſecond degree [b], which is made after the firſt, in caſe the firſt Heir dies, or refuſes to take the Heirſhip on himſelf, and the like: As when a Teſtator ſays in his Will, *I appoint* Titius *to be my Heir*; and *if he will not be my Heir*, then *I ſubſtitute* Caius *in his Room and Stead.* Here *Titius* is ſaid to be the Heir *appointed* or *inſtituted*, and *Caius* the Heir *ſubſtituted.* And in this ſenſe Subſtitution is a ſecondary and conditional Inſtitution. For the Perſon ſubſtituted ſhall only then be Heir, when the Perſon inſtituted in the firſt place does not take the Heirſhip on himſelf, either becauſe he refuſes ſo to do, or elſe becauſe he

[a] I. 2. 15. pr.
[b] D. 28. 6. 43.

he cannot do it. Hence Subſtitution cannot be without Inſtitution, for that a Subſtitute is ſaid to be the ſecond Heir appointed, as he comes in the Place of the firſt Heir, that either dies or refuſes to act as ſuch, and the like, as aforeſaid. 'Tis to be obſerved, that every Inſtitution after the firſt, is ſaid to be in the ſecond degree, in the ſame manner as all Marriages are termed ſecond Marriages, which follow the firſt. *Subſtitution* is ſo called from the word *Subtus*, becauſe an Heir ſubſtituted is deſcribed and deemed to be under the firſt Heir. For the Ancients were wont to begin their Teſtaments with the Inſtitution or Appointment of an Heir: And, therefore, formerly Legacies and Freedoms were not uſually mentioned in a Will before the Appointment of an Heir. For, as *Juſtinian* obſerves, the Inſtitution itſelf was the Head and Foundation of the Will [b]. And hence that Part of the Will is by *Horace*, in the ſecond Book of his Satires, called *prima cera*. Then the Teſtator named an Heir by way of Subſtitution, or ſubſtituted a ſecond Heir, in caſe the firſt Heir refuſed, *&c.*

[b] I. 2. 20. 34.

The chief Diviſion of Subſtitution is, that it is either *direct* or *precarious*. The firſt is that which is made by direct Words: As *if* Titius *will not be my Heir, let* Seius *be Heir:* And of this I ſhall here chiefly ſpeak. *Precarious* Subſtitution, otherwiſe called *Subſtitutio Fidei-Commiſſaria*, is that which is made in *oblique* and *precarious* Terms; that is to ſay, by Terms of Intreaty, *&c.* As, *I pray you,* Titius, *that when you die, you will reſtore my Inheritance unto* Seius [c]. This *oblique* Subſtitution wants the Aid and Aſſiſtance of another hand, becauſe the Perſon ſubſtituted thereby takes the Heirſhip from the hand of another Perſon: And thus the Inheritance of the Deceaſed devolves to him *viâ obliquâ*, by the Interpoſition of another Perſon: The Teſtator, for example, ſaying thus, *viz. Let* Titius *be my Heir, and I pray him, and commit it to him in Truſt, that when he dies, he would reſtore the Heirſhip or Inheritance unto* Caius. Here tho' *Caius* by a *Fidei-Commiſſum* be ſubſtituted unto *Titius*; yet *Titius* ought in the firſt place to take the Heirſhip on himſelf, and then reſtore it after he has accepted thereof unto *Caius*, with a Defalcation of the fourth Part of the Inheritance, in *Latin* called the *Portio Trebellianica:* And thus retaining three Parts in twelve, he ought to reſtore the nine Parts unto *Caius*. By a *direct* Subſtitution, the Perſon ſubſtituted does immediately, and without the Miniſtry of another Perſon, take the Teſtator's Heirſhip on himſelf, not by any oblique Ways and Means, but directly, as in the Example already deſcribed. Now a *direct* Subſtitution contains five *Species* under it. For there is one kind of Subſtitution termed *vulgar*; another ſtiled *pupillary*; a third called *exemplary*; a fourth ſaid to be *breviloquous*; and a fifth named a *compendious* Subſtitution. In ſpeaking of *vulgar* Subſtitution, I ſhall *firſt* conſider what it is. *Secondly*, how it is divided. *Thirdly*, by what Words it may be made. *Fourthly*, what is the Effect thereof. And *fifthly*, how it is extinguiſhed.

[c] C. 6. 42. 14.

And *firſt*, a *vulgar* Subſtitution is defined to be the Inſtitution or Appointment of a ſecond Heir, in the Place or Degree of the firſt, who does not, or will not take the Heirſhip on himſelf: which may be made by any one to a Perſon proper and capable thereof, provided it be done in plain, vulgar, and common Terms [d]. And hence it is called *vulgar* Subſtitution. As when a Man ſays, *Let* Titius *be my Heir, and if he will not, then let* Caius *be my Heir*. This kind of Subſtitution is twofold, *viz. expreſs* and *tacit*. The firſt is made by negative Words, the Heir declaring himſelf by expreſs Words of Negation: As when I make an Inſtitution firſt thus, *viz. Let* Titius *be my Heir*; and then I make a Subſtitution after this manner by negative Words, ſcil. *If* Titius *will not be my Heir, then let* Caius. A *tacit* vulgar Subſtitution is ſaid to be, wherein a Negation does not expreſſly reſult, but is *incluſively* and *tacitly* underſtood, and

[d] D. 28. 6. 8. pr.

is

is made by affirmative Words: As when I appoint two Heirs, namely, *Titius* and *Caius*; and then make a Subſtitution after this manner, *viz.* *And I ſubſtitute them mutually*; or thus, *Let the longer Liver, either of them* (meaning *Titius* and *Caius*) *be my Heir.* In this caſe, if they ſhall both of them live, they are both my Heirs: But if one of them will not be my Heir, or cannot, the other Perſon ſhall then be my Heir alone. Yet theſe Words, *I ſubſtitute them mutually*, have not this meaning, *viz.* That if one of my Coheirs ſhall die without Children, after he has accepted of the Heirſhip, the other Coheir ſhould ſucceed him; becauſe if *Titius* has taken the Heirſhip on himſelf, he is Heir.

The ſecond *Species* of Subſtitution is that, which is ſtiled *pupillary* Subſtitution, from the *Latin* word *Pupillus*, as *vulgar* Subſtitution is ſo called from the word *Vulgus*. This ſecond *Species* of Subſtitution is, when a Father has Children under the Age of Puberty, and ſubſtitutes an Heir, after he has already appointed Heirs by Inſtitution; and reſtrains this Subſtitution within the time of Puberty, or within a ſhorter time. As when he ſays, *Let my Son* Titius, *who is under the Age of Puberty, be my Heir*; *and if he will not, or will be my Heir, and ſhall die within the Age of a Pupil, then let* Caius *be my Heir* [e]. Or, *if my Son ſhall die under ten Years of Age, let* Caius *be my Heir* [f]. And thus it differs from *vulgar* Subſtitution, becauſe *vulgar* Subſtitution is extinguiſhed after the Heir has accepted of the Heirſhip: But *pupillary* Subſtitution is not determined, though the Son who is under the Age of Puberty accepts of the Heirſhip; provided he dies afterwards before he arrives at Puberty. For theſe two Caſes, *viz.* if the Son, as being under the Age of Puberty, ſhall not be the Heir; that is to ſay, ſhall not take the Heirſhip on himſelf, but dies before he arrives at Puberty, are always underſtood to be comprehended in this Subſtitution. Wherefore, in both caſes a Subſtitute ſucceeds, but by a different way and manner. For in the former caſes, when the Son becomes not Heir to the Father, the Subſtitute himſelf becomes Heir to the Father. But if the Son be Heir, and dies before Puberty, the Subſtitute becomes Heir to the Son himſelf. And the Father may reſtrain this Subſtitution to a narrower Compaſs of Time: As *if my Son ſhall die within ten Years of Age, then let* Caius *be my Heir*, as aforeſaid [g]. In this caſe, if the Son dies after the tenth Year, even before he arrives at the Age of Puberty, *Caius* does not ſeem to be a Subſtitute to him.

[e] D. 28. 6. 8.

[f] D. 28. 6. 21.

[g] D. 28. 6. 21.

The ſecond principal Queſtion is, from whence this kind of Subſtitution had its beginning? And here the Emperor ſays, that it was firſt introduced by the Manners and Cuſtoms of the *Roman* People, *viz.* That whereas a Pupil could not make a Laſt Will and Teſtament for himſelf through Defect of Age, the Father might make a Will for him the Son [h]. But at this day, becauſe this Cuſtom is reformed and reduced into writing, it is deemed to be a Matter of written Law. The Lawyers make *pupillary* Subſtitution to be two-fold; and diſtinguiſh it into that which is ſtiled an *expreſs*, and that which is called a *tacit* pupillary Subſtitution. The firſt is that, which is made *generally* and *ſpecially* in expreſs Terms: As *if my Son will not be Heir to me*, or will, and dies *before his pupillary Age, then let* Titius *be my Heir.* But *tacit* pupillary Subſtitution is ſaid to be that, which is contained in a vulgar Interpretation of Law, from the preſumptive Mind of the Teſtator: As when a Father appoints his Pupil-Son to be his Heir, and if he will not be his Heir, then he ſubſtitutes *Caius.* This is an *expreſs* vulgar Subſtitution; for every one may thus ſubſtitute an Heir. But if the Son ſhall take the Heirſhip on himſelf, and die within his pupillary Age, a Subſtitute ought in this caſe to be admitted by a *tacit* pupillary Subſtitution, and not by a vulgar Subſtitution, which is extinct by his taking the Heirſhip on himſelf: Becauſe a Teſtator is even in this caſe

[h] I. 2. 16. pr.

caſe preſumed to provide and take care of an Heir for his Son. The Gloſs reckons up five things neceſſary to a pupillary Subſtitution; to which *Bartolus* adds three others. For *firſt*, it is neceſſary, that he for whoſe ſake a Subſtitution is thus made, ſhould be of the Number of the Father's Children [i]: And this is not only underſtood of *natural* and *lawful* Children (as we ſay) *together*, but even of ſuch as are *lawful only*, who paſs into the power of the Father that adopts them, as thoſe do that are adopted by an Aſcendant. And, moreover, this ought to be underſtood not only of Children of the firſt degree, but even of Grand-children, and other Deſcendants: ſo that even poſthumous Children are included, ſince he that is in the Womb is deemed as a Perſon born. *Secondly*, 'tis neceſſary that the Son, who has a pupillary Subſtitution granted him, ſhould be under the Age of Puberty; for after Puberty, he may make a Will. In a Male, a Perſon is under Puberty till fourteen Years of Age, and in a Female till twelve: And it is not enough, that the fourteenth Year ſhould be commenced, but it ought to be compleatly ended [k]. *Thirdly*, 'tis neceſſary that the Son ſhould be in the power of him that makes this Subſtitution [l]: For a Mother cannot make a pupillary Subſtitution for her Children under the Age of Puberty, according to a common Concluſion of the Doctors coming after *Bartolus*. *Fourthly*, 'tis neceſſary that the Son or Perſon, for whom this Subſtitution is deſigned, ſhould be *ſui Juris* at the time of the Perſon's Death, who makes this Subſtitution. And *fifthly*, this Subſtitution ought to be made by Laſt Will and Teſtament, becauſe the Perſon ſubſtituted is in the Place of an Heir.

[i] I. 2. 16. pr.

[k] D. 28. 1. 5.

[l] I. 2. 16. pr.

The third *Species* of Subſtitution is that which we ſtile *exemplary* or *quaſi pupillary* Subſtitution, ſo called becauſe it is made *quaſi Pupillo*; that is to ſay, in the behalf and for a Madman, Ideot, Lunatick, *&c.* and it was introduced by *Juſtinian* [m], after the Example and Model of pupillary Subſtitution. In this caſe, the Parents ought firſt to appoint the Children of the Madman, Lunatick, Ideot, *&c.* to be his Heirs, if he has any Children; and if not, then his Brothers and Siſters, and if in Defect of theſe he inſtitutes for them any other Perſon [n]. This is not allowed by reaſon of any paternal Power they are inveſted with, but meerly out of Pity and Compaſſion, and as it is an Act of common Humanity: For they may appoint a Subſtitute, whether their Children are in their power or not, provided their Children are ſuch Perſons as are here deſcribed, *viz.* Madmen, Lunaticks, Ideots, interdicted *Prodigals*, and deaf and dumb Perſons. In other Subſtitutions, any Perſons whatſoever may be ſubſtituted [o]; but here it is reſtrained to Brothers and Siſters, as aforeſaid, unleſs it be in failure of them.

[m] C. 6. 26. 9.

[n] C. 6. 26. 9.

[o] D. 28. 6. 1. 2.

Pupillary and *Quaſi Pupillary* was peculiar to the *Romans*, unknown in *England*, and other Nations, according to *Groenvegen de ll. Abrog.* [p] For by the *Roman* Law, every one might at the time of his Death diſpoſe of his own Eſtate, and the Eſtate of his Children being then in his power, if the Children refuſed to accept of the Inheritance, or if they died before the Age of Puberty; for then they could not make a Will for themſelves. Before that time, the Father and Children were eſteemed but one Perſon; and therefore in regard to their paternal Authority, *one* Will or Teſtament ſerved for all of them. As to *vulgar* Subſtitution, we have ſomething of it here in *England*, wherein we always follow the Dictates of the *Civil* Law: only we could not ſo freely diſpoſe of ſuch military Fees, as we were in poſſeſſion of, by our Laſt Wills, but were obliged to leave ſuch a Portion of the Fee or Inheritance to our Heir [q]. But thoſe Eſtates which we hold by Socage, if they are not Eſtates in Tail [r], or bound by ſome particular Cuſtom [s], we may bequeath to any Perſon whatſoever, whether he be the next of Kin or a Stranger, 32 *H.* VIII. *c.* 1. provided we hold

[p] I. 2. 16.

[q] 32 H. 8. c. 1.

[r] Bract. lib. 2. c. 30.

[s] Glanv. lib. 7. c. 3.

no

no other Lands *in capite* by Knight-Service; and in each caſe we might make an Heir by vulgar Subſtitution. By Subſtitution, in the Senſe of the common Law of *England*, we mean nothing elſe but the adding of that Condition, which our Lawyers call a *Tail*, *viz.* a Limitation of Heirs, unto whom we would have Lands deviſed, *&c.* to deſcend, or remain, or (at leaſt) to revert to us and our Heirs. But this Subſtitution is not the ſame with that of the *Romans*, becauſe that has this Condition annexed, *viz. I appoint* Titius *to be my Heir*, and if *he will not*, *then let* Sempronius *be Heir* [s]. But this of ours *non aſtringitur*, but the contrary is rather tacitly impoſed on a Legatary: As *I bequeath ſuch a Fee unto* Titius, and if he will not accept of it, then I will that ſuch or ſuch a Perſon ſhould be his Heir, and ſucceed him, which makes it a Fee-Tail [t]. *Doctor and Student*, lib. 1. c. 24. Obſerve, that the *Civil* Law calls him *Heir*, who ſucceeds to the whole Eſtate *real* and *perſonal*, without any diſtinction. But by the Law of *England* and *Scotland*, he only is Heir who ſucceeds to the real Eſtate by Right of Blood. See *Coke*'s firſt Inſtitute 237. *b.* and *Mackenzy*'s Inſt. of *Scotland* [u].

[s] I. 2. 15. pr.

[t] Weſtm. 2. c. 1. 13 Ed. 1.

[u] Lib. 2. Tit. 2.

TIT. XVII.

How the Heirſhip or Inheritance may be either got or loſt: And how Teſtaments are to be open'd, publiſhed, writ out or engroſſed; and what Men's Teſtaments are to be open'd and publiſhed.

I Shall here join two Titles [v] of the Law together, and firſt conſider how the Heirſhip or Inheritance may be either acquir'd or loſt, becauſe I have omitted it under a foregoing Title touching Heirs: And, *ſecondly*, I ſhall enquire how Teſtaments are to be opened, publiſhed, writ out, or engroſſed; and what Mens Wills are to be opened and publiſhed, and within what time. In reſpect of the firſt thing here to be conſidered, it is to be obſerved, that it is not enough for a Perſon to be appointed Heir, but he ought alſo to have an actual Acquiſition of the Heirſhip: which Acquiſition, when it is had by a Perſon who is Heir *ipſo Jure*, and not a Poſſeſſor [w], is in our Law-Books ſtiled *Immixtio*; and when it is obtained by an extraneous Perſon or Stranger, it is called *Aditio Hæreditatis*, as already related under a foregoing Title. We have no proper Word in the *Engliſh* Tongue to expreſs theſe two Acts by. The Heirſhip is acquired and loſt by the Mind of the Perſon alone [x], whether the Mind be expreſſed and declared in Terms, or by ſome Act and Deed, which is ſped by a Perſon as being Heir [y]. This ought to be done freely, and without impoſing any force on the Will of the Agent [z]; unleſs it be in reſpect of a Bondman appointed Heir by his Maſter, who is then a neceſſary Heir [a], as before remembred. But Perſons that are under any doubt about the Heirſhip, or that do not know themſelves to be Heirs, do not acquire the ſame, unleſs it be for their Heirs [b]. Nor can a Perſon rightly take the Heirſhip on himſelf, or renounce the ſame, unleſs there be a certain *Conſtat*, whether the Heirſhip be

[v] Tit. 2. & 3. D. 29.

[w] I. 3. 1. 3.

[x] I. 2. 19. 7.

[y] D. 29. 2. 20. 4.

[z] C. 6. 30. 16.

[a] D. 29. 2. 66. & 67.

[b] D. 29. 2. 63.

be given him by Will, or by a Perſon's dying inteſtate; and it muſt likewiſe appear too, how much of the Eſtate he is Heir of[c]. Whoever takes the Heirſhip on himſelf, or renounces the ſame, ought to do it *abſolutely*, without any Condition or Day annexed thereunto[d]; and ſuch Acceptance or Renunciation ought likewiſe to be made *in ſolidum*[e]. The Heirſhip may be accepted and ſued for at any time within thirty Years[f], though Creditors and Legataries may pray to have the Heirſhip accepted of immediately after the Teſtator's Deceaſe, or (at leaſt) within a Year[g]. When an Heir has accepted of the Heirſhip, it extends its Effects not only to the Time to come, but it has alſo a Retroſpect to the Time of the Death of the Deceaſed[h]. After a Perſon has once accepted of the Heirſhip, he cannot afterwards repudiate or renounce the ſame[i], but muſt ſtand to all Hazards and Chances: And if a Perſon has once renounced or waved the Heirſhip, he cannot afterwards be admitted thereunto, if he would[k]. But that Perſon does not ſeem to refuſe accepting of the Heirſhip, who cannot take the Heirſhip on himſelf[l]: For *ubi non aſſiſtit juris potentia, voluntas eſt inanis & vacua*, ſays *Baldus*. By loſing the Heirſhip or Inheritance in this Title, I mean the Refuſal or Renouncing of it; and that Perſon may renounce or wave it, who may acquire it[m].

[c] D. 29. 2. 15. 16. & 21.
[d] D. 50. 17. 77.
[e] D. 29. 2. 1. & 2.
[f] C. 3. 31. 7.
[g] D. 29. 2. 9.
[h] D. 50. 17. 193. & 138.
[i] D. 6. 31. 6. I. 2. 19. 7.
[k] C. 6. 31. 4.
[l] D. 29. 2. 4.
[m] D. 29. 2. 18.

By the *Roman* Law, a Pupil of neither Sex can be obliged without the Authority of his Guardian[n]: And hence it is, that the Guardian's Authority is neceſſary, before a Pupil can accept of an Heirſhip, becauſe the Heirſhip obliges a Perſon to the Payment of another's Debts, though there be not Aſſets, if the Law be not punctually obſerved in making an Inventory. But if the Heirſhip be given unto a Pupil either by Will or Law, and the Guardian will not conſent for his Pupil's Benefit, through a groundleſs and pretended fear of ſome Diſadvantage to his Pupil, the Pupil may have recourſe to the Judge, who, upon Cognizance of the Matter, may decree the ſame[o]. But I haſten to ſpeak of my ſecond Conſideration, *namely*, how Teſtaments are to be opened, publiſhed, engroſſed, *&c.*

[n] D. 29 2. 17.
[o] D. 29. 2. 51.

Heretofore by the *Lex Papia*, an Heir to the whole Subſtance of the Deceaſed, might take the Heirſhip on himſelf, before the Tables of the Will were opened, but not a Perſon that was only Heir in part of it[p]. But the Emperor *Juſtinian* took away this difference: So that both an Heir to part, as well as to the whole Eſtate, may now take the Heirſhip on himſelf, even before the Will is opened[q]. At this day, a Will may be opened and publiſhed within three or five Days from the Death of the Teſtator[r]; for it cannot be opened in the Teſtator's Life-time[s]. After a Will is opened, that it may be read, every Perſon may have the Sight and Inſpection thereof, as ſoon as it is engroſſed and writ out in ſome publick Office, and a Copy thereof ſhall be granted to any Perſon that demands the ſame, tho' it be in another's Name; but then he ought to take an Oath, that he does not requeſt it with any diſhoneſt or foul Intent, but for his neceſſary Intereſt and Satisfaction[s]. And it is the Duty of the Judge, or ſome Magiſtrate, to convene the Perſons who ſigned the Will, in order to acknowledge their Marks or Seals, or elſe to deny that they ſigned the ſame[t]. And this was the Method of proving Wills among the *Romans*, which is ſtill continued to this day in Places where the Witneſſes ſet their Seals on the Label of the Will, as the *Romans* were wont to do. Tho' a Witneſs ſhould refuſe to acknowledge, yet this does not hinder but that the Will may be opened and publiſhed: But a Will becomes ſuſpected of Forgery, if one or more of the Witneſſes ſhall deny their Seals[u]. A Will once thus proved and publiſhed, remains firm and valid in reſpect of it, though the original Will ſhall be loſt by ſome Accident or other[v]. The Perſon who refuſes to exhibit the Tables of the Will, which he acknowledges to be in his Cuſtody, and lodged with him, may be preciſely compelled

[p] D. 22. 6. 1.
[q] C. 6. 51. l. un. 5.
[r] C. 6. 23. 18.
[s] D. 29. 3. 2. 4.
[s] C. 6. 23. 3.
[t] D. 29. 3. 4. & 5.
[u] D. 29. 3. 1. fin.
[v] C. 6. 23. 2.

hereunto

hereunto by the Office of the Judge. If he denies that he has the keeping thereof, he may be convened by an Action or Interdict *de Tabulis exhibendis* [w]. If ſome of the Witneſſes die, before the Will comes to be open'd, ſo that they cannot recognize their Seals at the opening of it; and by this means their Seals cannot be known: Yet this does not deſtroy the Will, provided it appears that ſuch Will was ſubſcribed and under-ſigned by the Witneſs deceaſed. For it would be highly unjuſt, that a Man's Will ſhould ſink by the Act or Death of a Witneſs, when we may be certain of the Truth of it by other means [x]. For even in a nuncupative or an unwritten Will, the ſame does not periſh, though one of the number of Witneſſes ſhould die; and the Will does not thereby fall to the ground, but the ſame may be proved by the others; and, conſequently, *à fortiori*, this holds true in a written Will.

[w] D.29.3.2.8.

[x] Arg. C.6. 33.3.

If a Will be written in two Exemplars, that is to ſay, if there are Duplicates of the ſame original Will, and one of theſe Duplicates is publiſhed, the Tables of the Will are ſaid to be opened: For the Queſtion is not by whom they were opened, but touching the Nature of the Will itſelf [y]. If the Tables of the Will do not appear, but are burnt by Accident, or ſuppreſs'd by Villany, the Legataries may be relieved againſt ſuch a Calamity, by proper Evidence of the Fact, and of their Legacies [z]. The Inſtrument or Tables of the Will are not the Property of one Man alone, *viz.* the Heir, but of all Men who have any concern therein; and hence the Tables are called a publick Inſtrument [a]. Though a Teſtament is properly ſaid to be that which is perfected according to Law; yet, in an improper Senſe, even thoſe are ſtiled Teſtaments, which are forged, rupted, unjuſt, *&c.* And we are alſo wont to call imperfect Wills by the Names of *Teſtaments* [b]. If a Man makes ſeveral Wills, and a Perſon deſires to have Copies or Probats of all of them, it ſhall be granted to him [c].

[y] D.29.3.10. 1.

[z] D.29.3.10. 2.

[a] D.29.3.2.pr.

[b] D.29.3.2.1.

[c] §.3. ult.

TIT. XVIII.

Of the Puniſhment of ſuch, who, a Will being extant, ſeek by Letters of Adminiſtration, or ſome other means, to poſſeſs themſelves of the Goods of the Deceaſed; and of ſuch as render themſelves unworthy of Legacies, by opening of Wills before an Enquiry has been made touching the violent Death of the Teſtator; and laſtly, of thoſe who compel or forbid any one to make a Will.

IT is the Province of an upright Judge to protect and defend the Wills of Perſons deceaſed, and to obviate the Knavery of ſuch Men, who, dropping the Deſign and Buſineſs of an extant Teſtament, endeavour to poſſeſs themſelves of the Goods of the deceaſed, by an inteſtate Heirſhip (with us called Letters of Adminiſtration) in order to circumvent and defraud Legatees of that which is due to them by virtue of a Will. And hence it is, that the *Prætor* has given an Action in Equity unto Legatees, *&c.* againſt theſe Cheats and Deceivers of other Men; and they may be

convened hereby in the ſame manner as if they had accepted of the Succeſſion by virtue of a Will [c]. It matters not, whether the Heir might acquire the Heirſhip in his own Perſon, or by another: For in what manner ſoever he might have acquired the Heirſhip, if he has not obtained it, he incurs the Edict of the *Prætor*. Though a Perſon does not ſeem to act as Heir, who has received a Sum of Money, or any other Reward, to paſs by an Heirſhip; yet an Action lies againſt him, in the ſame manner as it lies againſt him, who, dropping the extant Will, has poſſeſſed himſelf of the Inheritance by an inteſtate Heirſhip, and he ſhall be liable to ſimple Legatees, and Legatees in Truſt [d]. But in this caſe, the Poſſeſſor of the Inheritance ought to be firſt ſued and excuſſed by the Legatees, eſpecially if he has made any Gain to himſelf by ſuch unlawful Poſſeſſion [e]. But if a Perſon has paſſed by the teſtamentary Heirſhip without receiving any Money or other Gratuity, he is exempted from this Action; becauſe no one can be compelled to be an Heir againſt his Will, unleſs he be a Bondman, as aforeſaid. It is the Fraud and Colluſion which makes the Heir ſubject to an Action, and not the Perſon's paſſing by the Heirſhip: And this Fraud may be proved by violent Suſpicion, and by proper Conjectures; as when a Perſon receives Money, and the like, to omit the Heirſhip. Theſe ſoul Practices were very frequent among the *Romans*, till this wholeſome Edict was made to puniſh it. If the Heir appointed or ſubſtituted dropt the Will without ſufficient Cauſe, or fraudulently tranſmitted it to another, he was not only liable to this Action, but he likewiſe loſt all Legacies bequeathed him in the Will [f].

[c] D. 29. 4. 1. & 12.

[d] D. 29. 4. 2. pr.

[e] D. 29. 4. 2. 1.

[f] D. 29. 4. 10.

There are alſo ſome other Perſons that render themſelves unworthy of Legacies by a knaviſh Officiouſneſs to have the Will of a Teſtator, that has been murdered by violent means, opened and read, before any Enquiry has been made touching his Death, ſuppoſed to be occaſioned by ſome of his own Family or Servants. And againſt theſe Perſons we have a Proviſion made by the *Senatus-conſultum Silanianum* and *Claudianum* [g]. Whereby it is enacted, That if any Heir or Legatary ſhall willingly open the Will of ſuch a Perſon ſlain, before Enquiry made touching his Death, they ſhould loſe their Legacies, and the ſame ſhould go to the Exchequer [h]. But if this was done by another Perſon, who had no Legacy left him, he was then condemned in a hundred Crowns or *Aurei* [i]. So careful were the *Romans* to enquire into the violent Deaths of Perſons ſuppoſed to be murder'd by their Domeſticks in an outrageous manner. But if the Perſon's Death happened by private means, as by Poiſon, *&c.* the Tables of the Will might be opened, and the Heir might load himſelf with the Inheritance before ſuch Enquiry made; but it was incumbent on him to enquire into the occaſion of the Teſtator's Death, and to proſecute the Murder [k]: which if he neglected to do, he loſt both the Heirſhip and his Legacies, and the ſame devolved unto the Exchequer [l]. *Note*, It was a great Crime in Servants and Domeſticks, who could have yielded help unto the Perſon murder'd, and did not do it; for they were in ſome meaſure reckoned guilty of his Death [m]. Thus this Decree of the Senate made a Diſcrimination of Legacies, as I ſhall again obſerve under the Title of *Legacies*.

[g] D. 29. 5. 1. 17. & 18.

[h] D. 29. 5. 5. 1.

[i] D. 29. 5. 25. 2.

[k] D. 29. 5. 5. fin.

[l] D. 29. 5. 15.

[m] D. 29. 5. 1. pr. D. 29. 5. 19.

By a Conſtitution of the Emperor *Adrian*, Actions are deny'd to that Heir who has compelled or prohibited another to make his Will, in proſpect of having or gaining the Succeſſion either by a teſtamentary or an inteſtate Heirſhip: And hence by the Denial of Actions unto ſuch Heirs, the Inheritance devolves unto the Exchequer, or (at leaſt) ſuch a Part of it as ſhould otherwiſe go unto the Delinquent [n]; for the Act of ſuch a guilty Perſon ought not to prejudice the Innocent [o]. But a Husband, who has rendred himſelf ſo benevolent to his Wife by a marital Affection, may be appointed Heir by her on perſuading of her to make her Will: But it is otherwiſe,

[n] D. 29. 6. 1.

[o] D. 29. 6. 21. 1.

otherwiſe, if he uſes force or fear. And if ſhe makes him her Heir through a conjugal Tenderneſs, he is exempted from the Puniſhment of this Imperial Conſtitution, and may bring his Actions as an Heir [p]. A Perſon may prohibit another to make his Will ſeveral ways; as when he hinders the Witneſſes deſigned for the Will, from coming to the Perſon who ſent for them, *&c.* And thus I have gone through the whole Buſineſs of ſolemn Wills and Teſtaments; and ſhall next proceed to ſpeak of Codicils.

[p] D. 29.64.

TIT. XIX.

Of the Right and Power of Codicils; *and of the Number and Solemnity of them; and of the Matter contained in them.*

THE Subject of the following Treatiſe under this Title relates to *Codicils*, which are a kind of an additional Part made unto Teſtaments [q], as being often joined thereunto. As when a Perſon has through Forgetfulneſs or ſome Inadvertence omitted to write ſomething in his Will, which otherwiſe he would have done, and is unwilling to open the ſame again, as being (perhaps) ſealed and cloſed up in a ſolemn manner: For then he may in this caſe declare the remaining part of his Will in Codicils And therefore a *Codicil*, according to *Cujacius*, is defined to be the Will of a Perſon dying either teſtate or inteſtate, and which is leſs ſolemn than a Teſtament, or wants ſome Solemnity.

[q] D. 29.7.14.

This kind of Will, according to *Juſtinian* [r], had its riſe from *Lucius Lentulus*. For it appears, that the making of Codicils was not in uſe before the time of *Auguſtus*: when, we are told, that the ſaid *Lentulus* was the firſt Perſon that introduced them; who alſo introduced the Buſineſs of Gifts or Legacies in Truſt, by our Books in *Latin* ſtiled *Fidei-Commiſſa*. For he dying in *Africa* made *Auguſtus* his Heir, and his Daughter his *fiduciary* Heir, or Heir in Truſt, whom by Codicils confirmed by his Will, he intreated to do ſomething for him after his Death, *viz.* that they would be careful to ſee that ſome Houſes were built for ſome of *Lentulus*'s Friends. And this gave the firſt riſe to Codicils and *fiduciary* Heirſhips or Bequeſts: which afterwards being approved of on the account of the Neceſſity thereof in ſome Caſes, and the advantage Codicils offered as well to Travellers, who among Strangers and Perſons unknown to them, cannot eaſily obſerve the Solemnities of a Teſtament, as to others who are *de facto* hindred from making their Teſtaments through ſeveral Haps and Misfortunes of Life [s]: I ſay, *de facto*, becauſe Perſons that are hindred *de jure* from making their Wills, cannot make Codicils. As appears in the Example of a Madman, who, as he cannot make a Teſtament, ſo neither can he rightly make a Codicil or Codicils [t], unleſs he made ſuch Codicil or Codicils before his Madneſs commenced, or diſpoſed of his Eſtate during the Time of his lucid Intervals. But he who avers Madneſs to be in the Perſon diſpoſing of an Eſtate, ought to prove him to be a Madman, becauſe a Preſumption of Law lies againſt ſuch an Averment: According to which Preſumption, the ſame Quality which is naturally inherent in Man, is always preſumed to

[r] I. 2. 25. 1.

[s] D. 29.7.2.3. D. 29.7.6.3.

[t] D. 29.7.2.3.

[t] X.4.1.30. to remain with him [t]. But he that is *de facto* hindred from making his Will, *viz.* becauſe he has not the Preſence of ſeven Witneſſes, may (notwithſtanding) make a Codicil or Codicils either in Writing, or by Word of
[u] C.6.36.8. Mouth, (for Codicils may be made even without writing [u]) in the preſence of five Witneſſes, though they be not asked or requeſted to bear Teſtimony thereunto. And as the Subſcription of theſe Witneſſes is neceſſary, when a Codicil is made in writing: So they ought all to be preſent together at one and the ſame time, as in the Buſineſs of Teſtaments, and not at different Seaſons. And they ought likewiſe, according to the *Civil* Law, to be Perſons of the Male-Sex: For as Women are not qualified to be Witneſſes unto Laſt Wills and Teſtaments, ſo neither are they qualified to be Witneſſes unto Codicils, which approach unto and are as Acceſſaries unto Teſtaments. For we ought not eaſily in theſe kinds of Diſpoſitions to recede from the Rules of Teſtaments: whereunto appertains that Law, whereby the ſame Form and Tenor is required to be obſerved in Codicils
[v] C.6.22.8.v. as in Teſtaments, in reſpect of a Notary and Witneſſes [v].

at cum humana. If it be a Queſtion, whether the Teſtator intended a Laſt Will and Teſtament, or only a Codicil, we muſt have recourſe to the Writing itſelf:
[w] D.29.7.13.1. ſuch a Doubt being often declared and ſolved from thence [w]. As when a Teſtator ſhall appoint a Subſtitute, which may be done in a Teſtament, though not in a Codicil. But if a Teſtator has made a Codicil, who might (if he had pleaſed) have made a Teſtament, ſuch a Codicil is valid, tho' no Teſtament be made: For Codicils even made by Perſons inteſtate are valid,
[x] D.29.7.8.2. even though there be no Heir appointed [x]. It matters not with whom the Teſtator diſcourſes, or to whom he directs himſelf, when he makes his Will; provided it appears, that the Deſign of his Will was directed to ſome certain Perſon, or that he intended to make ſomebody his Heir. But when a Teſtament is made, and Codicils are eſtabliſhed thereupon, ſuch Codicils are valid *optimo jure*, whether they are made before or after the making
[y] D.29.7.6. of a Teſtament, if they be expreſſly confirmed by the Teſtament [y]: But if they be not found to be thus confirmed by the Teſtament, the old Lawyers doubted what ought to be decreed touching them. And herein it is agreed, that ſuch Codicils as are made after the Will, ſhall receive force from the Teſtament, though they be not therein ſpecially and expreſſly confirmed. But touching ſuch Codicils as are made before the Teſ-
[z] D.29.7.3.2. tament, the Doctors diſagree [z]. *Papinian* would have them to be only valid, when they are ſpecially confirmed by the Teſtament, or by ſome
[a] D.29.7.5. other ſubſequent Will after the making of the ſolemn Teſtament [a].

At this day, by a Reſcript of the Emperors *Severus* and *Antoninus*, approved of by *Juſtinian*, it is certainly true, that whenever a Teſtament is made, Codicils have their force from thence, though they are not confirmed by any expreſs Words therein. Therefore, ſince Codicils eſtabliſhed upon a Will do receive their force from thence, they ought to follow the Law relating to the ſame Teſtament, and ſtand and fall with that Teſtament, as
[b] D.29.3.11. being an Appendix or Acceſſory thereunto [b]. Wherefore, if a Man has not entred on the Heirſhip in virtue of ſuch a Will, a Legacy in Truſt even from ſuch Codicils will be of no Weight and Moment. And 'tis the ſame thing, if a Teſtament be irritated, rupted, or reſcinded on any other account. As when a poſthumous Child or Heir is born to the Teſtator after making of his Will, and the Teſtament is rupted by his Nativity on the ſcore of his being paſſed by: For by this Defeazance of the Teſtament all the
[c] C.6.36.1. Codicils fall to the ground [c].

A Codicil is revoked by the Will of the Perſon that makes the ſame: For this is common unto every Laſt Will and Teſtament, that it ſhould be revocable by the contrary Will of the Perſon that makes the ſame. Nor is it neceſſary, that a Codicil ſhould be revoked in expreſs Terms by any

other Codicil or Teſtament, wherein mention is made of ſuch Revocation: But it is ſufficient, if it be done tacitly by making a Diſpoſition contrary to the former Codicil; provided the latter Codicil or Teſtament contains ſomething which is contrary to the former, for then this latter Codicil contrary to the former deſtroys the ſame. By a latter Will or Teſtament made, Codicils are revoked even from that Clauſe therein, which caſſates all other Wills and Teſtaments: For ſuch a Clauſe muſt neceſſarily include a Codicil, becauſe this Expreſſion in the plural Number cannot otherwiſe be maintained and verify'd, ſince only one Will can properly precede the ſame. A Perſon forbidden by Law to make a Teſtament, is alſo prohibited to make a Codicil [d]. Codicils are ſaid to belong to a Teſtament, whether they are made before or after the Will, and whether they be expreſſly confirmed or not: For their Right and Power always depends on the Will. Heretofore Codicils made before or after a Teſtament were not valid, unleſs they were confirmed by the Teſtament itſelf: But at this day, they are underſtood to be confirmed *ipſo Jure*, unleſs they are expreſſly revoked by the Will. A Teſtament cannot be confirmed by Codicils, becauſe that which confirms a Thing is greater than the Thing confirmed: But a Codicil is inferior to a Teſtament, and therefore it cannot confirm the ſame. Beſides, a Codicil is only an Acceſſion unto a Teſtament, as aforeſaid; and an Acceſſory does not confirm its Principal, according to this Maxim, *viz. nihil eſt cauſa ſuæ cauſæ.*

[d] D. 29.7.8.2.

Codicils have not entirely the ſame Effect as Wills or Teſtaments have: For thoſe Things, which have different Names, have alſo different Effects. Thus we do not inſtitute or ſubſtitute an Heir by Codicils, tho' we may do it by a Teſtament: For the Inſtitution or Subſtitution of an Heir is only made in Teſtaments [e]. A Codicil is not valid or ſupported, unleſs the Teſtator ſhall order it to be valid, as a Codicil. For it is to be obſerved, that a Teſtator who has determined to make a Teſtament, if he cannot compleat the ſame, ſeems to die inteſtate. As a Codicil may be repealed and taken away by a contrary Codicil, and the latter Codicil ſhall be preferred unto the former [f]; ſo a Codicil may be ſupply'd and corrected by a Codicil, and even changed by a Codicil [g]. A Perſon may have ſeveral Codicils by him at one and the ſame time [h], though he cannot thus have ſeveral Wills; and theſe Codicils require no Solemnity of Ordination. But what if there are ſeveral Codicils found to have been made on one and the ſame day, and in one of them a Deviſe is made of an Eſtate at *Tuſculum* unto *Titius*; and in the other no ſuch Deviſe is made unto the ſaid *Titius*? In this caſe, the Codicil, unto which the Legacy is aſcribed, ſhall be deemed to be the firſt Codicil. For we always preſume that to be firſt, which ought to be firſt *de jure.*

[e] C. 6 36. 2.
[f] C. 6. 42. 19.
[g] C. 6. 36. 3.
[h] I. 2. 25. 3.

It has been ſaid, that Codicils do regularly receive their Strength and Validity from a Teſtament: And that which is written in Codicils, after a Teſtament is made and executed, is ſaid to be written in the Teſtament it ſelf; and Legacies bequeathed by way of Codicil are ſued for by a *teſtamentary* Action, according to *Panormitan* [i]. But Codicils made by a Perſon inteſtate, are not properly a Teſtament; nor does a *direct* Action *ex Teſtamento* ariſe from ſuch Codicils, but only an Action founded upon Equity, by the *Civilians* called *utilis actio.* And Codicils are ſaid to be made by an Inteſtate, when no Teſtament is extant or in being; becauſe thoſe Perſons ſucceed, who come to the Heirſhip or the Inheritance by virtue of the Perſon's dying inteſtate. A Perſon that appoints an Heir, ſeems to intend a Teſtament, and not a Codicil. By the ancient Law [k], Legacies could not be left to any one's advantage, unleſs it were in a ſolemn Will, and not by Codicils: But it is otherwiſe at this day, according to the *Juſtinian* Law [l], which has rendred ſimple Legacies in all reſpects equal unto

[i] Conſ 4. n. 2. & 3.
[k] D. 5. 6.
[l] C. 6. 43. 2.

unto *fiduciary* Bequeſts. Though a Codicil, properly ſpeaking, be not a Teſtament, as wanting an Heir: yet it may be ſo called in a large Senſe of the Word, becauſe it is a *Teſtatio mentis*, a Declaration of the Perſon's Mind, atteſted by Witneſſes. A Codicil is the Sequel and Conſequence of a Teſtament, which is leſs ſolemn than a Teſtament in point of Form: For there is no Form obſerved in a Codicil, no certain Words regarded, nor any Order minded: nor is it neceſſary that it ſhould be written or ſigned
[m] D.29.7.6.1. by the Hand of the Teſtator [m]. What is written in a Codicil is as much confirmed as if it was written in the Teſtament itſelf. A Perſon cannot make a Codicil who is doubtful touching his own State, unleſs he be a Soldier. We often meet with the word *Codicil* in the Laws of *England*: wherefore in this caſe we follow the Rules borrowed from the *Civil* and *Canon* Law, for the Interpretation of them, unleſs they mention a Freehold Eſtate of Inheritance; and then they ought to be proved before the Eccleſiaſtical Judge, and to receive their Interpretation from the Laws of the Realm.

TIT. XX.

Of the Ratification, Approbation, *and* Confirmation *of Laſt Wills and Teſtaments, Contracts and other Obligations*, &c.

AS *Ratification*, otherwiſe by the *Civilians* called *Ratihabition*, has a reſpect unto Laſt Wills and Teſtaments, Codicils, and the like, as well as unto Contracts and Obligations, I chuſe to give this Title a Place here. Now *Ratification* is nothing elſe but a kind of ſtrengthening or corroborating of ſome precedent Act, as *Confirmation* is: Wherefore, the very ſame Things which are required in *Confirmation*, are alſo neceſſary in *Ratification*. Yet, in a large Senſe, a Ratification is a kind of Approbation, and it even requires that the Perſon who ratifies a Thing ſhould be certain. In reſpect of its Effect, *Ratification* imports the ſame as *Confirmation*: Becauſe as they are either pronounced *affirmatively*, as I *confirm*, *ratify*, or utter'd *negatively*, as *I do not ratify* or *confirm*, they import the ſame thing.

Ratification is two-fold: The firſt is, when an Act or Contract is ſped by another in my Name, and the Matter begins to belong to me from his acting for me in virtue of an *improper* Contract: In this caſe I may ratify the Act in the Abſence of the Party; for ſuch Ratification requires not the preſence of the Parties; and it has a Retroſpect to the Time of the Buſineſs
[n] D.3.5.13. done [n]. The other is a Ratification of an Act or Contract, which has been ſped by me in a null manner, as becauſe (perhaps) ſome Solemnity or other Matter has been wanting: And in this caſe the ſame Solemnity is required in the Ratification, which is neceſſary to the Will or Contract, as the preſence of Parties, and other formal Requiſites; otherwiſe the Ratification is not valid, unleſs it be made after the ſame manner, as the Will or Contract was or ſhould be made, and this Ratification has not a Retroſpect to make a null Act valid *ab initio*.

A *Ratification* is made three ſeveral ways, *viz. Firſt*, by *expreſs* Words; *Secondly*, by *tacit* Conſent; and *Thirdly*, by the Intervention of ſome Act. A Solemnity, which is required in the firſt Act which is ratify'd, is alſo neceſſary in the Ratification of ſuch firſt Act. Thus in ratifying the Alienation of an Eccleſiaſtical Eſtate, becauſe a Solemnity is required in the principal Alienation, the ſame Solemnity is alſo neceſſary in the Confirmation or Ratification of it [n]. A Ratification, whether taken in a proper or improper Senſe, is not valid, when the Perſon approving has not full Knowledge of the Act ratify'd: And a Perſon is proved to have full Knowledge thereof, when the Tenor of the Act is inſerted in the Deed. If the firſt Diſpoſition be null through a Defect of Knowledge, or through Surprize, the Ratification will likewiſe be null, unleſs mention be made of ſuch Defect, and the ſame is cured by ſome Expreſſion: Becauſe as the Subſtance of Ratification is Knowledge; ſo a full Knowledge of the Act ratify'd with all its Qualities is required [o]. Yea, a Minor, Body-Politick, and the like, becauſe they may be ignorant of the Law, cannot be ſaid to ratify any Act in a valid Senſe, unleſs they know both the Law and the Fact. And generally wherever Knowledge is required, ſuch Knowledge ought to be entirely certain in order to prejudice the Party: Becauſe, according to *Baldus* [p] aforeſaid, Knowledge both of Law and Fact is required to render a Ratification valid; eſpecially when the Queſtion is about ratifying a fraudulent Contract, becauſe not only Knowledge of the Contract is neceſſary, but alſo of the Deceit [q]. For it is one thing to ratify and approve of an Act or Contract, and another to ratify the Quality of ſuch Act or Contract [r]. Nay, true Knowledge is ſo far required in the Perſon ratifying, in order to render his Ratification valid, that it is neceſſary for him to read the Inſtrument ratify'd, according to *Caſtrenſis* [s], becauſe an Inſtrument is not preſumed to be read, unleſs it be ſaid that the ſame was read, and explained in the vulgar Tongue [s]. And the ſame may be ſaid of a Will, an Award given by Arbiters, called a *Laudum*, and alſo of a *Tranſaction*, or any Contract ratify'd. For it is not enough to hear the ſame read, unleſs it be alſo ſaid that the Tenor thereof was read and underſtood. Becauſe Preſence alone is not ſufficient to an Act, unleſs it be proved that ſuch Act was underſtood, ſince he that does not underſtand a Thing, cannot be ſaid to be preſent [t]: Where Knowledge is required, it is meant touching full Knowledge, with all its Qualities.

[n] Gemin. Conſ. 128. n. 5.

[o] Bald. Conſ. lib. 2.

[p] Conſ. 327. lib. 2.

[q] Bald. Conſ. 222. lib. 2.

[r] D. 46. 8. 3. fin.

[s] Conſ. 46. 5. lib. 1.

[s] Zabar. Conſ. 44. n. 5. & 6.

[t] D. 50. 16. 209.

A Perſon who ſues for or retains Goods which are left him in a Laſt Will and Teſtament, ſeems thereby to ratify ſuch Will [u]; and ſo does he who receives the Fruits and Profits of a Thing bequeathed. If a Perſon receives the yearly Rents and Iſſues of an Eſtate, he thereby ſeems to ratify and confirm the Act of demiſing ſuch Eſtate. And in the like manner, he who receives the Purchaſe-Money of an Eſtate or Thing alienated, ſeems to ratify ſuch Alienation [v].

[u] D. 5. 2. 10. 31. & 32.

[v] D. 40. 12. 7. 1.

If a Perſon ſimply appeals from a Sentence pronounced and had with a falſe Proctor, he ſeems thereby ſo far to ratify that which is done by ſuch Proctor, that he cannot afterwards alledge ſuch Proceſs to be null and void. And thus a Perſon, who demands another to render an account of his Adminiſtration, ſeems to approve of thoſe Things which are done by ſuch Adminiſtrator, and cannot afterwards ſay that he was not his Adminiſtrator. Again, a Perſon ſeems to ratify a Contract, who brings his Action to recover any thing in virtue of ſuch Contract [w].

[w] Dec. Conſ. 489.

Ratification is a Matter of Fact; and as thoſe Things which are Matters of Fact are not preſumed, but ought to be proved [x]; ſo he who alledges the Ratification of any Act, ought to prove the ſame. And a Perſon who founds his Intention on a Ratification, ought not only to prove that the Thing was ratified, but ought likewiſe to prove that the Perſon

[x] D. 49. 15. 2. 2.

ratifying the ſame had Knowledge of thoſe Matters which are contained in ſuch Ratification. See *Baldus* [y] and *Jaſon* [z] on the Laws here quoted: And the reaſon is, becauſe he who is miſtaken or ignorant of a Matter of Fact cannot be ſaid to ratify the ſame, ſince there is a Failure of Conſent through ſuch Ignorance, and a Perſon that does not give his Conſent does not ratify a Thing. A Man cannot ratify that which is not done in his Name, and on his Account, even though the Buſineſs does appertain unto him. And, for this reaſon, it is neceſſary that a Commiſſion ſhould be previous thereunto: But if a full Commiſſion be given without a Promiſe of Ratification, then a Ratification is not held neceſſary, becauſe the Fulneſs of the Commiſſion ſupplies the ſame. If a Perſon has a certain Commiſſion given him, and acts contrary thereunto, his Commiſſion is not a Ratification, how full and large ſoever it be, but he acts as if he had no Commiſſion at all. A Ratification does not extend the Act which is ratified to a *Species* not included therein: And, therefore, if a Proctor, who has not a Commiſſion to make a Gift, ſhould make a Gift, it does not introduce a Gift; becauſe as ſuch Proctor could not make a Gift, a Ratification is not inferred.

[y] D. 1. 16. 4. 2.
[z] D. 29. 2. 17. 1.

A Ratification is neceſſary in many Caſes. As *firſt*, it is neceſſary to give a Perſon an Action. *Secondly*, it is neceſſary in the Buſineſs of Bargain and Sale, or of any other Contract, if it be promiſed: For then without ſuch Ratification, it is not valid. A Ratification is alſo neceſſary, whenever a Donation is made to an abſent Perſon; becauſe ſuch abſent Perſon neither acquires the Property, nor the Poſſeſſion of ſuch Grant, unleſs he ratifies the Gift; nor can he have an Action for the ſame without it [a]. If a Ratification promiſed be not made within thirty Years, a Lapſe of Time is in the Place of it. A Ratification in ſhort makes every thing to be ours, which was done in Contemplation of our Intereſt. An Act which is null and void *ipſo jure*, cannot be ratified, if the Defect was abſolutely in the efficient Cauſe; but it is otherwiſe, if it be only ſo by Accident.

[a] Caſtr. Conſ. 195.

TIT. XXI.

Of Legacies *and* Bequeſts, *both ſimple, and in Truſt; what Things may be bequeathed, and what not; and to whom any Thing may be bequeathed; and of the Signification of the Words and Things which appertain unto Legacies: Of yearly and monthly Legacies, at what Time they be due, in the Beginning or End of the Year; which of them be* pure, *and which* conditional, *&c.*

HAVING already treated of Heirſhips and Inheritances, wherein univerſal Succeſſion conſiſts, and likewiſe of Codicils the Appendixes unto Teſtaments; I ſhall here diſcourſe of Legacies, wherein I ſhall conſider particular Succeſſion: For a Legatary, in reſpect of the Legacy or Thing bequeathed, is, in ſome meaſure, as it were, in the Place of an Heir or Executor. We have ſeveral Definitions in Law given us of a Legacy. *Ulpian* ſays [a], That a Legacy is that, which is left by a *Mode* of Law, *viz.* That which the Teſtator commands by Will to be given to ſome certain Perſon or other. But I ſhall here define it according to *Juſtinian*, ſaying, That a Legacy is a Gift, which the Deceaſed leaves to be paid, and made good by the Heir unto the Legatary after the Teſtator's Death [b]. He calls it a Donation or Gift, becauſe it includes an Act of Liberality, and is not made by any Compulſion of Law: For tho' ſometimes a Man bequeaths a Legacy to a Perſon unto whom he is bound or ſtands indebted; yet ſuch a Legacy is free, becauſe he was not obliged to bequeath it, but only to pay the Debt, or ſatisfy the Obligation. But a Legacy is not properly, but only improperly a Donation; for a *proper* Donation is only conferr'd on a Perſon that is preſent, and that accepts thereof; but a Legacy is left by Will, and often to a Perſon that is ignorant of it. It is ſaid in our Books to be *relicta donatio*, or a Gift bequeathed, to diſtinguiſh it from a Donation, *in Proſpect of Death*, which is not left and bequeathed, but made and conſtituted among Perſons preſent, by mutual Conſent. It is ſaid to *be left by the Deceaſed*, and not left in his Teſtament, becauſe Legacies may be left by Codicils. And the Words, *to be paid and made good by the Heir*, &c. are added, becauſe the Teſtator during his Life Time ſhall not pay the Legacy: For tho' the Legatary be Lord and Proprietor of the Thing, even before the Delivery thereof; yet he loſes the Legacy, if he takes Poſſeſſion of it by his own Authority, and does not receive it from the Heir or Executor [c]. A Legacy is left by the Perſon deceas'd *directly* and *immediately*, wherein it differs from a *Fidei commiſſum*, or a Gift in Truſt, which is alſo left by the Deceaſed, but *mediately* to be paid by the Heir. All *ſimple* Legacies are to be paid by the Heir: For they paſs to the Legatee, immediately on the Teſtator's Death, in reſpect to the Property of them [d]; yet the Heir muſt give the Legatary the Poſſeſſion of his Legacy, as aforeſaid.

[a] Lib. Reg. Tit. 34.

[b] I. 2. 20. 1. D. 31. 1. 36.

[c] D. 43. 3. 1. 7.

[d] D. 31. 1. 80.

By the old *Roman* Law there were four Kinds or Forms of Bequeathing; *viz.* Firſt, *per Vindicationem*; as by theſe Words, *do*, *lego*, *capito*, *ſumito*, &c. By which Form only ſuch Things could be bequeathed, which did belong to the Teſtator at the Time of making his Will, and at the Time of his Death. The ſecond was *per Damnationem*, as by theſe Words, *viz.* *Hæres meus damnas eſto*, *dato*, *facito*, *Hæredem meum dare jubeo.* By which means all Things might be bequeathed, as well thoſe which were of the Teſtator's Property, as thoſe which belonged to another Perſon. A third was *ſinendi modo*, as by theſe Words, *viz.* *Hæres meus damnas eſto ſinere*; or, Suffer the Legatary to have and take that Thing to himſelf: By which means the proper Goods of the Teſtator and Heir were bequeathed. The laſt Way was by Way of Precept or Command; as, *Illam rem præcipito*: And by this Means Things were bequeathed after the ſame Manner, as *per Vindicationem*, only with this Difference, that the Heirs were written *ex Parte*, that is to ſay, they had their proper Parts allotted them to pay. But *Juſtinian* put an End to theſe ſolemn Forms of Bequeathing, and, in Favour of Laſt Wills, enacted, That one and the ſame
[e] I. 2. 20. 2. Nature and Power ſhould be to all Legacies [e], and that Legacies might be left by any Words whatſoever, whereby the Teſtator's Intention might appear. Yet ſome of the Emperors, I think, before *Juſtinian*, had taken
[f] C. 6. 37. 27. away theſe Forms [f]. But tho' the ancient Solemnity of bequeathing Legacies be now taken away, in reſpect of Words; yet at this Day, a Legacy may be bequeathed *per ſinendi modum*: For a Solemnity of Words is only ſo far taken away, that a Tranſpoſition of Words ſhall not vitiate a Legacy. For if the Teſtator ſhall ſay, *I depute ſuch a Thing to* Titius, it is the ſame Thing as if he had ſaid, *I bequeath it to him.* And 'tis the ſame Thing, if he ſays, *I aſſign ſuch a Thing to* Titius.

By the ancient Law, there is a wide Difference between a *ſimple* Legacy, and a Legacy in Truſt, called a *Fide-commiſſum*. For in *ſimple* Legacies, a Solemnity of Words was neceſſary, but not in Legacies in Truſt. *Secondly*, *Simple* Legacies could only be left in a Will, or in Codicils confirmed by a Will; but Legacies in Truſt might be left in Codicils not thus confirmed. *Thirdly*, The Nature of *ſimple* Legacies was ſtrict; but Legacies in Truſt
[g] I. 2. 20. 3. might be more largely interpreted [g]. But now theſe ancient Diſtinctions are changed, and at an End, by the *Code*, and all Legacies, whether *ſimple* or in *Truſt*, are equal unto each other; and as to the Effect there is no Difference between them: But ſtill the eſſential Difference remains between *ſimple* Legacies, and Legacies in *Truſt*: And that which is bequeathed in *direct* and *imperative* Words, is ſtill a *ſimple* Legacy; and that which is left by *precarious* Terms, is called a Legacy in *Truſt*.

But for the better Underſtanding of this Title of Legacies, I ſhall *firſt* conſider, what Things may be bequeathed; *Secondly*, the Perſons, unto whom a Legacy may be given; and *thirdly*, I ſhall ſpeak of the Manner, whereby a Legacy may be left. Now all Things may be bequeathed, that are *in Rerum Natura* exiſting, or which may ſo exiſt, whether they are corporeal or incorporeal, moveable or immoveable, the Teſtator's own, or belonging to the Heir, or to another Perſon; provided they are ſuch
[h] I. 2. 20. 4. Things as lie in Commerce, and may be purchaſed [h]: For if they are the Goods of another Perſon, the Heir ought either to purchaſe the ſame for
[i] C. 6. 37. 10. the Legatary, or to pay the Value thereof to him [i]. By a Fiction of Law, the Property of a Legacy is immediately veſted in the Legatary, on the Teſtator's Death. As only thoſe Perſons can bequeath Legacies, who have
[k] D. 30. 1. 2. the Power of making a Will [k]; ſo only thoſe Perſons are capable of receiving Legacies, that have the Power of making a Will; and a Legacy may be either to one Perſon or to ſeveral, and to them either jointly
[l] D. 31. 2. 33 & 34. or ſeverally [l]. But a Legacy could not be left to the Bondman of an Heir;

Heir; becauſe the Heir, unto whom he was a Bondman, could not pay himſelf [m].

[m] I. 2. 20. 32.

A Legacy may be left, either *purely*, or elſe under a Condition, or elſe *in Diem* [n]; and it may be left *ſub modo*. As for Example, *Titius* making his Laſt Will and Teſtament, appointed *Mævius* to be his Heir, and by ſuch Will, left unto *Seia*, a hundred Pounds, to the End that ſhe ſhould marry *Sempronius*. This Legacy, left *ſub modo*, is like unto a Legacy left under a Condition. Hence, as it is, when a Condition is inſerted; ſo it is alſo when a *Modus* is inſerted, *viz.* That if it be not thro' *Seia*'s Means, that ſhe does not marry him, but thro' the Fault of *Sempronius*, ſhe ſhall have the Legacy as if ſhe had married him. If a Legacy be left to a Perſon in this Manner, *viz.* when he ſhall have Children, and he at the Time of his Death leaves his Wife pregnant, it is a *conditional* Legacy, and he is underſtood to have died fulfilling the Condition of the Legacy; and the Legacy is valid, if a Poſthumous Child be born [o]. A Legacy left *in Diem iterabilem*, or to be paid on an anniverſary Day, is underſtood to be a yearly and perpetual Legacy [p]. *Titius* in his Laſt Will and Teſtament ordered his Heir, that he ſhould on his Birth-day diſtribute among the Burgomaſters of *Bononia*, a hundred Pounds out of his Inheritance. In this Caſe his Heir ought every Year *in perpetuum*, to divide among the ſaid Burgomaſters, a hundred Pounds on the like Day as *Titius* was born. Some would have it, that this was only a Legacy, due for one Year only; but their Opinion was adjudged to be ill-grounded. *Seius* having a Daughter, a Widow, made *Titius* his Heir, and then ſaid in his Will, *Let my Heir give unto my Daughter a hundred Pounds*, in ſingulos Annos, *during her Widowhood*, and afterwards he died. After the Teſtator's Death, the Daughter of *Seius* marry'd before the End of the Year, from the Time of the Death of *Seius*, and (notwithſtanding) demanded of the Heir the full Sum of a hundred Pounds for that Year: And it was adjudged, that ſhe ſhould have it paid her [q]; for in this Caſe it is ſufficient, if the Year be begun. *Marcus* bequeathed unto *Titius* a yearly Maintenance, without adding any certain Sum. And it was in this Caſe adjudged; that he ſeems to have bequeathed unto him, that which he was wont to pay him in his Life-time. And if he was not wont to pay him any Thing, then *Titius* ſhall have every Year for Alimony, paid him as much as is ſuitable to his State and Condition [r]. And thus, in Favour of Alimony, an uncertain Legacy is valid. A yearly Legacy for the firſt Year is a *pure* and *abſolute* Legacy, and it betokens more Legacies to enſue: But for the following Year it is a *conditional* Legacy; for this Condition ſeems to be inherent to it, *viz.* If the Perſon lives; and therefore, if the Legatary dies after the firſt Year, the Legacy does not paſs to his Heir [s]. A Legacy left to the Rector of a Church, is underſtood to be an annual Legacy in Favour of a *pious Cauſe*: But then the Words muſt be doubtful, whether it be left to the preſent Rector, for his Benefit alone, or to him and his Succeſſors. A Legacy left to the State or Church, is a perpetual Legacy; and a Legacy left to the Pariſh-prieſt of any Church, ſeems to be left to the Church or *intuitu Eccleſiæ*, as *Bartolus* [t] obſerves, if it be not otherwiſe ſpecially mention'd.

[n] C. 6. 36. t. t.

[o] D. 36. 3. 18.

[p] D. 33. 1. 23.

[q] D. 33. 1. 22.

[r] D. 33. 1. 14.

[s] D. 33. 1. 14.

[t] In L. 2. D. 34. 5.

It often becomes a Queſtion, when a Legacy may be ſaid and preſumed to be *pure*, when to be *modal*, and when to be a *conditional* Legacy. Now herein we ought to diſtinguiſh in two Particulars. The firſt, is, when a Legacy is left by an extraneous Perſon, or by one that is not of Kin to the Legatary, and not obliged to endow a Woman. The ſecond, is, when it is left by a Father or Grandfather, who by the *Civil* Law is bound to endow his Daughter or Grand-daughter. As to the Particulars, I ſhall diſtinguiſh in ſome Caſes. And the firſt Caſe, is, when certain Words are added to a Legacy, which ſignify a Condition, mode, or *pure* Legacy. As this Condition,

dition, *viz. if he or ſhe ſhall not marry*, ought ſometimes to be fulfilled, and ſometimes it is looked upon as not added. The ancient Law rejected this Condition, almoſt without any Diſtinction, as being contrary to the Procreation of Children, and the Advantage of the State: For ſuch was the Judgment then, that Marriage ought not to ſuffer by any Impediment [u]. For though it be for the Intereſt of the State, that the Teſtator's Will ſhould be obſerved in other reſpects, yet the Wiſdom of Men has thought it more for the Advantage of the Commonwealth in this Caſe, that the ſame ſhould be peopled by a lawful Off-ſpring [x]. And *Baldus* well obſerves, that the Good of the Publick rather conſiſts in Marriages, than in a State of Continency; it being the Intereſt of a State to have as many Subjects as poſſible [y]. And this is to be obſerved in all firſt Marriages; but in ſecond Marriages the Condition is to be fulfilled and perform'd. For Widows are Praiſe-worthy that content themſelves with one Husband, as being a Pattern of Chaſtity and Modeſty [z]; becauſe a ſecond Marriage, according to the Canoniſts, is a kind of Fornication, which yet is permitted upon a good Account, even by the *Canon* Law; and therefore, they ſtile it an *honeſt* Fornication [a]. Wherefore, If a Husband leaving a Legacy to his Wife, adds this Condition, *viz.* if ſhe ſhall keep her Widowhood, or until ſhe marries a ſecond Time, ſuch Condition ought to be obſerved; for if ſhe contracts a ſecond Marriage, the Legacy is forfeited. And it is the ſame Thing, even by the *Canon* Law; tho' the Apoſtle ſays, that after the Huſband's Death, the Wife is free from the Law of her Husband. A Legacy of Dower bequeathed unto a young Damſel, when ſhe ſhall be married, is a conditional Legacy, and is preſumed to be due, according to the Teſtator's Meaning, as ſoon as ſhe has contracted Marriage by Words *de præſenti*, tho' carnal Copulation does not enſue thereupon [b]; for the Neceſſity of carnal Copulation, in order to conſummate a Marriage, is only a Creature of the *Canon* Law. As when a Teſtator ſays in his Will, *I bequeath unto* Caia *a hundred Pounds, to be paid her at the Time of her Marriage.* In this Caſe, according to the Text and the beſt Interpreters thereon [c], the Teſtator is preſumed to mean the Time of Matrimony contracted, tho' no carnal Copulation enſues thereon, and the Legacy ought to be then paid; and ſo ſays the *Abbot*, even on the *Canon* Law [d].

[u] D. 35. 1. 72. 5. D. 35. 1. 6. & 64.

[x] D. 24. 3. 1.

[y] D. 24. 3. 1.

[z] Nov. 2. c. 1

[a] 31. 2. 1. 9.

[b] D. 31. 1.

[c] Bart. & Socin. in D. l.

[d] In Rubr. X. 4. 1. n. 4.

A ſimple yearly Legacy is determined with or by the Death of the Legatary [e]: But a yearly Legacy left for a certain Term of Time, is not thus determin'd; for it is due and ought to be paid, even to the End of the Term appointed by the Teſtator. In a yearly Legacy, if there be a Deficiency in the Fruits of one Year, ſuch Defect ought to be ſupply'd and made good, according to *Bartolus* [f], from the Fruits of the following Year. A Legatary *in ſingulos Annos*, if he ſhall die in the Beginning of the Year, tranſmits his Legacy of that Year unto his Heir or Executor: But this is not true in a Uſu-fructuary; for an Uſu-fructuary does not tranſmit the pendant or growing Fruits unto his Heir, if he dies in the Beginning of the Year, but only ſuch as he has received or are ſever'd from the Ground [g]. Though a Legacy left *in ſingulos Annos* be like unto an Uſufruct, it being determin'd by the Death of the Legatary; yet it is not determin'd by a *capitis Diminutio*, as by Baniſhment, and the like. When a Legacy is left to be paid *in ſingulos Annos*, it may be called an Annuity, or an annual Legacy; and then it appears that ſeveral Legacies (as already hinted) and not one alone are due [h]: And it matters not, whether a hundred Crowns be bequeathed *in ſingulos Annos*, or whether a hundred Crowns be left the firſt Year, a Bondmand the ſecond, and Corn the third Year [i]. But if *this* or *that* Thing be bequeathd, it is but one Legacy: For the Enumeration of ſeveral Things, in the Disjunctive, does not make it ſeveral Legacies.

[e] D. 33. 1. 8.

[f] In L. 13. D. 33. 6.

[g] D. 33. 1. 8.

[h] D. 36. 3. 1c.

[i] D. 36. 3. 11.

Legacies l. If a Teſtator ſhall bequeath to his Wife ten Sacks of Corn every Year ſo long as ſhe ſhall continue in her Widowhood, and afterwards the Widow ſhall die within two Months, or marry a ſecond Time, ſhe ſhall have the whole Legacy for the Year ſhe died or married in; becauſe it is a yearly Legacy, which is due to her for the Year ſhe died or marry'd in: For in this Caſe the Teſtator does not forbid her to marry, but is willing ſhe ſhould only have a Legacy during her Widowhood, and not after Marriage. And the Legacy being due and payable in the Beginning of every Year, ſhe ſhall not be obliged to reſtore the Fruits and Profits for the Time paſt; but ſhe cannot demand her Legacy *in futurum* after Marriage. But if an Eſtate in Land had been given her for a Legacy, ſhe ought to reſtore the Eſtate itſelf, but not the Profits and Fruits actually received. If a Legacy be left by Way of Annuity, that is to ſay, to be paid yearly, the Payment thereof ought to be made at the Beginning of every Year, as juſt now related: Yet if the Legacy be of the yearly Corn growing out of ſuch an Eſtate, ſuch Legacy is only due at Harveſt Time, and not at the Beginning of the Year. In theſe Caſes, the Mind of the Teſtator is to be conſider'd; for if he had a Mind to eaſe the Heir, he ſhall only be obliged at the End of the Year: But if he had an Intent to advance and help the Legatary, then the Legacy ſhall be paid in the Beginning of the Year. It has been ſaid, that a yearly Legacy for that Year, wherein the Legatary dies, is tranſmitted to his Heirs: which alſo proceeds, if the Teſtator bequeaths an hundred Pound *per Annum*, iſſuing out of the yearly predial Profits of an Eſtate; but it is otherwiſe, if it be out of the natural Fruits themſelves, unleſs they are ſever'd from the Soil at the Time of the Legatary's Death. [k] D. 36. 3. 25.

Touching conditional Legacies, it is ſaid, that a *poteſtative* Condition, which is eaſy to be fulfilled, ought to be performed out of Hand, *viz.* as ſoon as may be l. *Mævius* bequeathed unto *Sempronius* twenty Pounds, on Condition that he aſcended the Capitol after his Death, which was eaſy to be done, and then *Mævius* died. *Sempronius* may demand this Legacy, if he ſhall aſcend the Capitol, as ſoon as poſſible he may after the Death of *Mævius*. But a *caſual* Condition may be fulfilled at any Time m. *Publius* *Mævius* made his Will, and therein named three Perſons to be his Heirs. And then ſaid in his Will, *Let my Heir, or Heirs, pay unto* Caius Seius, *his Siſter's Son, the Sum of four hundred Pounds, to ſupport the Honour of the Conſulſhip, if he ſhall be appointed Conſul.* Afterwards, in the Teſtator's Life-time *Caius Seius* was made Conſul, and declared that he would accept of the ſaid Sum, and on the Calends of *January* (as the Cuſtom was) he entred on the Conſulſhip, and then the ſaid Teſtator died. And now the ſaid *Caius* demanded of the Teſtator's Heirs, the ſaid four hundred Pounds: But the Heirs ſaid, they were not liable to pay the ſaid four hundred Pounds; becauſe the Condition had its Event in the Teſtator's Life-time. But it was adjudged, that the ſaid four hundred Pounds were due to him. A Condition, *viz.* *If the Legatary pleaſes*, makes a conditional Legacy. *Caius* left unto *Titius* a thouſand Pounds, *if he pleaſed to accept of it*, and then died; and afterwards the ſaid *Titius*. *Quære*, Whether the Legacy belongs to the Heir of the ſaid *Titius?* And it was reſolved, that it does not, unleſs the ſaid *Titius* declared his Acceptance of the ſaid Legacy; becauſe a Condition ſeems to be enjoined the Perſon of the ſaid *Titius* n; and conditional Legacies do not paſs to the Heirs of the Legatees, before the Condition is compleatly fulfilled. A conditional Legacy is not extinguiſh'd by the Death of the Perſon that is charged to pay ſuch Legacy, if he dies pending the Condition; for then he leaves his Heir bound o. An impoſſible Condition in Laſt Wills and Teſtaments is reputed as a Condition not added or annexed thereunto; becauſe it cannot be fulfilled p. If the Event of a Condition be defeated before the Day of fulfilling the ſaid Condition, the [l] D. 35. 1. 29. [m] D. 35. 1. 36. [n] D. 35. 1. 68. [o] D. 35. 1. 64. [p] D. 35. 1. 3.

Day is to be expected and waited for, by reaſon of the Word *Tunc*, or *Then*, which denotes an Extremity of Time [q]. As when a Perſon ſays, *If* Titius *ſhall not have a Son born to him within five Years, then let my Heir pay unto* Seius *ten Pounds.* In this Caſe, if *Titius* dies before the Time, the Money is not immediately due unto *Seius*, but he ought to wait the Time. In all Conditions *de non faciendo*, of not doing a Thing, which cannot be fulfilled before the laſt Breath of a Man's Life, without expecting the ſaid Event, Caution *de non faciendo* is taken as Security for the fulfilling of the Condition. *Titius* left unto *Caius* ten Pounds, if he did not aſcend the Capitol, or if he did manumiſe his Bondman *Stichus.* In this Caſe, if *Caius* ſhall give Caution to the Heir of *Titius*, That he will aſcend the Capitol, or manumiſe *Stichus*, he ought to have the Legacy paid him [r]. And this Caution is in our Books call'd *Cautio Mutiana*, as being introduced by *Mutius.* And 'tis the ſame Thing, if one be appointed Heir under any of the like Conditions. For Example, *Seia* made her Husband her Heir in one Moiety of her Eſtate, if he did not ſue for the Dowry which ſhe promis'd, but never paid him: For the Husband ſhall, in this Caſe, give Caution to his Co-heir not to ſue, and then he ſhall be admitted Heir. But if his ſaid Wife made him alone her Heir in the aforeſaid manner, and thus there is no one to whom Caution may be given, he ſhall be Heir, tho' he gives no Caution [s].

[q] D.35.1.4.1.

[r] D.35.1.7.

[s] D.tu ſupra.

A falſe Demonſtration neither affects a *ſimple* Legacy, nor a Legacy in Truſt, nor an Heir [t]. For Inſtance: *Caius* ſaid, in his Will, *I bequeath to my Brother* Titius *an hundred Pounds*; or, I *appoint* my Brother *Stichus to be my Heir*; whereas, in Truth, *Titius* was not his Brother, and this he knew. In this Caſe, ſuch Demonſtration does not affect the Legacy, nor the ſaid Appointment of his Heir. But if he had bequeathed a Legacy unto *Titius*, or had appointed *Titius* ſimply to be his Heir, without ſtiling him his Brother, and one *Titius* ſhould ſay that the Teſtator meant him, and another *Titius* ſhould ſay that he was meant: In that caſe, *Titius*, who ſhall prove that the Teſtator meant him, ſhall be admitted Legatee, and not the other. It matters not, whether a Legacy be bequeathed unto any one by Name, as to *Lucius*; or by pointing out his bodily Perſon, Trade, Office, Kindred, *&c.* As, *I give unto my Couſin the Notary ten Pounds*, &c. For a Demonſtration is oftentimes in the Place of a Name, when it is made by expreſſing of the Perſon or Thing [u]. I ſay, *oftentimes*; becauſe ſometimes it is otherwiſe. If the Perſon of the Legatary does not appear, the Legacy is not valid from ſuch a *Non-conſtat* [x]. But a Legacy made to an uncertain Perſon, of Thing certain or uncertain, is valid, if ſuch Uncertainty of the Perſon may be delared and pointed out by any future Event [y].

[t] D. 35. 1. 33. pr.

[u] D. 35. 1. 34.

[x] D. 34. 5. 5.

[y] D. 3. 5. 6.

A Legacy is ſometimes left *ſub modo*, (as before remember'd): But ſuch a Legacy left, cannot be effectually demanded, unleſs the Legatary gives ſufficient Caution or Security to fulfil the *Modus* of the Legacy [z]. For Illuſtration-ſake: *Termitius* had a mind to have a Monument erected to his Memory; and to this End, he bequeathed unto *Lucius Publius* and *Cornelius Lentulus* the Sum of a thouſand Pounds. If they give Security to erect the ſaid Monument, they ſhall have the thouſand Pounds paid them, and not otherwiſe. Words importing a *Modus*, according to Cardinal *Tuſchus* [a], are ſuch as theſe, *viz. Sub hac conditione*; and, according to *Baldus* [b], *Sub modo tibi relinquo*, &c. But a *Modus* and a Condition are Things different in their Nature; as I have in a former Title declared. See alſo the Title, *Of a Condition*, &c. This Word (*Ut*) or *That*, in *Engliſh*, always imports a *Modus*, and not a Condition, as *Baldus* obſerves [c]; where it is ſaid, on the other hand, that the Word (*Si*) or *If*, in *Engliſh*, imports a Condition, and not a *Modus.* The Words *Modo &*

[z] D.35.1.40.5.

[a] Concl. 585.

[b] Conſ. 229. lib. 2.

[c] Conſ. 150. lib. 5.

formâ

formâ infra-ſcriptis, import a *Modus*, and not a Condition, according to *Caſtrenſis* [d]. But if the Word (*Ut*) be added to a Term which depends on *Fortune*, it imports a Condition, and not a *Modus*; elſe it is otherwiſe, as *Alexander* remarks in his *Conſilia Juris* [e]. The Word *Dummodo* alſo imports a *Modus*: But of this, ſee more in the Title of *Conditions*, as aforeſaid.

[d] Conſ. 292. lib. 2.

[e] Conſ. 95. lib. 7.

An uncertain Day, which is not apt and ſufficient to ſuſpend a Legacy, does not hinder the Deſcent of a Legacy after the Death of the Legatary. *Caius* ſaid in his Will, *Let my Heir pay unto* Titius, *by way of Legacy, an hundred Pounds, when the ſaid* Titius *ſhall happen to die.* This ought to be judged a *pure* Legacy, tho' it be left to be paid at an uncertain Day, and tho' it be a Kind of Legacy *ſub Conditione*; (for an uncertain Day is look'd upon to be a Condition [f]). And thus it ought to be judged a *pure* Legacy; becauſe the Event of the ſaid Condition is ſure to happen, ſince *Titius* muſt die, ſooner or later. And in this Caſe no Condition ſeems to be apply'd to the Legacy, but only a Delay or Suſpenſion of Payment 'till the Death of *Titius*: And when *Titius* comes to die, the Day of the Legacy ſucceeds; and thus *Titius*, after his Death, tranſmits it to his Heir. But it had been otherwiſe, if the Teſtator had ſaid, *Let my Heir pay unto* Titius *a hundred Pounds, when the ſaid Heir ſhall die*; becauſe then it ought to be judged a Legacy left under a Condition; ſince an uncertain Day is reputed as a Condition, as juſt now hinted. Hence, if the Legatary dies before the Heir, he does not tranſmit it to his Heir.

[f] D. 35. 1. 74.

A Legacy given *in liberam voluntatem*, and at the Diſcretion of the Heir, are different Legacies: For the firſt is in the Breaſt of the Heir, whether he will pay it, or not; but the other, *viz. ad arbitrium Hæredis*, imports the Will and Diſcretion of an honeſt Man, and is a valid Legacy [g]. And it is the ſame thing, if it be left by theſe Words, *viz. Si videatur judicio tuo*, or, If it ſhall pleaſe the Heir to pay ſo much: For it imports the Diſcretion of an honeſt Man. But the Words *liberum* and *plenum arbitrium* import a free Choice, whether he will pay it, or not [h]. Under the Appellation of *Wood*, is contain'd Wood provided for Fuel, being ſeparated from the Soil, tho' it be not ſpecially mention'd; unleſs the Mind of the Teſtator, or the Condition of the Wood, induces the contrary [i]. For there is one Kind of Wood, which is call'd Materials for Building; and another Kind, which is uſed for Fuel; and both theſe come under the Name of *Lignum*; tho' we, in *Engliſh*, ſtile the firſt by the Name of *Timber*, and the other *Fuel*. The firſt is never intended, unleſs the Teſtator ſpecially names it. Under the Appellation of Books, in a Legacy, we may reckon all Volumes, whether written upon Parchment, Vellum, Paper, or any other Matter [k]: And therefore, in a Legacy of Books, whether written upon Paper, Vellum, Parchment, *&c.* all the Books ſo written paſs as a Legacy. But Blank Vellum or Paper, which are pure and not written on, do not paſs by the Name of *Books*. Nor, on the other hand, are Books due as a Legacy, if a Perſon only bequeaths his Papers, unleſs it be in one Caſe, *viz.* when a Student, who has nothing elſe but Books, bequeaths unto another Student all his Papers: For then Books may well enough be reckon'd under the Appellation of his *Papers*; becauſe the Teſtator's Will ſeems to be ſuch. But if a Man bequeaths unto you all his clean and unwritten Papers, Parchments, Vellums, and other Materials whereon Men uſually write, they do not paſs hereby; becauſe Paper is that which is made of Silk, Linen, *&c.* But Parchment and Vellum is made of Sheep-skins, *&c.* Nor are Books which are begun to be written, by ſuch a Bequeſt, due as a Legacy: For Books begun to be written, cannot be call'd clean Paper. Nor can Books begun to be written,

[g] D. 30. 1. 78.

[h] D. 31. 2.

[i] D. 32. 1. 55.

[k] D. 32. 1. 52.

written, paſs under the Denomination of *Books*; for they are not then Books: But it is otherwiſe if they are compleatly written throughout, tho' [l] D. 32. 1. 52. they are not corrected, or bound up [l], *&c.* And thus, if a Man bequeaths all his Books, only thoſe are meant that are written throughout, and not thoſe which are not finiſh'd. If Books are bequeath'd; thoſe Things do not ſeem to be given, wherein the Books are contain'd and found; as [m] D. 32. 1. 52. 3. Book-caſes, Boxes, and the like [m].

If the ſame Sum of Money be twice bequeath'd, it is twice due, as it is ſaid; unleſs the Teſtator does afterwards, in expreſs Terms, change his [n] D. 34. 4. 9. Mind, and revoke the ſame [n]. *Titius* made his Will, and therein bequeath'd unto *Seius* an hundred Pounds *purely* and *abſolutely*; and afterwards, in the ſaid Will, he left unto the ſame *Seius* the ſame Sum of an hundred Pounds *conditionally*, *viz.* if ſuch a Ship ſhould return out of *Aſia* by ſuch a Time, and then he died. And then the Queſtion was, Whether the Teſtator would have this Sum of an hundred Pounds, which he had bequeathed *conditionally*, to be a diſtinct Legacy from the firſt? The firſt Sum, which he bequeathed *abſolutely* and *purely*, is due immediatly on the Teſtator's Death; and that Sum which he left *conditionally*, is due, if the Condition ſhall have its Event. But if the firſt Sum, which he left *abſolutely*, be paid; it ſeems that the ſecond Sum, which he left to him *conditionally*, is not due. But, in this Caſe, it appears, that the *pure* Legacy is converted into a *conditional* Legacy, by the Teſtator's changing his Mind. But,

In alternative Legacies there is only one Legacy due; and if one Part of the Alternative be conditional, nothing is tranſmitted to the Heir, if the [o] D. 36. 2. 25. Legatary dies in the Interim [o]. *Titius* made *Seius* his Heir, and gave a Legacy unto *Caius* in this manner: *I bequeath unto* Caius *my Eſtate at* Tivoli, *or my Eſtate at* Brunduſium; and then *Titius* died. Now, the Enumeration of ſeveral Eſtates comprehended in a disjunctive manner by way of Legacy, does not create ſeveral Legacies, but only makes one Legacy as to the Payment of it. For the Heir is not bound to give the Legatary more than one of the ſaid Eſtates. Nor is an alternative Legacy due for more than one, tho' one of the Alternatives be *purely*, and the other Part be *conditionally*, bequeathed. For, pending the Condition, the Heir has not his Choice which Eſtate he will deliver, whether the *pure*, or the *conditional* Legacy: Nor has the Legatary his Choice which Eſtate he will demand of the Heir, tho' the Teſtator has given the Legatary his Election; for an Election, properly ſpeaking, is, when the Party can chuſe which of the two Eſtates he will have. But in this Caſe it is not ſo: becauſe the *conditional* Legacy cannot be choſen; nor can the *pure* Legacy on the Account of the *conditional* Legacy. And moreover, becauſe it appears, that if the Legatary dies, pending the Condition, he cannot tranſmit the ſaid Legacy to his Heir, if it be left alternatively. In Alternatives, if the Caſe be doubtful, the Legatary has his Option or Choice: As thus; if a Teſtator ſhall ſay, *I bequeath unto* Titius *my Eſtate at* Milain, *or the Uſufruct of the ſaid Eſtate*; *and I give him the Election of having which he pleaſes*; in this Caſe the Legatary may either demand the naked Property of the ſaid Eſtate, or the Uſufruct without the Property. But if he had bequeathed him the Eſtate itſelf, tho' he alſo hereby ſeems to have bequeathed the Uſufruct to him, yet he cannot demand the Uſufruct, and quit the Property: And ſo *vice verſâ*.

If a Term or Delay be granted in Favour of the Heir by the Teſtator, he may pay the Legacy before the Day of Payment: But if it be granted [p] D. 33. 1. 15. on the Legatary's Account, he may not do this [p]. And if it be a Queſtion, whether ſuch Term be added in Favour of the Heir or Legatary, it is [q] D. 45. 1. 122. preſumed to be added in Favour of the Heir, as being a Debtor [q]. For a Legacy

a Legacy is in the Nature of a Debt, tho' not a real Debt; for a Legacy is not paid until all juſt Debts are deducted [r]. And thus, from what is here ſaid, *Ulpian* rightly obſerves, That as the Law, in doubtful Caſes, favours Debtors more than Creditors: ſo, as often as a Time is added for the Payment of Legacies, ſuch Term is deemed to be added in Favour of the Heir; becauſe, in paying of Legacies, and in executing Teſtamentary Truſts, the Heir repreſents the Perſon of a Debtor. And thus a great Advantage accrues to him: For before the paying of Legacies comes, he ſhall acquire to his own Behoof the meſne Fruits and Profits of the Legacies [s]. And it ſhall be at the Diſcretion of the Heir, whether he will pay the Legacy when it becomes due, or not, unleſs ſome Prejudice ſhall happen to the Legatary from ſuch an Anticipation of Payment. For Example: A Teſtator left to his Heir in Truſt, to reſtore ſuch an Eſtate either to *Titius* or *Sempronius*, as the Heir thought fit, after the ſaid Heir's Death. Now ſuch Heir cannot, in his Life-time, reſtore it to whom he pleaſes, in Prejudice of the other Perſon; becauſe the Will of the Deceaſed was, that he ſhould give it to him who ſurvived after the Heir's Death [t].

[r] D. 7. 72. 1.

[s] C. 6. 42. 12. D. 31. 1. 43. 2.

[t] D. 31. 1. 77. [10] D. 32. 1. 41. 12.

Thoſe who ought to have receiv'd Legacies from the Hands of an Heir deceas'd, are preferr'd, in Point of Right, unto all ſuch Legataries as are made ſo by ſuch Heir [u]. *Titius* died, leaving *Seius* his appointed Heir, and gave unto *Sempronius* a Legacy of ten Pounds. *Seius* alſo died, leaving *Mævius* his appointed Heir, and bequeathed unto *Caius* a Legacy of ten Pounds. Now the Queſtion was, which of the two Legataries ſhould be preferr'd, *viz.* whether *Sempronius* who was the firſt Legatary, or *Caius*? And it was adjudged, That *Sempronius* ſhould have the Preference in Point of Payment, becauſe the firſt Legacy is due as a Debt. And thus the Legataries of the Deceas'd are preferr'd, in Point of Right, to all the Legataries of the Heir: And this Order is obſerv'd among the Legataries of ſeveral Wills; becauſe Legataries of the firſt Will are as Creditors, in reſpect of the ſecond Will [x]: For a Legacy is in the Nature of a Debt, tho' not a real Debt; ſince a Legacy is not paid, 'till all juſt Debts are deducted [y].

[u] C. 7. 72. 1.

[x] C. 7. 72. 1.

[y] C. 7. 72. 1.

Touching what we call *Legatum caducum*, or an eſcheated Legacy, it is ſuch a Legacy as eſcheats from the Legatary unto the Exchequer; and this in ſuch a manner, (as *Ulpian* obſerves [z]) that the Legatary cannot receive the ſame. The *Lex Papia Poppæa*, touching eſcheated Legacies and Heirſhips, was made under the Reign of *Auguſtus Cæſar*, for the ſake of increaſing the publick Treaſury or Revenue, which the Civil Wars between *Julius Cæſar* and *Pompey*, and between *Pompey*, *Lepidus* and *Brutus*, had drained, and much exhauſted [a]. And *Pliny*, in his Panegyrick upon *Trajan*, tells us, That the twentieth Part of all Inheritances was, by a Law, given to the Treaſury, for the ſake of increaſing the publick Revenue. Moreover, there was another Reaſon for introducing the *Lex Papia Poppæa*, touching eſcheated Legacies, *viz.* for the ſake of puniſhing Batchelors; that, being frighten'd with the Puniſhment of Eſcheats, they might apply their Thoughts unto Marriage, and, by this means, add Subjects unto the Empire, whoſe Number had been much diminiſh'd by the Civil Wars. And as Legacies and Inheritances are diminiſh'd by the *Falcidian* Law [b], and by the *Senatus-conſultum Trebellianum* [c]; ſo, in the like manner, were they not only leſſen'd by the *Papian* Law, but even entire Legacies, and whole Inheritances, did, by this Law, deſcend unto the Exchequer, in order to ſupport the Charges of the Wars. This Law contain'd ſeveral Heads or Articles. For, 1*ſt*, It was hereby provided, That a tenth Part of thoſe Goods ſhould be apply'd to the Exchequer, which a Husband, dying without Children, had left to his Wife. See *Ulpian*'s *Fragments* [d]. But this Part of the Law was afterwards repealed,

[z] De Caduc. tollend.

[a] Tacit. Ann. lib. 3.

[b] D. 35. 2. 1.

[c] D. 36. 1.

[d] Tit. 15.

[e] C. 8. 58. 1 & 2. for wiſe Reaſons [e]. 2*dly*, This Law impoſed a Tax or Duty upon all Batchelors, as aforeſaid. And, 3*dly*, It made a Defalcation on all Legacies and Heirſhips. But as this Law is abrogated, I ſhall no longer inſiſt on it. It was call'd the *Papian Poppæan* Law, becauſe it was made when *M. Papias Mutilus* and *Quint. Poppæus* were Conſuls.

A Condition, that induces a perpetual Widowhood is remitted, according to *Baldus*, as invalid: As when a Legacy is left to *Sempronia*, if ſhe ſhall always continue a Widow. But if a Legacy be left on this Condition, *viz.* that ſhe ſhall neither marry *Titius*, nor *Seius*, nor *Mævius*, ſhe ſhall loſe her Legacy if ſhe marries either of them: For perpetual Widowhood is not enjoined by ſuch a Condition, ſince ſhe may lawfully marry any other Perſon. If a Teſtator ſhall ſay, *I bequeath unto my Wife ſuch a Houſe, ſo long as ſhe ſhall live chaſtly and honeſtly*, ſhe ought to have the Legacy, tho' ſhe paſſes to a ſecond Marriage, becauſe ſhe does (nevertheleſs) live a chaſt and honeſt Life, ſuch a State being agreeable to the Modeſty of a [f] Diſt. 31. c. 12. Woman [f]: And, therefore, *Bartolus* ſubjoins [g], that the Teſtator ought to [g] Bart. in l. 22. D. 36. 1. 4. ſay, *ſo long as ſhe lives honeſtly and chaſtly, and keeps herſelf a Widow.* But if thoſe Words *chaſtly* and *honeſtly* are utter'd by the Husband towards his Wife, they ought to be underſtood *de plena caſtitate*; becauſe (ſay the Novels) the Soul of her former Husband is made ſad by her ſecond Mar- [h] Nov. 2. riage [h]: But it is otherwiſe, if theſe Words are utter'd by a Father, or the Woman's Kindred.

A Condition of Marriage is either conceived in affirmative Terms, *viz. If he or ſhe ſhall marry*; or elſe negatively, *If he or ſhe ſhall not marry.* In reſpect of the firſt Caſe it is to be obſerved, that tho' no Perſon ought to [i] D. 45. 1. 134. X. 4. 1. 29. be invited to Matrimony through Fear of Puniſhment [i]; yet he may [k] D. 35. 1. 71. be induced hereunto through a Proſpect of Gain [k]. Wherefore, if a Legacy be left to a Perſon under this Condition, *viz. If he ſhall marry with* Lucia; he ought to comply with the Condition, otherwiſe it is a Bar [l] D. 37. 7. 23. to his Legacy, if he could contract Marriage with her *decently* and *honeſtly* [l]. Moreover, a Teſtator may take away a Legacy under a Condition, *viz. If the Legatary ſhall contract Marriage with ſuch a Perſon, or a certain Kind of Perſons*: For tho' ſuch a Revocation ſeems to be made *nomine Pœnæ*, yet no Puniſhment is really inflicted, whereby any Thing is taken away, which he can properly call his own; and therefore, it cannot properly be ſtiled [m] D. 39. 2. 1. a Puniſhment [m]. A Condition of Marriage referred to the Advice and Diſcretion of another Perſon, is not valid in reſpect of a Legacy given on ſuch Condition, though a Dowry may be conferred *in arbitrium alterius.* As when *Titius* gives unto *Caia*, a Legacy, if ſhe ſhall marry with the Advice of *Sempronius:* In this Caſe ſhe ſhall have her Legacy, tho' ſhe marries without his Advice. But if *Titius* gives unto *Caia* a Dowry of one hundred Pounds, if his Heir *Sempronius* ſhall think fit to pay it, ſuch Condition is valid. But a Legacy may in this Manner be given *in arbitrium alterius*, as a Condition; as, *I bequeath unto* Titius *an hundred Pounds, if* Seius *ſhall think well of it*: And in this Caſe the Legacy is valid, as if he had ſaid, *If* [n] D. 31. 1. 1. Seius *ſhall aſcend the Capitol* [n]; becauſe here is no Reſtraint laid on a lawful Act. But if a Teſtator ſhall ſay, *I bequeath a Legacy unto* Mævius *a Pupil, if his Guardian ſhall think well of it*; this is not a conditional Legacy: Nor can the Guardian delay demanding the ſame, or tranſmit it to his Heir.

When a Teſtator ſays, *Let my Heir pay unto* Titius, *as much as* Seius *ſhall think proper*, or, *according to the Extent of my* Eſtate, ſuch Legacy is [o] D. 31. 1. 1. 2. valid [o]. A Legacy is alſo valid, if it be given on a Condition which depends on the Power of another; as *if* Titius ſhall not aſcend the Capitol, for it is in his Power either to aſcend, or not to aſcend it: For the Legatary may then demand the Legacy, when it ſhall be certain, that *Titius* cannot aſcend the Capitol. *Sempronius* bequeathed a Legacy of an hundred

dred Pounds unto *Titius*, under a Condition, that he the ſaid *Titius* did ſo, *&c.* and then died. Afterwards the ſaid *Titius* died before the Condition was fulfilled; in this Caſe the Legacy is extinguiſhed. But it had been otherwiſe, if *Titius* had been baniſhed to ſome Iſland in the mean Time, becauſe the Legacy is not extinguiſhed before his natural Death; for he might have been reſtor'd to the City again, and Baniſhment is only a civil Death. But if he had been made a Servant unto Puniſhment, it is the ſame Thing, as in the firſt Caſe; becauſe Servitude is like unto Death itſelf p. p D. 35. 1. 58.

If a Perſon ſhall bequeath Part of his Goods, as is uſually now done, the Legacy ſhall be paid without the Profits thereof; unleſs the Heir ſhall delay the Payment of it q. *Seius* bequeathed unto *Titius* a fourth Part of his Goods, and limited three Months for the Payment of the Legacy: In this Caſe the Heir is not bound to give the Legatary the Profits thereof, if he pays the Legacy within three Months; but otherwiſe he ſhall be obliged to yield him the Profits thereof. In a doubtful Caſe, a Man ſeems only to bequeath the Right which he has in a Thing, tho' the Right ſhould be loſt by Death. As for Example: If I have an Uſufruct, and have bequeathed the ſame, ſuch Legacy is of no Advantage to the Legatary, unleſs I afterwards purchaſe the Property thereof r. If a Man bequeaths all his Books or written Works, only thoſe are intended that are written throughout, and not thoſe which are not finiſhed. If Books are bequeathed, thoſe Things do not ſeem to be given, wherein the Books are found, as Book-caſes, Boxes, and the like s. q D. 30. 1. 23. r D. 30. 1. 24. 2. s D. 32. 1. 52. 3.

A Man may not in Part renounce a Legacy, and in Part acquire the ſame: But if he dies and leaves two Heirs, the one may acquire his Part, and the other renounce his t. If a Legatary renounces his Legacy, the Thing bequeathed is feigned never to be with the Legatary, but always to remain with the Heir. Thus if the Legatary deliberates, and the Heir delivers the Thing to another, ſuch Delivery is void, if the Legatary afterwards accepts it: But if he renounces the Legacy, the Delivery is valid u. He who is hindred, or forbidden to execute the Teſtator's Will, on the Account of his being in the Service of the Wars, does not therefore renounce or loſe his Legacy; becauſe a Condition which is impoſſible by Law does not vitiate a Legacy, but ſuch Condition is rejected and rendred void x. *Gracchus* made *Horatius*, who was a Soldier, by his Will, a Guardian unto his Son, being at the Age of Puberty, and left a Legacy to *Horatius* if he adminiſtred the Office of Guardianſhip. And it being a Query, whether he could receive the Emolument without the Incumbrance or *Onus*, it was reſolved, that in this Caſe he might; becauſe *Horatius* was a Soldier, who, by the Oath of War, is hindred from being a Guardian: So that here he is not barred from demanding his Legacy, ſince he cannot act as Guardian if he would y. A Legatary, who poſſeſſes himſelf of a Legacy, and takes it from the Heir by his own Authority in an unlawful Manner, loſes his Legacy and his Action z. t D. 30. 1. 38. u D. 34. 5. 16. x C. 6. 37. 8. y D. 4. 6. z C. 6. 37. 5.

Enunciative Words, principally utter'd in a Laſt Will and Teſtament, *propter ſe*, do induce a Diſpoſition, unleſs it be proved that they were emitted through Error and Miſtake. *Titius* making his Will, appointed *Sempronius* to be his Heir; and, among other Things bequeathed, ſaid, *I forbid my Heir to demand of* Seius *the ten Pounds* which he owed me, *becauſe he had paid me.* Now if he has not really paid the Money, *Quære*, whether it may be demanded, or not? I anſwer, if the Money has been paid, it is plain it cannot be demanded; and if it has not been paid, *Seius* ſhall have an Action *ex Fidei-commiſſo* to be diſcharged, unleſs *Sempronius* ſhall prove that *Titius* would not have him to be diſcharged: But 'tis otherwiſe, if he had through Error thought that *Seius* had paid him.

A falſe Demonſtration does not vitiate a Legacy, where a certain Sum or Quantity is expreſſed, either in Terms, or elſe pointed out by Relation had

to

to ſomething elſe: But 'tis otherwiſe, if the Sum or Quantity be entirely uncertain. *Titius* making his Will, appointed *Caius* his Heir, and ſaid thus, *viz. I give and bequeath unto* Sempronius *the ten Pounds which he owes me*; whereas, in Truth, *Sempronius* owed him nothing. *Quære*, whether ſuch a Legacy be valid? Adjudged that it is, and may be ſued for, by an Action *on the Will.* For it being ſaid, that *I bequeath unto you the ten Pounds which you owe me*, here is ſomething in certain expreſſed: But it had been otherwiſe, if it had been uncertain, as, *I bequeath unto you what you owe me*; for then the Legacy is not valid thro' the Uncertainty of it. And it is likewiſe the ſame, as if he had ſpoke in the third Perſon, as, *I bequeath unto him what he owes me.*

If a ſimple Legacy, or Legacy in Truſt, be left in this manner, *viz. If my Heir ſhall think fit*, &c. both a ſimple Legacy and a Legacy in Truſt ſhall be due and valid; becauſe it is not given or meerly left to the Will of the Heir, but committed to him as an honeſt Man, to judge of the Expediency of it [a]. Wherefore, heretofore there were ſeveral Diſputes and Controverſies about ſimple Legacies and Legacies in Truſt, what they were, and what was the Difference between them, as we may ſee in the *Juſtinian Inſtitutes*: But now theſe Diſputes are laid aſleep and taken away by this Law [b], which makes ſimple Legacies to be equal to Legacies in Truſt, and to agree with them in many Things. But yet, I think, they differ in ſeveral reſpects. For Legacies in Truſt, by this Law cannot be effectually ſued for [c]; but ſimple Legacies may. Again, ſimple Legacies are only in a Will [d]; but *Fidei-commiſſa*, or Gifts in Truſt, may be otherwiſe conferred. *Thirdly*, a ſimple Legacy cannot deſcend or be bequeathed after the Death of the Heir; but a *Fidei-commiſſum* may be granted beyond his Time [e]. If a ſimple Legacy, or a Legacy in Truſt, be left unto the Exchequer, with an *Onus* or Incumbrance at the Tail of it, it paſſes to the Exchequer with ſuch an Incumbrance [f]. And it is the ſame Thing in reſpect of other Perſons, beſides the Exchequer. And ſo if a Legacy be revoked, the *Onus* or Incumbrance, which goes along with ſuch Legacy, is alſo underſtood to be revoked together with it, as I ſhall note hereafter under the *Revocation* of Legacies.

[a] D. 30. 1. 75.

[b] D. 30. 1. 1.

[c] I. 2. 23. 1.

[d] I. 2. 23. 10.

[e] I. 2. 23. 35.

[f] D. 35. 1. 59. fin.

By the *Civil* Law, a Thing belonging to another, may be bequeathed to this Effect, *viz.* That if the Teſtator has bequeathed ſuch a Thing, the Heir ſhall be obliged to purchaſe it, and to deliver it to the Legatary, or elſe to pay the Value of it to him: But if the Teſtator did not know it to belong to another, or to be another Perſon's Goods, but thought it to be his own, then ſuch Legacy is not due, even in reſpect of the Value thereof [h]: When a Teſtator bequeaths a Thing as a Legacy, which belongs to another Perſon, the Legatary is obliged to prove that the Teſtator knew it to be ſuch: For, in a doubtful Caſe, it is to be preſumed, according to *Theophilus* [i], that the Teſtator believed it to be his own. But *Barbatius* thinks, that this Matter ought to be left to the Diſcretion of the Judge. I ſay, that in a doubtful Caſe, a Teſtator is rather preſumed to bequeath that which is his own, than what belongs to another Man [k]; for this beſt ſuits with a Laſt Will and Teſtament, which was invented, to the end that a Man ſhould or might diſpoſe of his own Goods [l]. I will put a Caſe. *John* bequeathed unto *Peter* what belonged to another Perſon: Whereupon *Peter*, on the Teſtator's Death, demanded the Legacy of the Heir. But the Heir, on the other Hand, in Defence of himſelf, alledged, that the Teſtator did not know it to belong to another; and therefore, ſaid, that he was not obliged to the Performance of this Legacy. But the Legatary averr'd the Teſtator's Knowledge herein; and, therefore, ſaid that the Legacy was valid; whereupon a Diſpute aroſe between the Heir and the Legatary, touching this Legacy. *Quære*, whether the Legatary ought to prove, that the Teſtator knew

[h] C. 6. 37. 10.

[i] In §. 4. I. 2. 20.

[k] D. 31. 1. 67. 8.

[l] D. 28. 1. 1.

knew it to belong to another, or whether the Heir ought to prove, that the Teſtator was ignorant thereof: And it was held, that the Legatary ought to prove the Teſtator's Knowledge; and it is not neceſſary for the Heir to prove the Teſtator's Ignorance, according to that general Maxim in Law, *viz.* That he Neceſſity of Proof is always incumbent on the Plaintiff.

A Legatary ſhall be put into Poſſeſſion of the Heir's Eſtate, if the Heir does not either ſatisfy the Legacy, or give Security for the Payment thereof, within ſix Months after he has apply'd himſelf to the Judge. But the Teſtator may remit this Caution or Security to him, whom he has charged with the Payment of a ſimple Legacy, or a Legacy in Truſt [m]. But tho' this Caution or Security in reſpect of a Legacy may be remitted unto an Heir; yet that Security, whereby it is provided that ſuch Heir ſhall make a right Uſe of the Legacy in his Hands, cannot be remitted: For if the Uſufruct of a Thing be bequeathed unto the Heir, or any other Perſon, he ought to give Security, that he will reſtore the Thing, when the Time of the Uſufruct is determin'd [n]. *Note*, Whenever an Heir pays Legacies, he may demand Caution from the Legataries, that they will refund ſuch Legacies, in Caſe that the Heirſhip or Inheritance be evicted.

[m] C. 6. 55. 2. & 7. D 36. 3. 12. D. 35. 1. 77. fin.

[n] D. 7. 9. 1. D. 7. 1. 1.

Titia making her Will, appointed *Seia* to be her Heir, and bequeathed unto *Mævius* the Uſufruct of her Eſtate, which was called *Fribach*, and in theſe Words made *Mævius* a Truſtee. *I would have* Mævius *pay unto* Pamphilus *and* Stichus *from the Day of my Death ſixty Pounds every Year, out of the Rent of my ſaid Eſtate, during the Continuance of their Lives*; and then the ſaid *Titia* departed this Life. Aftewards *Mævius* had the ſaid Eſtate from *Seia* the Heir, and the ſaid *Mævius* for ſome Years paid unto the aforeſaid *Pamphilus* and *Stichus* the Annuity of ſixty Pounds, and then the ſaid *Mævius* died, and by this Means the ſaid Eſtate reverted unto *Seia* the Heir, *pleno Jure*, ſo that the Uſufruct was now extinct by the Death of *Mævius*. And hereupon it became a Queſtion, whether *Seia* the Heir of *Titia* was obliged to pay *Pamphilus* and *Stichus* the ſaid Annuity of ſixty Pounds? And it was reſolved in the Negative; becauſe the ſaid ſixty Pounds were not left by the Heir, but by *Mævius* the Uſufructuary [o]. For if a Legacy be begun and ended by the Death of the Legatary, the Incumbrance that was charged thereon, is extinguiſhed *quoad omnes*. It became another Queſtion, whether the Heirs of *Mævius* were obliged to pay it? And 'tis ſaid, that they are not, unleſs *Pamphilus* and *Stichus* do evidently prove, that the Teſtatrix would have the ſaid Annuity continued unto the aforeſaid Perſons, even after the Death of *Mævius*, and then the Heirs of *Mævius* the Uſufructuary ſhall be obliged, if the Rent received by *Mævius* in his Life-time, from the ſaid Eſtate, be ſufficient, otherwiſe they ſhall not be liable [p].

[o] D. 33. 1. 19.

[p] D. ut ſupra.

A Legacy is ſometimes not valid, in reſpect of the Perſon bequeathing it, as being a Perſon that is inteſtable [q], and the like, and ſometimes in reſpect of the Perſon to whom it is bequeathed, becauſe (perhaps) he is not capable of the Thing bequeathed: And, according to *Speculator*, there are ſeveral of theſe Perſons, who can neither bequeath, nor take a Legacy given them. See *Speculator de Inſtrum. Editione* [r]. And ſometimes a Legacy is not valid in reſpect of the Thing bequeathed; becauſe the Thing itſelf cannot be bequeathed [s], tho' regularly ſpeaking, all Things may be bequeathed, which are not ſpecially prohibited by ſome Law [t]. A Legacy bequeathed to an unlawful Purpoſe, may, by Conſent of Parties, be converted to a lawful Purpoſe: But 'tis otherwiſe, if it be left to a lawful Purpoſe; for then it cannot be converted to an unlawful one. We have a Provincial Conſtitution in *Lendwood*, which ſtrictly forbids all Annals, Trentals, and other Maſſes, to be ſold, which is not lawful to do, even by the *Canon* Law: Wherefore,

[q] I. 2. 20. 24.

[r] §. Compendioſa.

[s] I. 2. 20. 4.

[t] D. 30. 1. 41.

Wherefore, when any one gives or bequeaths any temporal Thing to be paid as a Reward or Price for a ſpiritual Thing, ſuch Diſpoſition then ceaſes. Tho' it be not neceſſary, in the bequeathing of a Legacy, to aſſign a Cauſe or Reaſon for ſo doing; yet if a Reaſon be given, it ought to be a good one.

If a Thing bequeathed, ſhall afterwards receive an Increaſe, the Legacy increaſes with it: And ſo, *vice verſa*, if it be diminiſh'd, the Legacy
[u] D. 30.1.24.3. decreaſes with it [u]. If I bequeath unto you, as a Flock, ten Sheep, which I have in my Flock, and which are ſaid to make a Flock, and afterwards I have five added thereunto, the Legatary ſhall have all of them; becauſe where a Flock is bequeathed, or any thing of the like Nature, thoſe Things
[x] D. 30. 1. 21. which do afterwards accede thereunto do belong to the Legatary [x]. If a Flock be bequeathed, and any of the Cattle ſhall happen to die in the Teſtator's Life-time, and other Cattle ſhall be ſubſtituted in their Room, the Legatary ſhall have the whole Flock notwithſtanding, becauſe it ſeems to be the ſame Flock: And if any of the ſaid Flock of Cattle ſhall happen to be diminiſh'd, and even but an Ox or Sheep remain, the Legatary may
[y] D. 30. 1. 22. claim it, tho' it then ceaſed to be a Flock [y]. That which is not yet in the Nature of Things, but only in future Expectation, may be bequeathed; as the Vine which ſhall hereafter grow and be produced from my Eſtate,
[z] D. 30. 1. 24. and the like [z]. If a Teſtator bequeaths a certain Sum of Money to ſuch and ſuch Perſons, on Condition that they do a certain Thing, and one of them fails in the Performance of it; yet, notwithſtanding this, the other
[a] D. 32. 1. 9. ſhall have his Part of the Legacy [a]. *Titius* having appointed his Heirs, afterwards ſaid in his Will, *I bequeath unto my Neighbour* Seius, *and to him of my Sons who ſhall come to my Funeral, an hundred Crowns.* None of his Sons, after his Death, came to his Funeral. *Quere*, Whether *Seius* ſhall have the whole hundred Crowns? And it was adjudged that he
[b] D. ut ſupra. ſhould, and that the Legacy ſhould not be leſſen'd upon this Account [b].

A Legacy left to one under the Name of a Dignitary, is underſtood to be left alſo to his Succeſſor in ſuch Dignity, unleſs he be a ſubaltern Perſon. Thus a Legacy left unto the Prince, is alſo deemed to be left to his Succeſſor; becauſe the Teſtator is preſumed to have the ſame Affection
[c] D. 31. 1. 56. for the Prince who ſucceeds, as he has for the Prince now living [c]. And it is the ſame Thing touching a Legacy bequeathed to a Biſhop: For if ſuch Biſhop ſhall die in the Teſtator's Life-time, it ſeems (according to
[d] In L. 56. D. 31. 1. *Bartolus* [d]) to be left even to his Succeſſor, when it is left to him as a Dignitary, as being Biſhop of *Sarum*, &c. But if a Legacy be left to a Vicar, it does not ſeem to be left to his Succeſſor; becauſe a Vicar is a ſubaltern Perſon, who has his Dignity from another, and not from himſelf. But whenever the giving a Legacy coheres to the Perſon of the Legatary, and not incident to his Dignity, it is then deemed to be left to his Perſon. Whereupon, we ought to conſider which Name is firſt expreſs'd in ſuch
[e] D. 45. 3. 37. Legacy, whether that of his Dignity, or his proper Name [e]. A Legacy left to a Parſon or Pariſh-prieſt, as to the Rector of *Cripplegate* Pariſh in *London*, ſeems to be left to the Church itſelf, and ſhall go to the Parſon,
[f] D. 33. 1. 20. 2. and his Succeſſors [f]: But if it be left to *J. S.* Rector of *Cripplegate*, he ſhall have it to his own Uſe; for the proper Name of the Perſon determines the Legacy. A Legacy bequeathed unto a Man's Wife only under her appellative Name, is not due to a ſecond Wife, which the
[g] D. 32. 1. 48. fin. Teſtator had after the making of his Will, on the Death of his firſt Wife [g]; becauſe the Teſtator could not be ſuppoſed to provide for a ſecond Wife by ſuch Will: But if the Teſtator had no Wife at the Time of making his Will, then a Legacy to his Wife, as a Wife, is not only due to his firſt, but alſo to his ſecond or third Wife; becauſe Legacies are favour'd in Law.

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An Heir, unto whom the Care of erecting a Monument is committed, is not obliged to be at the whole Expence of it, if ſufficient Aſſets do not come to his Hands by way of Legacy. *Titius* appointed his Wife *Seia* to be his Heir as to the twelfth Part of the Inheritance, and *Mævia* to be his Heir to all the reſt, and, in theſe Words, order'd to have a Monument built in Honour of himſelf, *viz. I would have my Body to be deliver'd to my Wife, to be bury'd in ſuch an Eſtate; and my Will is, that there be a Monument erected to me, to the Value of five hundred Crowns. Quære*, Whether the Teſtator, by the ſaid Words, wou'd have his Wife alone, who had no more than an hundred and fifty Crowns of her Husband's Eſtate, at her own Coſt and Charge, erect the ſaid Monument; or, whether both Heirs ſhould be at the Expence of this Monument, according to the reſpective Shares of Goods that came to their Hands? And it was held, That both the Heirs ſhould be at the Charge of this Monument, according to their reſpective Shares in the Teſtator's Goods; and that the Wife, by theſe Words, was only enjoin'd, through conjugal Affection, to ſee this Work performed.

A Perſon bequeathing a Thing which is in common with him to another, is only underſtood to bequeath his own Part of the Thing [h]. If the Whole be bequeathed unto one, and a Part of the Whole unto another, a Part of the Whole is deemed to be revoked and taken away from him by ſuch a Legacy [i]. If there are two Codicils made upon one and the ſame Day, and a Thing be bequeathed unto *Titius* in one of them, and the ſame Thing be bequeathed unto *Caius* in the other, they both ſeem, by the Will of the Deceaſed, to have a concurrent Right in the Thing, and ſhall be admitted to the Legacy together. Where a Thing cannot be had in *Specie*, an Action accrues for the Value thereof; as in the Caſe of a Legacy, where the ſame Thing is left to me, by way of a Legacy, in Truſt, and likewiſe bequeathed unto you, not with a Deſign of bequeathing the Thing in common, but unto each Perſon *in Solidum*. For if it be paid unto one, the other has no Right unto the Thing itſelf; but yet he may have an Action for the Value of it [k].

[h] C. 6. 37 20.

[i] D. 40 6. 6.

[k] D. 32. 1. 20.

In a Legacy, we ought rather to conſider the Thoughts and Intention of the Teſtator, than the Words and Writing of the Will, whereby a Legacy is given: For if the Deſign and Meaning of the Teſtator be proved, it is, in a doubtful Caſe, to be preferr'd to the Writing of the Teſtament. But if it does not appear what and how much is bequeathed, nothing is due, unleſs it be in favourable Caſes [l]: And a Legacy is of no Advantage, unleſs the *Species* of the Legacy be expreſſed. But Legacies left to *charitable Uſes*, tho' they are uncertain, are yet ſupported in Law: And ſo likewiſe is an uncertain Dower bequeathed: For it ought to be declar'd and aſcertain'd by the Judge; unleſs it be ſimply bequeathed by the Husband, in which Caſe there is no Occaſion of a Specification. If Legacies, which are given to ſuch a Sum, do exceed the Eſtate or Patrimony of the Perſon deceaſed, they leſſen the Quantity of the Legacy given in *Specie*.

[l] 30. 1. 75. 1.

By the *Civil* Law, a Biſhop ought to take Care and ſee, that a Legacy given to *charitable Uſes*, be fulfilled according to the Teſtator's Intent: And this he ought to do without any Fee or Reward; according to that Command of our Saviour *Chriſt*, viz. *Freely ye have received, freely give* [m]. Theſe Legacies were publiſh'd before the Magiſtrates, and recorded in their Rolls. But by the common Uſage of the Country, in *Holland*, theſe Legacies are not wont to be publiſh'd before the Magiſtrates; but the Deacons, and other Perſons that are Stewards for the Poor, are obliged to fulfil the pious Deſigns of the Deceaſed, according to good Conſcience, and without Delay [n]. In *England*, the Biſhop is to ſee that the

[m] Mat. 10. 8.

[n] Groenv. de L.L. Abr.

the Teſtator's Will be obſerv'd in this reſpect; and if the Executor fails herein, he may call him to an Account: And if other Feoffees are fraudulent or negligent in their Duty, a Commiſſion of Charitable Uſes will go out of the Court of *Chancery*, to enquire touching ſuch Neglect or Abuſe of ſuch Charity. See the Statute of *Charitable Uſes*. It is one thing to leave a Legacy to *pious Uſes*, and another to bequeath it for the Maintenance of a Perſon. For a Legacy, left for Maintenance unto a certain Perſon, does not ſeem to be left to *pious Uſes*: But if it be left to the *Poor*, it is left to
[o] C. 1. 3. 49. pious Uſes [o]. Tho' Money left for Alimony may be put out to Uſe, and the Intereſt receiv'd from thence go towards Alimony; yet Money left to charitable Uſes cannot be put out to Intereſt without the Biſhop's Conſent, whom the *Civil* Law has intruſted with the Care of it. If a Perſon, by his Will, leaves a certain Sum of Money, or the like, by way of Legacy, to be diſtributed to the Poor; *Quere*, Whether it may be given to one poor Man alone?
[p] In L. 67. D. 30. 1. *Bartolus* [p] thinks that it may: But herein he differs from himſelf in
[q] In L. 1. D. 38. 1. another Place of his *Commentary* [q]. And the common Opinion of the Lawyers is, That it ought not to be conferr'd on one only: It being more agreeable to the Teſtator's Intent, that it ſhould be diſtributed unto ſeveral; and his Intent ought to be regarded. For the Reaſon hereof is different; becauſe it is more agreeable to Charity to ſupply the Wants of ſeveral, than to relieve one Perſon.

Before the Time of *Conſtantine the Great*, it was either unlawful, or very ſeldom practiſed, to bequeath any Thing to the Church: And though
[r] C. 1. 2. 1. *Conſtantine*, by an Imperial Conſtitution [r], permitted ſuch Legacies to be made; yet the Emperor *Arcadius* afterwards did, for wiſe Reaſons, forbid
[s] Sacroſanct. Eccl. C. 1. 17 & 20. any Thing to be left to Eccleſiaſticks. See the *Theodoſian* Code [s]. This St. *Jerom*, in a Letter to *Nepotianus*, ſtiles a good Cauſtick apply'd to the Wound which the Prieſthood had given to the Church, by their inſatiable Avarice: But yet this did not reſtrain their Covetouſneſs, but
[t] D. 33. 1. 20. 2. they eluded this Law, by procuring Legacies in Truſt [t].

[In *France* Churches cannot acquire new Penſions or Poſſeſſions without a Royal Charter of *Mortmain*.]

If a Man bequeaths any Thing to his *Kindred*, he ſeems to bequeath it to ſuch as were of his Kindred at the Time of making his Will: But if he had no Kindred at that Time, then it goes to ſuch as were ſo at the Time
[u] D. 34. 5. 20. of his Death [u]. That which is bequeathed to Adminiſtrators or Directors of any Corporation, ſeems to be bequeathed to ſuch Corporation. And 'tis
[x] D. 34. 5. 2. the ſame thing, if it be bequeathed to the Citizens of ſuch a City [x]. If there be not a *Conſtat* of the Perſon of the Legatary, the Legacy is not valid
[y] D. 34. 5. 5. from a *Non-conſtat* of the Perſon [y]. But a Legacy given to an uncertain Perſon, of Things certain or uncertain, if they may be pointed out, is valid; for ſuch Uncertainty of the Perſon may be declared (perhaps) by
[z] D. 34. 5. 6. ſome future Event [z], and then it is valid. A Legatary is not obliged to
[a] C. 4. 2. 1. pay Debts upon Contracts, but the Heir is obliged [a]: And the Reaſon is, becauſe the Heir, by accepting of the Heirſhip, contracts (as it were) with the hereditary Creditors.

A Legacy is ſaid to be *namely* or *expreſly* given, if it may be underſtood from that which is bequeathed, tho' the Name of it be not men-
[b] D. 32. 1. 90. tion'd [b]. If a Houſe be bequeathed, the Garden and Backſide belonging to ſuch Houſe are due, if ſuch Garden or Backſide are purchaſed for the ſake of the Houſe, that the Houſe may be more pleaſant and healthy, and there be a Paſſage to the Garden by or from the Houſe; and, laſtly, if the Garden be an Appendage unto the Houſe; for we purchaſe Gardens
[c] D. 32. 1. 91. 5. for the ſake of Health and Pleaſure [c], and Backſides for Conveniency. If

Wooll

Wooll be bequeathed, even that which is dyed is due as a Legacy; for dyed Wooll is Wooll.

If any Thing be bought and purchaſed out of the Money bequeathed to a Perſon, the Legacy is not thereby extinguiſh'd, but ſhall be made good to the Perſon out of the Thing purchaſed [d]. *Titius* made his two Sons and his Daughter his Heirs, and divided his Subſtance between them; ſaving a few Chattels, which were to remain undivided, and in common: And would have his ſaid Daughter accept of three hundred Pounds out of that Gain which he, the Father, had made, from the Adminiſtration of a publick Office which he had. And afterwards, out of the Money ariſing from the Profits of the ſaid Office, the Father purchaſed an Eſtate, and for the ſaid Eſtate he gave four hundred Pounds out of the ſaid Profits, and ſo gave a hundred Pounds more than he had bequeathed to his Daughter. After this, the Father died; and the Queſtion was, Whether the Brothers and Daughter were bound to make good the ſaid Legacy of three hundred Pounds unto their Siſter; becauſe the three hundred Pounds, with another hundred Pounds of the ſaid Profits, were laid out in a Purchaſe? And it was judged, That they were obliged; becauſe, what is converted into the Body of an Eſtate, does not ſeem to be ſpent or conſumed. Wherefore, the ſaid Daughter ſhall have her Legacy, out of the Eſtate or Inheritance, before any Diviſion is made, and then the Remainder of the Inheritance ſhall be divided between the Co-heirs, Share and Share alike [e].

[d] D. 34. 4. 23.

[e] D. ut ſupra.

If a ſimple Legacy, or a Legacy in Truſt, be left unto the Prince or Emperor, by Virtue of an imperfect Will, he ought not to claim the ſame, becauſe it is contrary to Decency; for the Prince ought to obſerve thoſe Laws from which he ſeems to be exempt [f]. Let the Flatterers of Princes, therefore, give Ear unto this Doctrine: For it is not only contrary to Decency, for a Prince, who is the Head of the Laws, to have Thoughts of breaking the Laws, but even contrary to the Laws themſelves. A Legatary ought to give Caution for the fulfilling of a *Modus* [g]: As, when a Man bequeaths an hundred Pounds unto *Berta*, that ſhe may marry *Sempronius*. If a Teſtament be imperfect or invalid, for want of a Solemnity requiſite thereunto, as becauſe the Will had not a ſufficient Number of Witneſſes, or was defective in ſome other teſtamentary Solemnity, the Legacies in the Will are not due, on the Account of ſuch Imperfections, as juſt now hinted, unleſs there be a codicillary Clauſe put in ſuch Will, to ſupport and ſtrengthen the Legacies thereby.

[f] D. 32. 1. 23.

[g] D. 35. 1. 40. fin.

If a Teſtator bequeaths his Houſe, with all Things therein, nothing excepted, he does not hereby ſeem to bequeath the Money in *Specie* which ſhall be found therein. Yet the Corn, and other Things which are there, are well comprehended in ſuch Legacy; and ſo is the Money, if it be left there by way of Safeguard, as in the Place of a Treaſury. And the Reaſon why Money in Caſh is excepted, is, becauſe Money in Tale or *Specie* is not locally circumſcribed. And if a Teſtator ſhall ſay, *I bequeath my Houſe, with all Things therein exiſting*, this is to be underſtood of thoſe Things which were there at the Time of the Will made, and not of thoſe Things which came in or were there afterwards [h].

[h] D. 32. 1. 44.

If a Father ſhall leave to his Son all his Law-books, provided he becomes a Proficient in the Study of the Law; or his Phyſick-books, if he ſhall become a Student in the Art of Phyſick; the Son ſhall acquire both the Law and Phyſick-books, if he ſhall become a Proficient in each Art or Science.

If a Teſtator bequeaths Cloaths and Jewels to his Wife, valued by him at two hundred Pounds, and at length they do not appear to be worth ſo much, the Wife cannot ſue or demand to have the Undervalue thereof ſupply'd and made good to her; becauſe the Husband (perhaps) might be

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[o] C. 1. 3. 49.

[p] In L. 67. D. 30. 1.

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[r] C. 1. 2. 1.

[s] Sacroſanct. Eccl. C. 1. 17 & 20.

[t] D. 33. 1. 20. 2.

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[u] D. 34. 5. 20.

[x] D. 34. 5. 2.

[y] D. 34. 5. 5.

[z] D. 34. 5. 6.

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[h] D. 32. 1. 44.

If a Father ſhall leave to his Son all his Law-books, provided he becomes a Proficient in the Study of the Law; or his Phyſick-books, if he ſhall become a Student in the Art of Phyſick; the Son ſhall acquire both the Law and Phyſick-books, if he ſhall become a Proficient in each Art or Science.

If a Teſtator bequeaths Cloaths and Jewels to his Wife, valued by him at two hundred Pounds, and at length they do not appear to be worth ſo much, the Wife cannot ſue or demand to have the Undervalue thereof ſupply'd and made good to her; becauſe the Husband (perhaps) might be

miſtaken in his Valuation of them. And thus, on the other hand, if thoſe Jewels or Veſtments ſhould be worth more, the Heir cannot demand the Surpluſage, nor diminiſh any Thing of the Legacy: but the Cloaths and Jewels as they are bequeathed in certain, ought to be given to the Wife, without any Regard to the Teſtator's Value and Eſtimation of them, ſince ſuch Eſtimation ought not to be conſider'd. But if the Teſtator had commanded his Eſtate to be ſold for ſuch a Price, ſuch Eſtimation ought to be regarded: Becauſe, that tho' the Eſtate was worth more, yet the Teſtator ſeemed (perhaps) to give the Surpluſage thereof in Sale, by Way of Gift, unto the Buyer. If a Teſtator ſhall ſay, *I bequeath my* Seian *Eſtate, which I value at one thouſand Pounds*, ſuch Eſtimation does not change the Condition of the Legacy; for if the Eſtate will yield ſo much, the Heir ought to pay the Value thereof: But if the Heir ſhall be charged with a *Fidei-commiſſum* or Truſt, and be onerated to give me the Eſtate, or one thouſand Pounds, it belongs to the Judge's Office, if the Eſtate itſelf be not given, to conſider whether the Eſtate be worth more or leſs than one thouſand Pounds. And 'tis the ſame Thing, if the Heir ſhall be charged to ſell an Eſtate to another for a certain Price, tho' the Price be very ſmall, yet the Teſtator's Eſtimation ſhall be obſerved: For what is above the Value aſcertain'd by him, he gave the Buyer by Way of Legacy, as aforeſaid.

A Legacy left to any Place of Charity, as to an Hoſpital or the like, for the Maintenance of the Poor, is no longer due or payable, if ſuch Place of Piety, *&c.* ſhall be deſtroyed: And the Reaſon, is, becauſe every Diſpoſition ought to be conſider'd according to the Time wherein it was made. Thus a Legacy given to all the Churches of a Dioceſe, is not due to Churches afterwards built. A Legacy left to a Woman, if ſhe ſhall bear and bring forth a Child, ſhall not have Place, if the Child be taken out of the Mother's Womb, *exſecto Ventre*; becauſe the Woman then ſhall not be ſaid *peperiſſe Filium*, or to have brought forth a Child; and for this Reaſon the Legacy ſhall ceaſe. But if a Child ſhall be born into the World, which was taken out of his Mother's Belly alive after her Death, he ſhall be capable of Succeſſion, provided he came out entirely alive into the World, tho' he ſhould die immediately afterwards: For theſe Children, tho' they be brought into the World by violent Means; yet as they have a Soul, they differ nothing from other Children that are *naturally* born; and therefore they are included in all Matters of Legacies, *&c.* But a Legacy made to a Woman, when ſhe ſhall *have* a Child, ſhall be due, tho' ſuch Child was cut out of the Mother's Womb after her Death, becauſe the Woman is ſaid to *have*, tho' not *peperiſſe filium*, the Child being taken from the Woman herſelf after her Death, by cutting open the Womb.

If I have alledged and averr'd, that a Laſt Will and Teſtament, wherein I have a Legacy left me, is falſe and *inofficious*, I cannot afterwards ſue for ſuch a Legacy therein bequeathed me; becauſe I have got a Sentence againſt the Will, and then it is not due, ſince Legacies are not due from Laſt Wills and Teſtaments, which are falſe and *inofficious*: Or elſe a Sentence is pronounced in Favour of the Will; and then it is not due, becauſe I have endeavour'd to impugn the ſame, and therefore ought not to have any Advantage from thence. But by Way of Objection it is ſaid, that I may obtain a Legacy, even from a Laſt Will, which I have endeavour'd to overthrow; becauſe, though I have alledged ſuch Will to be leſs ſolemn, and am caſt therein, yet I may demand the Legacy thus left me. But this is not quite the Caſe above-mentioned. *Sed quære de hoc.*

TIT. XXII.

Of an Uſufruct, Dwelling, *the* Labour *of Servants, and of a* Dowry *bequeathed; and what Profit the Legatary has thereby; of the Choice and Election of the Thing bequeathed; of Wheat, Wine, and Oyl bequeathed, and what is contained under every of them; of Ground furniſh'd or a Stock bequeathed, and the Inſtruments thereunto belonging, and what is to be underſtood by ſuch a Bequeſt.*

EITHER the Uſufruct of one Thing alone, or of all a Man's Goods, may be bequeathed [i], or the Propriety alone without the Uſufruct; or the Propriety may be bequeathed to one Perſon, and the Uſufruct unto another. If a Teſtator bequeaths an Eſtate in Land, called a *Fundus*, by the Bequeſt of ſuch an Uſufruct, ſuch Eſtate ſhall be in common between two Legataries [k], becauſe this Word *Fundus* even comprehends an Uſufruct and a Propriety [l]. But an Uſufructuary himſelf cannot bequeath an Uſufruct; for it determines and reverts to the Proprietor [m]. If the yearly Fruits of an Eſtate be left, the Uſufruct of ſuch Eſtate is underſtood to be bequeathed; becauſe this ſeems to be the Teſtator's Meaning [n]. But tho' the yearly Rent or Revenue of an Eſtate bequeathed, and thereupon the Fruits and Value become due; yet a Dwelling or Habitation does not go along with ſuch Deviſe [o]. The Legacy of an Uſe or Uſufruct is determined by the Death of the Legatary, as juſt now hinted, and does not paſs to Heirs: nor does a Legacy of Rent; ſince it is like unto an Uſufruct, or to a Legacy of an Annuity [p].

[i] D. 33. 2. 1. C. 3. 33. 5.
[k] D. 33. 2. 19.
[l] D. 50. 16. 60 & 115.
[m] D. 30. 1. 24. 1.
[n] D. 33. 2. 41.
[o] D. 33. 2. 17 & 38.
[p] D. 33. 2. 16. 17 & 22.

The Labour of a Freeman as well as of a Bondman may be bequeathed, according to the *Civil* Law [q]: And ſuch a Legacy is not determin'd by the Death of the Legatary, nor by a Non-uſer, nor by a *capitis diminutio*, or a Disfranchiſement [r]. An Habitation or Dwelling may alſo be bequeathed; but ſuch a Legacy likewiſe expires with the Death of the Legatary, as the Legacy of an Uſufruct does, ſince it is only for the Service of the Legatary. All theſe yearly Legacies, *viz.* an Uſe, Uſufruct, yearly Rent or Annuity, *&c.* are like unto each other [s]. Predial Services may alſo be bequeathed by thoſe who may conſtitute the ſame *inter Vivos*, and give them unto thoſe who have a predial Eſtate, unto which theſe Services may be annexed. And ſuch a kind of Legacy is perpetual, and is not determin'd by the Death of the Legatary; becauſe a Service is a *real* Right, or a Right which ſavours of the Realty, and is *ipſo Jure* conſtituted *in Perpetuum*, and not for a Time [t]. But the Uſufruct or Uſe of a Service cannot be bequeathed, becauſe there can be no Service of a Service. Tho' the Wife, on the Death of her Husband, be Miſtreſs and Proprietor of her Dower; yet the Legacy of a Dower is valid, becauſe it is a fuller Right than an Action of Dower [u]. For a Legacy may be demanded immediately, but a Dower heretofore yearly, or on the ſecond or third Day, though at preſent only after a Year, whether it conſiſts in Moveables or Immoveables. All Pacts made in Prejudice of the Wife, in Relation to the Reſtitution of a Dower, are quaſhed, if ſuch Dower be bequeathed beforehand [x]. But this

[q] D. 33. 2. 2 & 3.
[r] D. 7. 7. 2.
[s] D. 33. 2. 22.
[t] D. 8. 1. 4. pr.
[u] I. 2. 20. 15.
[x] D. 33. 4. 1. 1.

this Title touching a Dower bequeathed, is now out of Uſe; and therefore I ſhall ſay no more of it.

[y] D. 30. 1. 5 & 10. Heretofore the Option of a Legacy was propounded in a ſolemn Manner *y*: But the Election of it was arbitrary. But at this Day, theſe Solemnities being removed and taken away, Option and Election are put upon the ſame [z] C. 6. 43. 1 & 2. Footing [z]. If a Legatary has his Election bequeathed unto him, the Legatary may chuſe what Thing he pleaſes, even the beſt of the Teſtator's [a] D. 33. 5. 2. Goods [a]: For he ought to have his Choice, who has the Power of bringing what Action he has a Mind to. But this ceaſes in Contracts, wherein the Debtor has his Election. If there are ſeveral Perſons, unto whom an Option is bequeathed, and they diſagree in their Choice, the Matter ſhall be decided by drawing Lots, and he ſhall have his Option, on whom the Lot [b] I. 2. 20. 23. ſhall fall [b]. An Option is to be made after the Heir has accepted of the [c] D. 33. 5. 16. Heirſhip [c]. If the Legatary ſhall delay or forbear to make his Election, the Judge may decree a Time, within which he ought to do it, and then he ſhall loſe his Right of Choice if he does not comply with the Judge's [d] D. 33. 5. 6. Decree [d]. After the Legatary has once made his Option, he cannot [e] D. 33. 5. 2. change his Will [e]. A Legacy, wherein the Legatary has his Option, at [f] D. 33. 5. 19. this Day paſſes unto his Heirs; but it was not ſo formerly [f].

If a Legacy of an hundred Hogſheads of Wine be bequeathed to a Perſon, and the Teſtator has left no Wine behind him, the Heir ought to buy ſuch a Quantity of Wine, and deliver it to the Legatary, and not Vinegar, [g] D. 33. 6. 3. pr. which has been reckon'd as Wine [g]. And if Wine be bequeathed, it is due, together with the Veſſels that contain it; not that the Veſſels are any Part of the Wine, but becauſe ſuch was the Teſtator's Mind, *viz.* That the Hogſheads ſhould go along with the Wine. But if the Wine be in a Wine-cellar, belonging to the Teſtator, it is otherwiſe; or if the Veſſels are ſo large, that they cannot be well moved; for then the Wine ought to be drawn into Bottles, *&c.* and theſe are due. But if Wine be bequeathed [h] D. 33. 6. 3. 1. in Bottles, the Bottles are not due [h]. When a certain Weight of Oyl is bequeathed, without adding the Quality thereof, the Queſtion is not what Sort of Oyl the Teſtator was wont to uſe, or what Sort of Oyl was in Uſe in that Country: Wherefore, the Heir may pay unto the Legatary what [i] D. 33. 6. 4. Sort of Oyl he pleaſes [i], unleſs the Teſtator has bequeathed unto the Lega- [k] D. 33. 6. 2. 1. tary his Election [k]. If a Perſon ſhall bequeath a Legacy of Wheat, and in ſuch Legacy ſhall expreſs an impoſſible Weight, ſuch Legacy is not valid: As when a Perſon bequeaths an hundred Buſhels of Wheat, each [l] D. 33. 6. 7. 1. Buſhel weighing an hundred Pounds [l], which is deemed an impoſſible Weight in Wheat, according to the common Standard of a Buſhel. If a certain Quantity of Wine, Oyl, and the like, be not expreſſed, the Heir is not at his own Diſcretion to pay what *Quantum* he thinks fit, but as [m] D. 33. 6. 7. much as the Teſtator has left, is deemed to be the Legacy [m].

The Stock or Furniture of an Eſtate is an *Apparatus* or Proviſion of Things, which are to remain thereon for a Length of Time, and without [n] D. 33. 7. 12. pr. which the Eſtate cannot be driven or managed [n]. And this Stock may be aſcribed unto ſeveral Things. For there is one Kind of Stock, which is [o] D. 33. 7. 12. 2. proper unto Husbandry, or Tillage of Land for Corn [o]; another, which is [p] D. 33. 7. 16. 1. peculiar to the Dreſſing and Culture of a Vineyard [p]; and another Kind, which is ſerviceable to a Painter [q], Fiſher [r], Baker, and the like [s]; and, [q] D. 33. 7. 17. pr. laſtly, there is one Kind of Stock which belongs unto an Houſe [t]. Theſe [r] D. 33. 7. 17. 1. ſeveral Kinds of Stocks are deſcribed and ſet forth in the Laws quoted in the Margin. There is a wide Difference in a Legacy, whether a Perſon [s] D. 33. 7. 18. 1. bequeaths an Eſtate with the Stock or Furniture thereunto belonging, or [t] D. 33. 7. 12. 16, &c. an Eſtate ſtocked, or an Eſtate and the Stock [u]. If an Eſtate be bequeathed [u] D. 33. 7. 1 & 5. with the Stock, only thoſe Things are comprized, which belong to the *Apparatus* or neceſſary Furniture of the Eſtate, *viz.* for gathering and preſerving

ſerving the Fruits thereof. If an Eſtate ſtocked be bequeathed, thoſe Things are deemed to be bequeathed, which moreover belong to the Uſe of a Maſter of a Family, as Houſhold Goods [x]. If ſuch an Eſtate bequeathed, be alienated, the Stock is due. But not, if an Eſtate be bequeathed with the Stock [y]. Therefore, in a Legacy of an Eſtate ſtocked, we reckon Servants, neceſſary Proviſions for the Table, Corn ſet aſide for ſowing the Land, called, Seed-corn [z], all Kind of Cattle neceſſary to the Farm [a], Houſhold-goods, *&c.* If an Eſtate be *ſimply* bequeathed, the Predial Advantages, that is to ſay, thoſe Acceſſions and Emoluments of the Eſtate, which the Maſter of a Family is wont to take from ſuch Eſtate, for the Tillage and Culture thereof, are not included and reckoned [b]. In all Legacies of this Kind the proper Signification of Words is not regarded, but the Teſtator's Intention, and what he would point out, and what is cuſtomary, and may be preſumed, according to the Manner of the Country where the Perſons dwell, ought to be obſerved [c].

[x] D. 33. 7. 12. 27 & 28.
[y] D. 33. 7. 5.
[z] D. 33. 7. 12.
[a] D. 33. 7. 25.
[b] D. 33. 7. 21. & 26.
[c] D. 33. 7. 18. 2.

TIT. XXIII.

Of Store *bequeathed, in* Latin *called* Penus, *and what is comprized under that Word; of Houſhold-ſtuff bequeathed, and of Gold, Silver, Women's Attire, Ornaments, and ſuch like Things; and,* laſtly, *of Alimony, Victuals,* &c. *bequeathed.*

UNDER the Appellation of the *Latin* Word *Penus*, or Store in *Engliſh*, we may reckon ſuch Eatables and Drinkables as are procur'd and laid up for the Sake of long Uſe [d]. And if ſuch a Legacy be bequeathed, thoſe Things are comprehended which ſerve for Eating and Drinking, and the Veſſels which contain ſuch Stores; unleſs the Teſtator's Mind appears to be contrary hereunto [e]. If a Perſon ſhall be enjoined by the Teſtator to pay or give any Thing by Way of *Store*, and if he does not pay, or give it, to pay ſo much Money, tho' the Heir be obliged to pay it in *Store*, yet if he be in Delay of giving it in *Store*, it may be demanded in Money [f]. Provender for Horſes, and ſuch other Cattle which the Maſter uſes for his own immediate Service, and the like, is included under the Notion of *Store*, but not for ſuch as he lets out to hire, or makes Uſe of for Tillage or Dunging his Land [g]. So likewiſe Pulſe, Bread-corn, and Barley are comprehended under this Denomination of *Store*; but Wood for Fuel, Coals, and the like, are not [h].

[d] Aul. Gell. lib. 4. c. 1.
[e] D. 33. 9. 4.
[f] D. 33. 9. 1. D. 50. 16. 115.
[g] D. 33. 9. 3. 7.
[h] D. 33. 9. 3.

By Houſhold-ſtuff, we mean ſuch Furniture as belongs to the Maſter of a Family, for the Uſe of Houſe-keeping, and which is not wrought in Gold and Silver Plate, nor reckon'd among wearing Apparel [i]; but that which cannot be caſt entirely into another Species [k], and which is a Thing of a moveable Nature, as Beds, Tables, Stools [l], *&c.* For it would be too tedious to enumerate all the Goods that are contained under this Article of Houſhold-ſtuff. See the Laws here cited in the *Digeſts* [m]. But a Legacy of all a Man's moveable Effects and Goods comprehends, Books, Gold, Silver in Bullion and in Caſh, Fruits ſever'd from the Soil, and all other

[i] D. 33. 10. 1.
[k] D. 33. 10. 7.
[l] D. 33. 10 2.
[m] D. 33. 10. 2, 3, 4, 5, &c.

other moveable Goods; and likewiſe all living Creatures, and Fruits hanging on the Tree, and tho' not ſeparated from the Soil, do yet come under the Stile of Moveables: But Monies laid up for the Sake of lending the ſame, are not included under ſuch a Legacy; nor are thoſe Things which are affixed to the Houſe or Soil, as Glaſs-windows, Wainſcot, *&c.*

If a Legacy of *Alimony* or Maintenance be bequeathed, Victuals, Cloathing and Dwelling ſhall be due, becauſe the Body of Man can't be ſupported without theſe Things: But ſuch Things as relate to Diſcipline and Educa-
[n] D. 34. 1. 6. tion are not included in ſuch a Legacy [n], unleſs it be proved that he wou'd
[o] Ib. l. 7. have it ſo [o]. If a certain Sum of Money be left by Way of Alimony, it
[p] Ib. 10 & 12. ought to be paid unto the Legatary [p]. When Alimony is bequeathed by Way of Truſt, without expreſſing the Quantity, we ought to conſider, what the Perſon deceaſed was wont to allow, and *Secondly* what he left to others of the ſame Degree and Order; and if neither of theſe appears, ſuch Alimony ought to be meaſured according to the Circumſtances and Subſtance of the Perſon deceaſed, and the Charity of him unto whom the Truſt is
[q] D. 34. 1. 2. pr. committed [q]: For the Uncertainty does not vitiate the Legacy, ſince it may be eaſily declared. If a Legacy of an Eſtate be given, to the end that the Legatary ſhould receive a Maintenance from thence; that rather ſeems to
[r] D. 34. 1. 22. 1. be an Annuity for Life, than a Legacy of Alimony [r]. If a Legacy be given by the Name of *Diet* or *Victuals*, neither a Habitation, nor Wearing-Apparel is due; becauſe the Teſtator only intended to bequeath Food, and
[s] D. 34. 1. 21. not Raiment [s]. A Perſon, that is bound to have his Commorancy with another, in Virtue of a Legacy of Alimony bequeathed to him, is not ſimply bound to follow him where-ever he goes, but ſuch Attendance ſhall be adjudged
[t] D. 33. 1. 13. of according to the Mind of an honeſt Man, or an upright Judge [t]. *Marcellus* making his Will, therein appointed *Claudius* to be his Heir, and left unto *Caius* Alimony, ſo long as he ſhould live with *Claudius*. *Claudius* died, and it became a Queſtion, whether Alimony was ſtill due unto *Caius*? And it was adjudged, that it was; becauſe a *mix'd* Condition being rendred ineffectual, or defective by Chance, does not make a Legacy of Alimony to be void: And, moreover, it ſeems to be the Teſtator's Will, that *Caius* ſhould have Alimony, even after the Death of *Claudius*; becauſe the Legacy was rather left in Contemplation of the Legatary, than in regard to
[u] C. 6. 37. 1. the Perſon with whom he ought to live [u]. Theſe Legacies of Alimony are not increaſed or diminiſhed, if the Teſtator, who bequeathed them, ſhall afterwards engage or bind ſuch and ſuch Eſtates unto the Perſon that is to have Alimony, that he may more ſecurely receive his Maintenance
[x] D. 34. 1. 12. from thence [x].

If Gold or Silver be bequeathed, every Thing wrought or not worked
[y] D. 34. 2. 19. pr. up, is included, but not Gold and Silver in Coin or Stampt for Money [y]. Wrought Gold is that, which is caſt into a certain Form or *Species*, as golden Veſſels, *&c.* But that which is unwrought or not worked up, is that which has not received any certain *Species*, but continues in the Ingot or Bullion. That which is coined, is that which is ſtamp'd with a publick Form, and is reckon'd amongſt Monies in Caſh or Tale.

[z] D. 34. 2. 39. A Woman's Attire, called *Mundus Muliebris* in our Books [z], is that Apparel which ſhe puts on for Elegancy and greater Neatneſs, or (as we
[a] D. 34. 2. 39. ſay) her beſt Apparel; and this the Husband may retain unto himſelf [a]; unleſs it be her *Paraphernalia*, or ſuch Cloaths as are provided for the Sake
[b] D. 34. 2. 25. of Health [b]. Under a Woman's Attire, we may alſo reckon her Toilet or Dreſſing-table. A Woman's Ornaments, are thoſe Things which are provided for no other End, than for the Sake of decking out and adorning her
[c] D. 34. 2. 25. 10 & 11. Body [c]. To Veſtments may be referr'd all thoſe Things, which come under the Denomination of Wearing-apparel for the Body, Bedding, *&c.* and
[d] D. 34. 2. 23. Things acceſſary hereunto [d]. Statues and Images may be bequeathed [e].
[e] D. 34. 2. 12, & 14.

If

If a Creditor bequeaths a Releaſe or Diſcharge unto his Debtor, ſuch a Legacy is valid [f]. And this may happen ſeveral Ways; as, when he diſcharges him expreſly by Name in his Will; or bequeaths unto him the Specialty of the Debt; or commands his Heir not to ſue him [g], or to give a Releaſe unto ſuch a Perſon being his Debtor [h]. So that even a Thing impawned or mortgaged may be bequeathed unto the Debtor: In which Caſe the Right of the Pledge ſeems to be remitted, though the the Debt itſelf is not diſcharged by ſuch a Legacy [i]. A Diſcharge may be either in the Whole or in Part hereby, or for a Time, or for ever [k]. If the Releaſe of a Debt be bequeathed, the Debtor is not only defended by an Exception [l], but may alſo have an Action againſt the Heir, to acquit him by *Acceptilation* [m], and implore the Office of the Judge to impoſe perpetual Silence on the Heir in this Matter, according to *Bartolus* [n].

[f] D. 34. 3. 1. & 3.
[g] D. ut ſupra.
[h] D. 34. 3. 19.
[i] D. 34. 3. 1. 1.
[k] D. 34. 3. 7. pr.
[l] I. 2. 20. 13.
[m] D. 34. 3. 3. 3.
[n] In L. 3. D. 34. 3.

TIT. XXIV.

Of the Revocation *of Legacies, and how a Legacy may be transferr'd from one Perſon to another; and of the* Falcidian *Law*, &c.

LEGACIES are loſt ſeveral ways; *viz.* either by Revocation, Transferring of them, by the Doubtfulneſs of Expreſſions in the writing of the Will, or by way of a Puniſhment added if the Legatary renders himſelf unworthy of them, or by the *Catonian* Rule, or if there be a Failure in the Conſideration or Condition of the Legacy. Now the Revocation of a Legacy may be either *expreſly* or *tacitly* made. *Expreſly*, when it appears that the Teſtator has recalled his Intention, either by Words *directly* contrary to ſuch Legacy, or by any other Means, whereby the Teſtator's Will may be known [o], and that either in the ſame Teſtament, or in another equally ſolemn, or even in Codicils [p]; or by ſome Fact, as when the Teſtator adviſedly cancels that Part of his Will wherein he had bequeathed a Legacy [q]. It is alſo a Revocation of a Legacy, if the Legatary dies before the Teſtator, or the Thing bequeathed periſhes, or be exempted from Commerce, without the Fault of the Heir; and when the Thing bequeathed comes to the Legatary by ſome other *lucrative* Cauſe or Title [r]. Legacies are *tacitly* revoked, either by the ſimple or naked Will of the Teſtator, when he gives the Thing bequeathed in his Lifetime unto another [s], or alienates the ſame without any Neceſſity: Or they are *tacitly* revoked by the *preſumptive* Will of the Teſtator alone, as by capital Enmities ſupervening between the Teſtator and Legatary, which are not removed by any Reconciliation [t]. A Legacy is alſo *tacitly* revoked, when a Legatary, before the Delivery of the Legacy, and after the Teſtator's Death, has debauched the Teſtator's Relict; for then the Legacy is taken away from him, as being unworthy thereof [u]. But a Legacy is not deemed to be revoked, tho' the Sum of the Legacy be converted into the Body of the Eſtate purchaſed; for the Sum bequeathed is, notwithſtanding, due unto the Legatary [x]. The Thing bequeathed, upon a Revocation thereof, remains with the Heir, with all its Incumbrances [y].

As to the ſecond Part of this Title, it is to be obſerved, That as a Legacy may be revoked; ſo, it being taken away from one, it may be transferr'd

[o] D. 34. 4. 5.
[p] D. 34. 4. 17.
[q] I. 2. 21. pr.
[r] D. 34. 4. 15.
[s] D. 34. 4. 18.
[t] D. 34. 4. 22.
[u] C. 6. 42. 27.
[x] D. 34. 4. 23.
[y] D. 34. 4. 19. & ib. Bart.

transferr'd to another [z]. And ſuch Tranferring of Legacies may be made four Ways, according to the Lawyers [a]. 1*ſt*, From the Perſon of the Legatary unto another Legatary: As when I now give unto *Seius* the Eſtate which I had bequeathed unto *Titius*. 2*dly*, From the Perſon of him who is order'd to pay it, that another ſhould give it. 3*dly*, It may be transferr'd from a Thing to a Thing: As when the Teſtator commands an hundred Pounds to be paid in Lieu of an Eſtate deviſed. And, 4*thly*, It may be transferr'd from the preſent Time, to the Event of a Condition: As when that which is *ſimply* and *purely* left, is transferr'd *ſub Conditione* under which it is bequeathed, unleſs the Condition adheres to the Perſon [b]. But that if the Perſon on whom it is transferr'd be uncapable, ſhall ſuch Transfer be valid? And it is held, That it ſhall, according to the *Gloſs* [c].

[z] D. 34. 4. 5.
[a] D. 34. 4. 6.
[b] D. 34. 4. 24.
[c] In L. 20. D. 34. 3.

If a Legacy be given in ſuch doubtful Terms in reſpect of the Perſon, that ſuch Doubt cannot be removed by any ſuitable Interpretation, it is a Defeazance of ſuch Legacy [d]; as when the Name of the Legatary is not expreſs'd in the Will, or when the Teſtator gives a Legacy unto his Friend *Sempronius*, and there are two of the ſame Name equally the Teſtator's Friends, and in the like Caſes [e]. But a doubtful or ambiguous Legacy ought always to be interpreted in favour of the Legatary, if known. For where there is an Ambiguity of Words, a Legacy ought to be taken in a large Senſe, *viz.* That the greater, and not the leſſer Thing, ſhould be due [f]; as when a Teſtator has bequeathed unto *Seius* three hundred Pounds, with the two hundred Pounds which he depoſited in his Hands: For tho' it becomes a Doubt, whether the two hundred Pounds depoſited with him ſhall be reckon'd into the three hundred Pounds; yet it is ſaid, that they ought not to be ſo reckon'd. Wherefore, ſuch Ambiguity is interpreted in Favour of the Legatary, *viz.* That not only the three hundred Pounds, but five hundred Pounds, the Total of both Sums, ſhall be due. A Legacy in a doubtful Caſe, is not underſtood to be revoked; becauſe, according to *Baldus* [g], the Revocation of a Legacy is an odious Thing in the Eye of the Law, which favours Legacies.

[d] D. 34. 5. 11 & 26.
[e] D. 34. 5. 9 & 10.
[f] D. 34. 5. 13. pr.
[g] Conſ. 28. vol. 3.

Legacies left unto certain Heirs, and their Succeſſors, were ſometimes taken from them, as being unworthy Perſons, and apply'd unto the Exchequer [h]; provided ſuch Heirs were guilty of any evil Deſign againſt the Teſtator, and died after him. See *Baldus* [i]. As when they kill'd the Teſtator, or were the Occaſion of his Death [k], or did not proſecute or avenge his Death within the Term aſſigned by the Judge, provided they could diſcover the Authors of ſuch Murder [l]. Thoſe Perſons alſo loſt their Legacies, as unworthy thereof, who ſued for the *Bonorum-poſſeſſio*, contrary to the Tables of the Will [m], or who marry'd a Wife contrary to the Laws [n], or excuſed themſelves from a Teſtamentary Guardianſhip [o], and likewiſe thoſe who committed any Depredation on the Inheritance, ſo far as ſuch Robbery extended itſelf [p], and the like Perſons.

[h] D. 35. 5. 29 & 30.
[i] In L. 8. C. 9. 17.
[k] D. 34. 9. 3.
[l] C. 6. 37. 10.
[m] D. 34. 9. 2.
[n] D. 34. 9. 3.
[o] D. 34. 9. 5.
[p] D. 34. 9. 6.

By a Conſtitution of *Antoninus Pius*, Legacies left *nomine Pœnæ* were invalid [q]; becauſe Legacies ought not to proceed out of Hatred, and by way of puniſhing the Heir, but out of Love and Benevolence to the Legatary [r]. But *Juſtinian* would have theſe Legacies to be valid, unleſs they contain any thing diſhoneſt, or contrary to the Laws [s]. By the *Catonian* Rule, the Legacy became ineffectual, if the Teſtator died at the Time of the Will made [t]. This obtains in Legacies, and in *pure* Appointments of Heirs, but not in conditional Inſtitutions [u]. There are ſome Legacies, which are look'd upon as not written in the Will, being ſuch as are given to Perſons that have ceaſed to be in the Land of the Living [x]; and ſuch as are expreſly left to Perſons incapable of receiving Legacies, and theſe remain with the Heir.

[q] D. 34. 6. 1 & 2.
[r] D. 17. 2. 9.
[s] I. 2. 20. 36.
[t] D. 34. 7. 1. pr.
[u] D. 34. 7. 3 & 4.
[x] D. 34. 8. pen.

I ſhall

I ſhall next ſpeak of the *Falcidian* Law, which was introduced on a very good Account; and the Effect thereof is of great Advantage to Heirs or Executors. For heretofore, by a Law of the Twelve Tables, the Power of Bequeathing was confin'd to no Limitations, but left entirely at large to the Teſtator; inaſmuch as that he might give away his whole Patrimony or Eſtate (without any Controul) in Legacies, and leave nothing to his written Heir: For by that Law of the Twelve Tables it was thus enacted, viz. *Quod ſicuti quiſque legaſſet rem ſuam, ita jus eſſet*; that is to ſay, In what manner ſoever a Man has bequeathed his Eſtate, his Will ought to be executed. Wherefore it was afterwards thought expedient, for the Advantage of the Eſtate, to reſtrain this unbounded Liberty of bequeathing Legacies. And therefore it is now provided, for the ſake of the Teſtator's Will; (for before, they often died, as it were, Inteſtate; their written Heirs refuſing to accept of the Heirſhip, becauſe they receiv'd little or no Profit thereby, and were frequently great Sufferers by this means, on the ſcore of paying the Teſtator's Debts and Legacies, the Benefit of an Inventory not being known when the *Falcidian* Law was made); That it ſhould not be lawful for Teſtators to bequeath more than three-fourths of their whole Eſtates; and that, whether the Teſtator appointed one or more Heirs, a fourth Part ſhould always remain with the Heir or Heirs, for his or their Trouble [y]. Indeed, the *Lex Furia* and the *Voconian* Law were anciently made, to remedy the aforeſaid Inconvenience. But theſe Laws were not ſufficient to hinder this Evil [z]; (for Heirs renounced their Heirſhips, notwithſtanding): And therefore, afterwards, the *Falcidian* Law was eſtabliſh'd. This Law was not ſo call'd from the Word *Falx*, as ſome Perſons, in the Time of *Harmenopulus* [a], imagin'd, but from *Falcidius* a Tribune of the People, in the Time of the ſecond Triumvirate.

[y] I. 2. 22. 1 & 2. D. 35. 2. 1.
[z] I. 2. 22. 1.
[a] Harm. 9.

In the *Falcidian* Law, all the Teſtator's Debts and Funeral Expences are firſt to be deducted [b], and not reckon'd in the Inventory, ſo far as to affect the Heir; becauſe only thoſe Things are deemed to be a Man's Goods and Chattels, which are the Surpluſage of his Eſtate, after his Debts are deducted. So that, if a Teſtator was indebted to him whom he has made his Heir, it ſhall not be reckon'd among his Chattels, ſo as to injure the Heir in his fourth Part, tho' the Debt be merged by his being made Heir. And thus the two chief Points of the *Falcidian* Law were, *firſt*, to confirm unto Teſtators the Power of Bequeathing, which was given them by a Law of the Twelve Tables; and, *ſecondly*, to limit this Power, as aforeſaid, that the Heir might have a fourth Part ſecured to him [c]; a Law not known in *England*. By the *Lex Furia*, it was not lawful for a Perſon to bequeath more than a thouſand *Aurei*: And by the *Voconian* Law it was provided, That a Legatary ſhould not have more than the Heir. But now ſimple Legacies are leſſen'd by the *Falcidian* Law, in Proportion to the Teſtator's Subſtance, as *Fidei Commiſſa*, or Legacies in Truſt, are by the *Senatus-conſultum Trebellianum*.

[b] D. 35. 2. 18. & 87. 2.
[c] D. 35. 2. 1. pr.

The Benefit of the *Falcidian* Law does not only accrue to the written Heirs themſelves, but likewiſe to their Heirs and Succeſſors [d]: And if there be more Heirs than one appointed, it accrues to each of them, namely, that each of them ſhall have the fourth Portion ſecured to him, upon a Diviſion of the Heirſhip [e]. And by *Accident* it alſo belongs to inteſtate Heirs, when Legacies in Truſt are bequeathed in Codicils by the Inteſtate, in ſuch a manner, that the whole Inheritance is charged with the Payment of a Legacy in Truſt [f]. But the *Falcidian* Law does not obtain in Point of Benefit, when the Heir does not make an Inventory, or the Teſtator himſelf has forbidden it to take Place [g]. The Sum of the Teſtator's Eſtate, to which the Reaſon and Benefit of the *Falcidian* Law has

[d] C. 6. 50. 10. & 16.
[e] D. 35. 2. 77.
[f] D. 35. 2. 18. Nov. 1. c. 4. §. 2.
[g] Nov. ut ſupra.

has a Reſpect, is to be conſider'd at that very Time when the Teſtator died: Nor are Legacies diminiſh'd or conſerved upon this Account, if the [h] Teſtator's Goods are diminiſh'd or increas'd after the Teſtator's Death [h].

[h] D. 35. 2. 30. & 73.

[i] X. 3. 26. 18. Touching the *Portio Trebellianica*, tho' the Word be not found in the *Civil* Law, yet it is expreſly made uſe of in the *Canon* Law [i]. For tho' it was introduced by the *Senatus-conſultum Pegaſianum*, after the Example of [k] I. 2. 23. 5. the *Falcidian* Law [k]; yet becauſe this Decree of the Senate was exploded, the *Senatus-conſultum Trebellianum* obtains in reſpect of Heirſhip in Truſt; and a fourth Part is at this Day retained by the Heir in Truſt, in Virtue of [l] 2. 2. 23. 7. the *Senatus-conſultum Trebellianum* [l], the *Senatus-conſultum Pegaſianum* being transferr'd or converted into the *Senatus-conſultum Trebellianum*. Wherefore, it is not without Reaſon call'd *Portio Trebellianica*, which is nothing elſe but a fourth Part or Portion which the Heir in Truſt deducts from the Legacy in Truſt; as a ſimple Heir, by the *Falcidian* Law, deducts the fourth Part from all ſimple Legacies. Thus the Portion call'd *Trebellianiaca*, is the fourth Part of all the Goods which are anywiſe taken by Vertue of the Teſtator's Will; and the Words *Falcidia* and *Trebellianica* are often [m] D, 28. 6. 21. D. 35. 2. 86. D. 36. 1. 16. uſed promiſcuouſly for each other [m].

TIT. XXV.

Of Inteſtate Succeſſion, *with us call'd an* Adminiſtration; *and who may have the Adminiſtration committed to them, and in what Order the Adminiſtration is committed*: *As*, Firſt, *To the Children of the Deceaſed*; Secondly, *To thoſe that are next of Kin in the Male Line*; Thirdly, *To thoſe who are near of Kin in the Female Line, according to the ancient* Civil *Law*; (*which Difference, notwithſtanding, between* Male *and* Female, *is at this Day taken away, and thoſe that are next of Kin are eqnally admitted in either Sex*). *Who may be ſaid to die Inteſtate*, &c.

HAVING, in ſeveral of the foregoing Titles, handled the Buſineſs of Succeſſion given by Teſtament; I ſhall here treat of that Kind of Succeſſion, which immediately flows from the Law itſelf, when a Perſon [n] D. 50. 16. 130. dies Inteſtate [n], call'd *Legal* or *Inteſtate* Succeſſion. And as this Title is of frequent and daily Uſe among us, I ſhall endeavour to explain the Matter thereof in a more ample manner. And, *Firſt*, It is to be noted, That the Law of the Twelve Tables did, in the *Firſt* Place, call thoſe to the Succeſſion of an Inteſtate Eſtate, whom our Books ſtile *ſui Hæredes*; meaning, ſuch Children as were in the Power of the Perſon Inteſtate, excluding all emancipated Children. The *Second* Perſons called unto this Kind of Succeſſion, were the *Agnati*, or Kindred by the Man's Side, in the aſcending Line. And then, *Thirdly*, came the *Cognati*, or Kindred by the Woman, in the ſame Line. But it is here to be obſerv'd, that Succeſſion rather deſcends, than aſcends.

Afterwards, by a ſupervening Law of the *Prætor*, tho' theſe three Orders of Succeſſion were reſtrained, yet the *Civil* Law was corrected in ſome Reſpects; the *Prætor* ordaining contrary to what the *Civil* Law had before

before decreed; as by calling the emancipated Children to ſucceed their inteſtate Parents, by the *Bonorum-poſſeſſio*, as being Children. And, in ſome Caſes, the *Pretorian* Law herein is in Aid of the *Civil* Law, by admitting them to the Succeſſion of inteſtate Eſtates, who were only otherwiſe, by the *Civil* Law, admitted after the *ſui Hæredes*; as the *Agnati* and *Cognati* were, firſt in the aſcending, and then the collateral Line. Wherefore the *Pretorian* Law introduced a fourfold Poſſeſſion of the Goods of the Inteſtate. The firſt ſtiled *Undè Liberi* [o], when the Children were to ſucceed the Inteſtate. The ſecond named *Undè Agnati*, or *Legitimi*, which is given to the Parents or Kindred by the Father's Side. The third termed *Undè Cognati* [p], which was given to the next of Kin on the Part of the Mother. This was not allow'd by the *Civil* Law. But the Diſtinction between the *Agnati* and *Cognati* is now wholly taken away by *Juſtinian*. The laſt was call'd *Undè Vir & Uxor* [q], by which the Survivor of the Husband or Wife, by the Grant of the *Prætor*, ſucceeded each other in the Eſtate, when the Kindred failed. And many Imperial Conſtitutions follow'd hereon, as may be ſeen diſperſed in the Body of the *Roman* Law: By which Conſtitutions the ancient Laws are much amended in ſeveral Points; and ſome new Laws are added by the *novel* Conſtitutions, among Lawyers call'd the *Jus noviſſimum Authenticum*. So that Emancipation and the Power of the Father being out of Doors, and the Difference of *Agnation* and *Cognation* being alſo removed in regard to Succeſſion, the *Novels* have eſtabliſh'd the other three Orders of Succeſſion [r]. Thus, touching this Kind of Succeſſion, call'd *Inteſtate* Succeſſion, we meet with ſeveral Alterations made in the *Roman* Law.

[o] D. 3. 6.
[p] D. 38. 8.
[q] D. 38. 11.
[r] Nov. 118. pr.

For the Law of the Twelve Tables was ſo ſtrict in Point of *Inteſtate* Succeſſion, that it preferr'd the Male Iſſue or Off-ſpring, and wou'd never ſuffer the Right of Heirſhip to come or be divided between the Mother and the Son, but entirely ſet the Mother aſide from ſucceeding to her Inteſtate Son [s]. But the *Pretorian* Law, in order to exclude the Exchequer, upon a Failure of Kindred by the Father's Side, at length admitted the Mother after the *Agnati* to ſucceed her Children by the *Bonorum-poſſeſſio, undè Cognati* [t], as aforeſaid. Then the Emperor *Claudius*, to comfort the Mother, for the Loſs of her Children, admitted her to ſucceed her Children, even though there were Perſons of the Father's Kindred living. See the *Gloſs* on the Word *Amiſſorum* in the *Inſtitutes* [u]. After this, it was provided by the *Senatus-conſultum Tertilianum*, That if the Mother of an *ingenuous* Birth ſhould have three Children born, ſhe ſhould be admitted to ſucceed her Children dying without Iſſue, excluding the Kindred by the Father's Side [x]: And this Law was alſo extended to a Woman that was a *Libertine*, if ſhe had four Children [y]. And this was call'd the *Jus trium liberorum*. *Mynſinger* ſays, That the Lawyer *Tertullian* was the Perſon who perſwaded the introducing this Decree of the Senate, whom the Emperor *Juſtinian* [z] ſtiles an Interpreter of the ancient Law. But the latter Emperors took away from the Mother, though ſhe had the *Jus trium liberorum*, ſome Part of the Inheritance, and gave a third Part of it to the Uncle of the Perſon deceas'd by the Father's Side, or to his Son, as being of Kin by the Father's Side. And when the Mother had not the *Jus trium liberorum*, then the ſaid Uncle, or his Son, came in for two Parts in three of the Inheritance, and the Mother had only a third Part [a]. And at laſt, by an Imperial Conſtitution of *Juſtinian*, it was enacted, That the Mother ſhould be call'd to the Succeſſion of her inteſtate Son indiſtinctly, tho' ſhe was not the Mother of three or four Children born [b]. So that the Emperor taking away the *Jus trium liberorum* in this reſpect, had only a Regard to Nature, and the Danger of Child-bearing, which often carries Death along with it: And hence, at this Day, Mothers ſucceed their Children.

[s] I. 3. 3. pr.
[t] I. 3. 3. 1.
[u] I. 3. 3. 1.
[x] I. 3. 3. 2.
[y] I. 3. 3. 3.
[z] C. 5. 70.
[a] I. 3. 3. 5.
[b] C. 8. 59. 2; I. 3. 3. 6.

And

And thus this Buſineſs of *Inteſtate* Succeſſion ſuffer'd five or ſix Changes before it was ſettled. By the ancient Law there were four Orders of ſucceeding [c], as there are at preſent, though differently ſtiled. The *Firſt*, according to the Antients, were the Children or *ſui Hæredes*. *Secondly*, the *Agnati*. *Thirdly*, the *Cognati*. And the *Fourth* Order was the Husband and Wife. Of all which Orders before. According to the preſent Law, we may reckon Deſcendants, Aſcendants, Collaterals, and Husband and Wife.

[c] D. 38. 6. 1. pr.

Wherefore, as latter Laws are derogatory, and do repeal former Laws [d], and ſince the Emperor has order'd the Law of the *Novels* to be obſerved in the Buſineſs of Succeſſions [e], I will here follow the Rule laid down by *Juſtinian*. And *firſt* ſpeak of Succeſſion, as it relates to Children, in the *deſcending* Line, whom the common Vote of Nature and Parentage calls to the Succeſſion [f]. *Secondly*, I will treat of Succeſſion, as it relates to *Aſcendants*, viz. to Parents, who ſucceed their Children by an inverted Order of Mortality [g], it being more frequent for Parents to die before their Children. *Thirdly*, I will diſcourſe of Succeſſion, as it reſpects *Collaterals*, viz. the *Agnati* and *Cognati*: But in reſpect of Succeſſion to allodial Eſtates, there is at this Day no Difference between the *Agnati* and *Cognati* [h]. And *fourthly*, I ſhall handle the Buſineſs of Succeſſion, as it concerns Husband and Wife [i]. And laſtly, ſpeak of fiſcal Succeſſion. And as in many Caſes we obſerve the *Saxon* and *Lombard* Law in this Country, which differ from the *Roman* Law, I will alſo ſay ſomething of thoſe Laws, and by certain Rules and Concluſions lay open the whole Matter, for the Advantage of our own common Lawyers. But *firſt*, I ſhall conſider, what Perſon may be ſaid to die Inteſtate, as an Introduction to the following Enquiries.

[d] D. 1. 3. 28.
[e] Nov. 118. pr.
[f] D. 38. 6. 7.
[g] D. 5. 2. 15.
[h] Nov. 118. C. 5.
[i] D. 38. 1. L. un.

Now a Perſon may be ſaid to die inteſtate ſeveral Ways. *Firſt*, When he has made no Will at all, though he might by the Law have done it, as being prevented (perhaps) by ſudden Death, or hindred by ſome Impediment [k]. *Secondly*, He is ſaid to die Inteſtate, who has not made his Will according to the Direction of the Law, becauſe he has in ſuch Will omitted ſome Solemnity of Law, which ought to intervene therein [l]; as the calling of Witneſſes thereunto, the ſetting of Seals, and the like, or has paſſed by in Silence a Child which he has in his Power. For it is the ſame Thing not to do a Thing at all, as not to do it as it ought to be done [m]. By the Law of *England*, the affixing of Seals is not neceſſary; nor is it neceſſary to call Witneſſes where the Will is in the Teſtator's own Hand-writing, and only diſpoſes of a perſonal Eſtate, and ſuch Hand-writing may be otherwiſe proved: And as to the paſſing by of a Child in Silence, it is entirely out of Uſe in all Countries; for every one may now diſpoſe of his Eſtate to whom he pleaſes, as before related, under the Title of *Teſtamentary* Succeſſion. *Thirdly*, A Perſon is ſaid to die inteſtate, who, though he has made a Will that is firm and valid in Law, yet afterwards repeals the ſame by a *capitis diminutio* [n], viz. by Baniſhment, or loſing the Rights of a Subject, *&c.* or elſe by the Birth of a Poſthumous Child paſſed by [o]; or *thirdly*, by making of a ſecond Will which is not found; or laſtly, by a *Querlea inofficioſi Teſtamenti*, and the like ways, whereby Teſtaments are pronounced to be unjuſt and made void [p]. For it is the ſame Thing to make no Will at all, as to make ſuch; ſuch a one may be pronounced null and void, according to what I have before hinted. And laſtly, he alſo is ſaid to die inteſtate, who has made a Will, that is valid in its own Nature, but yet falls to the Ground, as a Teſtament, according to the *Civil* Law [q], becauſe no one will accept of the Heirſhip, or becauſe ſuch Heir appointed therein could not do it by reaſon of ſome Defect, under which he labours [r]. And this is not an improper Senſe of the Word *Inteſtate*, according to the *Roman* Law, though *Bartolus* impugns the ſame: For the Text ſays, that

[k] D. 38. 16. 1. pr.
[l] C. 6. 23. 21.
[m] D. 2. 8. 6.
[n] D. 28. 1. 8. 1.
[o] D. 38. 16. 1. pr.
[p] I. 3. 1. pr.
[q] I. 3. 1. pr.
[r] D. 38. 16. 1. pr

he

he is properly an *Inteſtate*, whoſe Heir refuſes to accept of the Heirſhip. In this Caſe, we here in *England* grant Adminiſtration of the Goods to the next of Kin, with the Will annexed.

Having thus far conſidered how many Ways a Perſon may be ſaid to die *Inteſtate*, I ſhall next enquire what is meant by *legal* or *inteſtate* Succeſſion, and who may be ſaid to ſucceed *ab Inteſtato*, in Purſuance thereof. Now *Inteſtate* Succeſſion (as already remembred) is nothing elſe, but ſuch a Succeſſion as is given to Men by the Power and Miniſtry of the Law alone [s]. Wherefore, if any one dies Inteſtate, according to the Ways before related, his lawful Heirs, or Heirs at Law, are called to the Succeſſion of the Inteſtate's Eſtate: Among which we ought to have a due Regard to the ſeveral Orders of lawful Heirs, meaning to that of the Deſcendants, Aſcendants and Collaterals. Therefore, in theſe Caſes, when any one dies Inteſtate, the Heirſhip or Inheritance is not given by the Diſpoſition of a Teſtator, or Man, but by a Diſpoſition of Law in a certain Order, to the neareſt of Kin, by Conſanguinity: And from hence that Heirſhip, which the Law gives of an Inteſtate's Eſtate, is in our Books properly ſtiled *Legitima Hæreditas* [t], or an Inheritance at Law, though even that Heirſhip which is given by Teſtament, may likewiſe be ſo called, becauſe the Law confirms the ſame as it does the other. See the *Gloſs* [u]. But this Caſe is improperly ſo termed; becauſe it does not ſo immediately proceed from it, as from the Diſpoſition of Man through the Approbation of the Law.

[s] D. 50. 16. 130.

[t] D. 17. 2. 3. 2.

[u] In l. 3. D. 17. 2. 2.

Inteſtate Succeſſion is either *perſonal*, which is made *in Capita*, or by Right of *Repreſentation*, which is made *in Stirpes*. And this Right of Repreſentation, in reſpect of Deſcendants, is *in Infinitum:* But, in reſpect of Collaterals, only in the firſt Degree of the Perſon's ſucceeding. Again, inteſtate Succeſſion is either *Natural* or *Civil*. The firſt is that, which proceeds from Right of Blood or Proximity, and is either *Primary* or *Secondary*. Primary is that, which accrues to Children, *in Infinitum*, by the natural Order of Mortality [x], without any Diſtinction had to Sex, or Regard had to Children in the Inteſtate's Power [y]; and is extended to poſthumous Children, as well as to Children already born. But it is of great Importance, whether they are lawful or illegitimate Children. Lawful and Natural, and alſo Children legitimated, do ſucceed indiſtinctly [z]. Natural *Illegitimate* Children born from a Concubine, do ſucceed the Mother, and the Mother's Parents; and if the Father has no lawful Children of his own, they may ſucceed him in a ſixth Part of his Eſtate only [a]. But *ſpurious* Children only ſucceed the Mother, and the Mother's Parents [b], but never the Father. *Inceſtuous*, and Children born in *Adultery*, are entirely cut off from all Succeſſion [c]. The *ſecundary* Succeſſion abovementioned, is, that which happens *turbato Mortalitatis Ordine* (as the Law phraſes it [d],) or contrary to the natural Order of Succeſſion; and this accrues to Parents alone, if they are ſole; or if they are but one, then to Brothers and Siſters of the whole Blood, together with them *in Capita*, and to the Children of Brothers and Siſters with them *in Stirpes* [e]. The nearer Parent excludes the more remote. If there are ſeveral Parents, they are equal in Degree; but if there be a Diſparity in Number, they are equally admitted to the Goods of the Deceaſed, by a Dividend made *in Stirpes*, and not *in Capita* [f].

[x] I. 3. 1. 1. Nov. 118. C. 1.

[y] I. 3. 1. 15.

[z] Nov. 12. C. 3. Nov. 117. c. 2.

[a] Nov. 89. c. 12.

[b] D. 38. 17. 1. 2.

[c] Nov. 89. c. ult.

[d] D. 5. 2. 15.

[e] Nov. 118. c. 2 & 3.

[f] Nov. 118. c. 2.

If a Perſon, who dies Inteſtate, has no one to ſucceed him in the Deſcending or Aſcending Line, Brothers and Siſters of the whole Blood are firſt called to the Succeſſion of ſuch Inteſtate's Eſtate, and likewiſe the Children of ſuch Brother or Siſter as dies before the Inteſtate: Excluſive of all Brothers and Siſters of the half blood; for the Children of ſuch a Brother or Siſter deceaſed, ſhall be preferr'd before the Brothers and Siſters that are only of the half-blood, though in the third Degree of Kindred [g]. But after Brothers and Siſters of the whole Blood, and their Children,

[g] Nov. 118. c. 2. §. 1. Nov. 127. c. 1.

Brothers and Sisters of the half blood are admitted, and their Children, by Way of Representation, as Brother and Sister's Children of the whole Blood are [h]: For these Brothers and Sisters Children being of equal Kindred unto the Deceased, are preferr'd unto Uncles and Aunts. Adoptive Brothers, if they were in the Power of their adopting Father, succeeded as lawful and natural Children [i]. After Brothers and Sisters, and Brothers and Sisters Children, all Persons whatsoever, that are neareſt in Degree of Kindred, are called unto the Succession, on the Failure of the aforesaid Persons: So that those, that are *pares in Gradu*, are *pares in Jure*, or have an equal Right, and shall be equally admitted; the old Distinction of Males and Females, that is to say, of *Agnation* and *Cognation* being taken away. But the Division ought to be made *in Capita*, and not *in Stirpes* [k].

[h] Nov. 118. c. 3.

[i] I. 3. 1. 14.

[k] Nov. 118. c. 3.

A Succession *in Capita*, is, when the Inheritance is to be divided according to the Number of Persons, which are to succeed; as the Inheritance of the Father into four Parts, among his four Sons. But a Succession *in Stirpes*, is, when by *a Fiction of Law*, a Family comes, by *Representation*, into the Place of the Person deceased, and divide that Share among themselves, which he himself would have received if he had been living. As if one of the four Sons had died before the Father, and left Children behind him, those Children should have *represented* their Father, and have had his Part, *viz.* a fourth Part amongst them all. In respect of *Ascendants*, the Right of Representation has no Place at all. In respect of *Descendants*, it has Place *in Infinitum*: But in respect of *Collaterals*, it does not extend beyond Brother's Children. By the *Saxon* Law the Right of *Representation* is only admitted in respect of *Descendants*, and not in respect to *Collaterals*. *Bartolus* [l] will have it; that the Right of *Representation* does not extend itself beyond Grandchildren: but with him I do not agree; because *Justinian*, after he has reckon'd up Grandchildren of the Male and Female Sex, says, that Great Grandchildren may succeed in the Place of Parents; and then he subjoins, that this shall have Place in other Persons further. And the *Novels* [m], moreover, add, That if any of these *Descendants* happen to die, leaving Sons and Daughters, or other *Descendants*, the Sons or Daughters of such Person deceased shall succeed in the Place of the Parent. But touching the Right of *Representation*, I shall speak more by and by.

[l] Inl. 1. D. 38. 16.

[m] Nov. 118. c. 1.

Tho' the Distinction of *Agnation* and *Cognation* be taken away, in respect to *Allodial* Estates, as before observed; yet in *Feudal* Estates, the *Agnati* do even at this Day, by Way of Prerogative, enjoy them before the *Cognati*, unless the *Fief* be a Female *Fief*. See *Zazius*, touching the Use of *Fiefs* [n]. Thus the *Roman* and *Lombard* Law differs in Point of Succession to immoveable Estates; for the *Lombard* or *Feudal* Law does not meddle much with moveable or personal Estates, but leaves them in some measure to the Disposition of the *Civil* Law. By the *Roman* Law both Males and Females now succeed to the Inheritance equally: But by the *Lombard* Law, all Women do not succeed in the same Manner as Males. For though, according to the *Lombard* Law, by a special Constitution of *Luitprand* [o], Daughters, or a lawful Daughter, if she be sole without Brothers, shall have her Father's whole Inheritance: Yet, by the said Constitution, if there be a Son together with her, she shall only be admitted to a third Part thereof, and the Male shall have two Parts. Besides, a natural Daughter is not excluded by a lawful Daughter: But a lawful Daughter has only a third Part, and a natural Daughter, whether there be one or more, has another third Part, and the King's Court or other Parents have another third Part. Again, if a Father has endowed his Daughter, she shall not come in for more in the Succession. *Thirdly*, by the *Lombard* Law, a lawful Son born after a Donation, which his Father has made of all his Estate in his Lifetime, may revoke that whole Grant after his Father's Death: But a Daughter

[n] De Fead Suc. c. 8.

[o] Leg. Lomb. Tit. 45.

ter can only revoke a third Part. But this is not a Part of the *Feudal*, though it be of the *Lombard* Law, but rather a ſpecial Conſtitution. *Fourthly*, by the *Lombard* Law, a Daughter cannot *Faidam levare*, but a Son may do this. But the more noble Provinces of *Lombardy*, which conſider'd each Sex more accurately, and the Nature of them, preferr'd the Males: And this was according to the Law of God [p], the Wiſeſt of all Legiſlators. To this Male Succeſſion St. *Paul* alludes, when he ſaid, *If thou art a Son, thou art alſo the Heir* [q], &c. But the eldeſt Son had a double Portion, as we read in *Deuteronomy*, Cap. 21. v. 17. By the ancient Law of the *Armenians*, Women did not ſucceed to their inteſtate Parents, nor to their Brethren, till *Juſtinian* corrected that Part of the Law by a *Novel* Conſtitution [r]. Among the *Alemanni* the Goods of the inteſtate Father were firſt equally divided among the Brothers, tho' born of different Mothers: But each of them ſucceeded the Mother *ſeriatim*; and if any or all of them died without Children, then the Daughters ſucceeded; and if without Daughters, then the next of Kin. By the Laws of the *Viſigoths*, thoſe of the firſt Degree or Order were called in the firſt Place, as among the *Romans*, viz. firſt Sons, then Grandſons, and after them Great Grandſons. See the *Code* of the *Gothick* Laws [s]. And upon Failure of theſe, the Father, Mother, Grandfather and Grandmother, and afterwards the neareſt in Degree, ſucceeded.

[p] Num. 27. 8, 9, 10, &c.
[q] Gal. 4. 7.
[r] Nov. 21.
[s] Lib. 4. Tit. 2. l. 1 & 2.

Tho' ſome particular Countries may differ in their Way and Manner of ſucceeding to inteſtate Eſtates; yet the common Cuſtom of all Nations almoſt, is, that Sons and Daughters ſhould ſucceed their inteſtate Parents, equally, without Diſtinction of Sex, according to the ancient *Roman* Law; for the Law of the Twelve Tables did not diſtinguiſh in this Kind of inteſtate Succeſſion [t], but the *Voconian* Law only admitted Daughters and other Women to a certain Part. This Deſcent to all, equally in equal Degree, according to the *Civil* Law, was to prevent Envy and Diſſentions, which in all likelihood will happen, when one is preferred before the other. But tho' this Policy ſuits beſt with ordinary Families; yet, when it is for the Advantage of the Publick to preſerve Kingdoms or Dignities, it may be reaſonable to prefer the eldeſt Son. The Law of *England* diſtinguiſhes Eſtates into *real* and *perſonal*; and in real Eſtates, generally following the *Feudal* Law, it prefers the eldeſt Son, tho' ſometimes by a local Cuſtom, called *Borough-engliſh*, the youngeſt may inherit, and ſometimes by *Gavel-kind*, the Fee is divided among all the Sons: Yet, in perſonal Eſtates we purſue the Wiſdom of the *Civil* Law, and call Sons and Daughters equally to the Diviſion of an inteſtate Eſtate, deducting a third Part for the Wife, if there be any.

[t] C. 6. 28. 4.

By a Law of the Twelve Tables, Children were not to inherit the Mother's Eſtate, becauſe they were neither *ſui Hæredes*, nor related to her by Agnation. But, this Law ſeeming hard, the *Senatus-conſultum Orphitianum* was made, at the Inſtance of *Marcus Antonius* [u]: According to which, the *legal* Inheritance of the Mother was given to her Son and Daughter, tho' they were ſubject to the Power of another Perſon [x]; and they were hereby preferr'd to the *Agnati*, and other Kindred by Blood unto the Mother deceaſed. Heretofore, alſo, by the *Civil* Law, the Brother of the Deceaſed excluded the Mother from ſucceeding to her inteſtate Son [y]: but at this Day he does not exclude or bar her [z]. If the Perſon deceaſed left a Mother and Siſters only ſurviving, the Mother ſucceeded to one Moiety, and the Siſters to the other Moiety of his Eſtate, according to the *Code* [a]: But now, by the *Novels*, the Mother ſhall only ſucceed *in Partem virilem*, or come in for no more than that of the Siſter's Part. If a Son died, and left a Father, Mother, Brothers and Siſters, the whole Property came to the Brothers, and half of the Uſufruct to the Father and Mother for their Maintenance, if the Perſon deceaſed

[u] I. 3 4 pr.
[x] I. 3. 4. 1.
[y] I 3. 3. 3.
[z] C. 6. 56. 7. Nov. 22. c. 47.
[a] C. 6. 56. 7.

deceaſed was *ſui Juris*, and the other Moiety was given to the Brothers [b]. Then, afterwards, the whole Uſufruct went to the Father [c]. And, in Proceſs of Time, the whole Uſe was given to him to inherit as his Property or Freehold [d]. But if the Perſon was not *ſui Juris*, the Father alone acquir'd the whole Uſufruct: But this Law was afterwards changed. But the Mother acquir'd the Property, and half of the Uſufruct, if ſhe came in with the Siſters alone. By a Law in *Spain*, the Father ſucceeds the Son, by excluding the Brothers of the Perſon deceaſed [e]. And, by another Law, it is there enacted, That he who dies without Children, cannot charge his Father or Mother to pay any more in Legacies than the third Part of his Subſtance; unleſs it be in ſome Places and Cities which are favour'd in this Point [f].

[b] C. 6. 56. 7. 1.
[c] C. 6. 58. 13.
[d] Nov. 118. c. 2.
[e] Duanaz. Reg. 364.
[f] Duanaz. ut ſupra.

Touching *Inteſtate* Succeſſion, we have two Rules laid down in Law. The firſt is, That ſuch as are in *pari Gradu*, ſhall equally ſucceed to the Goods of a Perſon dying Inteſtate. And the other is, That he who is prior in Degree, ſhall be preferr'd unto the Succeſſion. But each of theſe Rules admits of ſome Limitations or Exceptions. For what we call *ſui Hæredes*, whether in an equal or remoter Degree, were preferr'd to Aſcendants or Collaterals. The *Agnati* alſo, that were in a remoter Degree, were preferr'd unto the *Cognati*, who were in a nearer Degree. The *Agnati*, or ſuch as are related to us by the Male Side, ſucceeded even to the tenth Degree; but the *Cognati*, or ſuch as are of Kin to us by the Female Side, only ſucceeded to the ſixth Degree, unleſs he was ſuch a Perſon as was deſcended from the *Sobrinus* or *Sobrina* of the Perſon deceaſed: For he being placed even in the ſeventh Degree, was by this Law admitted; becauſe he was, in ſome meaſure, nearer of Kin to us. The Reaſon of this Difference, why an *Agnatus*, that is in a remoter Degree than a *Cognatus*, was admitted before him, was, *viz.* becauſe the Rights of the *Cognati* were founded on the Law of Nature; and Nature does not ſuffer any one to live beyond the ſeventh Degree: But the Rights of the *Agnati* were founded on the *Civil* Law, which is arbitrary. From whence theſe Rights, by the *Civil* Law, may be extended *in Infinitum*, as they are alſo by the ſame Law reſtrained in ſome certain Caſes. For Perſons heretofore, who contracted inceſtuous Marriages, had no one to ſucceed them: But at this Day, by a *Novel* or *Juſtinian* Law, Children born from any lawful Marriage, may ſucceed their Parents. Whilſt there are any of the Deſcending Line remaining, *Aſcendants* and *Collaterals* are excluded from the Succeſſion.

By the *Civil* Law, the Goods of a Stranger or Foreigner dying Inteſtate, went to his Heirs, as aforeſaid, *viz.* 1*ſt*, to his Deſcendants; 2*dly*, to his Aſcendants; and, 3*dly*, to his Collateral Kindred: But if he happens to die without an Heir, his Inheritance ſhall not go to *pious Uſes*, but to the Exchequer [g]; and therefore the Biſhop of the Place at this Day ought not to intermeddle with vacant Goods of this Kind, as he might have done heretofore. In *France*, the King, *Jure Albinatûs*, ſeizes the Goods of all Foreigners that die in his Dominions, and have Goods with them there, unleſs they are Scholars who come thither for the ſake of Learning, or are by certain Privileges exempted from the *Jus Albinagii*, as the *Scotch*, *Switzers*, and the like, are. See *Rebuffus*, in his Proem to the *Gallick Conſtitutions* [h]; and *Paponius*, touching the Right of *Albinage* [i]. But though the Right of *Albinage* be in Uſe among the *French*; yet by the *Roman* Law this Right did not accrue to Kings, in reſpect of the Goods and Eſtates of their Allies and Confederates dwelling in their Territories. In *Holland* and *Flanders*, heretofore, the Goods of Strangers and Travellers devolved to the Exchequer, as Goods eſcheated, and not having an Owner to claim them. See *Grotius's Introduction* [k]. But when theſe Countries began

[g] C. 10. 10. 1.
[h] Gloſſ. 5. n. 82.
[i] 5 Arr. 1.
[k] L. 1. par. 13. § 13.

began to flouriſh in Trade and Commerce, eſpecially by the great Acceſs of Strangers and Travellers, this Rigour, by Degrees, grew into Diſuſe in the *Netherlands*; ſo that now both Subjects and Strangers enjoy the ſame Right.

Repreſentation, whereby a Son repreſents the Perſon of the Father, is by ſeveral Perſons call'd a Fiction of Law, when the Queſtion is about Succeſſion to an Inteſtate's Eſtate [l]: But *Pariſius*, *Socinus* the Younger, *Decianus*, and ſome others, ſtile it a *Preſumptive* Repreſentation, and not a Repreſentation by Fiction of Law. I think, both Opinions may be true, by this Explanation thereof, *viz.* That all Repreſentation is a Kind of Fiction, which the Law makes Uſe of, by feigning the Perſon of the Son to be that of the Father, as the Text ſufficiently proves, when *Juſtinian* ſays in the *Inſtitutes* [m], That it ſeems equitable, that the Son ſhould be reckon'd in the Place of the Father: yet this Fiction is founded upon the preſumptive Will and Mind of the Father, when the Diſpute is about the Succeſſion and Inheritance of the Father. For the Law preſumes, that a Perſon dying Inteſtate, as a Grandfather, or an Uncle by the Father's Side, did *tacitly* call the Son into the Place of the Father, who would otherwiſe have ſucceeded him. But when the Queſtion is about Teſtamentary Succeſſion, then, they ſay, the Whole depends on the preſumptive Will and Mind of the Father, whether this Repreſentation ſhall take Place, or not. *Quære?* *Secondly*, 'Tis to be obſerved, That this Repreſentation is by a ſpecial and particular Right; and therefore, it being ſomewhat extraordinary, it ought to have no Place in a doubtful Caſe, according to *Bartolus* and *Aretinus*. *Thirdly*, 'Tis to be noted, That in thoſe Caſes wherein it is ordained either by Law, or the Diſpoſition of Man, that Repreſentation ſhall obtain, it cannot be ſaid to be taken away or impeach'd by any Conjectures whatever, unleſs it be by ſuch as are inferr'd from the Words of a Diſpoſition. And, *Laſtly*, when we ſay, that a Son goes into the Place of his Father, the Degree is not ſaid to be deſtroy'd, but to be repreſented: And this is not ſaid to be more remote, but to be that very Degree wherein the Father repreſented would have ſucceeded, if he were living [n]. Thus the Force and Power of Repreſentation is ſo great, that a Brother's Son of the whole Blood ſhall be preferr'd in Succeſſion before a Brother that is only ſuch by the half Blood: So that, in this Caſe, a Perſon that is really in the third Degree, is, by a Fiction of Law, brought nearer, and preferr'd to a Perſon *truly* in the ſecond Degree. Heretofore, indeed, the Brothers and Siſters of a Perſon deceaſed were preferr'd unto the Children of other Brothers [o]: But now, by the *Novels*, the Right or Benefit of Repreſentation is granted unto the Children of a Brother or Siſter deceaſed [p].

[l] Aretin. Alex. Rubeus, *&c.*

[m] I. 3. 1. 6.

[n] Bald. Alex. & alii.

[o] C. 6. 58. 3.

[p] Nov. 127. c. 1.

There was anciently another Kind of Inteſtate Succeſſion, call'd *Civil* Succeſſion, (for I have been hitherto ſpeaking of *Natural* Succeſſion), and that was, *Firſt*, when the *Patron* was call'd to ſucceed to the Goods of his *Freedman* or *Libertus* dying without Children or Parents, and leaving to the Value of an hundred *Aurei* or Crowns [q]. But this is grown out of Uſe; the Diſtinction of Patrons and Freedmen ceaſing at this Day. *Secondly*, When the Husband or Wife ſucceeded to the Goods of the Inteſtate Husband or Wife. *Thirdly*, When Partners or Collegues ſucceeded to the Goods of a Collegue or Partner dying without Children, Parents, or any other Kindred by Agnation or Cognation [r]. *Fourthly*, After all theſe, the Exchequer ſucceeded, *quaſi in Subſidium*, and poſſeſs'd itſelf of the hereditary Goods, by way of Eſcheat [s]. And heretofore the Exchequer had a Right to the Goods of Perſons condemned, in Preference of the *Cognati*; but at this Day the *Cognati* or Kindred come in, even to the third Degree: And if the Perſons condemned have no Relations within this Degree, the Exchequer ſeizes the Goods, as is ſtrictly obſerv'd in Treaſon.

[q] I. 3. 8.

[r] C. 6. 62. 4.

[s] C. 10. 10. 1. & pen.

[t] C. 6. 59. 7. But Succeſſion does not accrue to any one by Right of Affinity [t], but only by Right of Conſanguinity: And therefore, a *Vitricus*, or Foſter-father, does not ſucceed his *Privignus*, or Son-in-law, dying Inteſtate; nor ſhall a Son-in-law ſucceed his Foſter-father. And thus, if a Man's Heirs which are his Children, die, or renounce the Heirſhip, his Brother may [u] C. 6. 58. 6. ſucceed him by Right of Conſanguinity, or Agnation [u]: And what I here ſay of a Brother, may be alſo ſaid of a Siſter; for by the Word *Frater*, in this Law, a Siſter is alſo ſaid to be underſtood, as it may be noted in many other Laws. By a Law in the *Code*, the Succeſſion to an Inteſtate is not equally given to an Uncle by the Father's Side, and to an Aunt by the Mother's, who are in the third Degree; but the Father's Brother ſhall, by Right of Agnation or Conſanguinity, be preferr'd unto the Mother's [x] C. 6. 58. 7. Siſter [x]: Yet, by a *novel* Conſtitution, ſuch Uncle is not preferr'd unto [y] Nov. 18. c. 3. ſuch Aunt [y]. In *Holland*, at this Day, Inteſtate Heirſhips, or Adminiſtration of the Goods of an Inteſtate, are not granted according to the Rules of the *Roman* Civil Law, but according to a Statute and Municipal Law of [z] Groenv. de L. L. Abr. D. 5. 3. 3. the Country [z], as in *England*.

TIT. XXVI.

Of the Bonorum-poſſeſſio, *viz.* decretal *and* edictal, *and how the latter is divided into* ordinary *and* extraordinary. *Of the* Bonorum-poſſeſſio ſecundum, *and* contra Tabulas. *And of the* Bonorum-poſſeſſio *accruing to a Madman, Infant,* &c. *Of the Poſſeſſion of Goods, according to a Soldier's Will. And of* Collations, *or throwing the Inheritance into an Average among Children, according to the Rules of Equity.*

THERE are ſome Perſons whom the Judge or *Prætor* calls to the Poſſeſſion of an Eſtate; but theſe Perſons do not become Heirs *ipſo Jure*: For the *Prætor*, by his Authority alone, cannot make an Heir; becauſe Heirs are only ſuch by the Law, or by ſome Conſtitution like unto the Law; as by an Imperial Conſtitution; or by the Decrees of the Senate, (among which we may reckon the *Senatus-conſultum Tertyllianum*, and the *Senatus-conſultum Orphitianum*). But whenever the *Prætor* grants unto any one the *Bonorum-poſſeſſio*, they are in the Place of Heirs; becauſe they do not only obtain the Poſſeſſion of the Goods, but even the Property of all hereditary Eſtates of the Deceaſed belongs to them. And as they they are in every reſpect ſubſtituted in the Place of Heirs, though, properly ſpeaking, they are not ſuch, every Diſpoſition of Law, that mentions an Heir, includes them. And thus the *Bonorum-poſſeſſio* did not grow out of the *Civil* Law, ſtrictly ſo call'd, (which only makes Heirs, and gives Right of Succeſſion), but was a Creature of the *Pretorian* Law, or the Law of Conſcience, which, in Equity, calls ſeveral Perſons to the Succeſſion of other Mens Goods by Adminiſtration, where there is no Will; and in ſome Caſes where there is a Will; as, where the Will is concealed, or the Executor renounces the Will, *&c.*

[a] D. 37. 1, 2, 3. Now the *Bonorum-poſſeſſio*, according to *Ulpian* [a], is defined to be that Right which any Perſon acquires and retains by imploring the Office of the

the Judge, when he wou'd poſſeſs himſelf of the Eſtate or Patrimony which another has at the Time of his Death, and wou'd retain the ſame. This Definition, taken from the Effect and Office of the Poſſeſſor, ought to be expounded in the largeſt Senſe of the Word *Bonorum*, *viz.* for the whole Patrimony and Succeſſion; including the Advantages and Diſadvantages which accrue from the hereditary Goods [b], without deducting the Debts of the Perſon deceaſed [c]. And as the *Civil* Law is pointed out to us by the Words *Hæreditatis aditio*; ſo, by theſe Words *Bonorum-poſſeſſio*, the *Pretorian* Law is ſignify'd to us, in reſpect of this Kind of Succeſſion; the *Bonorum-poſſeſſio* being only given to us by the *Prætor*, as the *Aditio Hæreditatis* is by the *Civil* Law given unto the proper Heir. Hence the Lawyers make a remarkable Difference between the compound Word *Bonorum-poſſeſſio* (which only conſiſts in Law), and the *Poſſeſſio Bonorum* as it is figur'd to us by two diſtinct Words; which Poſſeſſion of the Goods only conſiſts or depends on ſome Fact, and is uſed for that Poſſeſſion which any Perſon has by natural Means, and has no relation to the Judge or *Prætor*.

[b] D. 37. 1. 1 & 2.
[c] D. 50. 16. 39. 1.

The Word *retain*, in this Definition, denotes a Difference, *Firſt*, Between *Vulgar* Poſſeſſion and *Pretorian* Poſſeſſion. For he who has the vulgar or corporeal Poſſeſſion of an Inheritance, ſhall (notwithſtanding) be obliged to apply himſelf to the Judge to decree the hereditary Poſſeſſion of the Goods: And, on the other hand, tho' the Judge has decreed the vulgar Poſſeſſion of the Goods; yet he has not hereby the corporeal Poſſeſſion, but only the Right and *Utile Dominium* of the hereditary Goods [d]. By *Utile Dominium*, I here mean a Right of Uſing, without the full Property of them. *Secondly*, this Word *retain*, denotes a Difference between the Poſſeſſion of the Goods, and a *Petitio Hæreditatis*, which does not accrue to the Perſon in Poſſeſſion. For thoſe Perſons who heretofore thus deſir'd to have the Heirſhip decreed to them, were ſaid, *agnoſcere Bonorum-poſſeſſionem*, according to the Law of the *Prætor*; as we ſay, *adire Hæreditatem*, according to the *Civil* Law. Now a Man is ſaid, *adire Hæreditatem*, when he proves the Will, or takes the Heirſhip on himſelf; and *Bonorum-poſſeſſionem agnoſcere*, when the *Prætor* decrees him the Poſſeſſion of the Goods: So that theſe two Phraſes only diſtinguiſh the different Ways of coming at the Goods of the Deceaſed. For after the *Prætor* had interpoſed his Decree, thoſe that ſucceeded to the Goods were ſtiled *Bonorum-poſſeſſores*, after the ſame manner as we call thoſe Perſons *Heirs*, who ſucceed according to the *Civil* Law. And hence the Difference is ſeen between the Authority of the *Prætor*, and that of the *Civil* Law, or the Law of the Twelve Tables. For ſince the *Prætor* could not make an Heir *ipſo Jure*, as aforeſaid (that Authority being preſerv'd unto the ſovereign Power of the Law); it ſeem'd expedient, that he ſhould have the Power of granting the Poſſeſſion of the Goods, by Virtue whereof he grants the Right of ſucceeding to ſuch and ſuch Perſons [e]. Therefore, an Heir and a *Bonorum-poſſeſſor* differ not in the Effect of the Thing, but only in Order of Law, as the Words *Aditio* and *Poſſeſſoria Agnatio* do. For an Heir acquires a Right, *ipſo Jure*, in a private manner, by an Acceptance of the Heirſhip, though he has not the corporeal Poſſeſſion of any of the hereditary Effects. But a Poſſeſſor of the Goods invokes the Office of the Judge, and publickly declares his Mind, in order to have the corporeal Poſſeſſion of the Inheritance in ſome manner or other. And this is that which *Ulpian* means, when he ſays, That the Poſſeſſors of Goods, are in all reſpects in the Place of Heirs [f]. *Paulus* makes the *Aditio Hæreditatis*, and the praying of the *Bonorum-poſſeſſio*, to be equivalent. Moreover, we ſue to have the Heirſhip conferr'd on us by an Action call'd *Hæreditatis Petitio*: But we ſue to have the *Bonorum-poſſeſſio* by an Action call'd *Bonorum-poſſeſſoria Hæreditatis Petitio*.

[d] D. 37. 1. 1. 2 & 3. pr.
[e] D. 37. 1. 1 & 2.
[f] D. 37. 1. 2.

Petitio. But the *Civil* and *Pretorian* Law are at this Day reduced to an Agreement; and, being one and the ſame in reſpect of Heirſhip, there is no further Uſe of this Title, touching the *Bonorum Poſſeſſio*: For thoſe Perſons, who ſucceed others, either by Will, or by inteſtate Succeſſion, are
[g] In fin. h. t. according to *Vinnius* [g], called Heirs to the whole Inheritance. See *Bugnion de legibus abrogatis.*

The *Prætor* introduced the *Bonorum Poſſeſſio* for the Sake of mending the
[h] L. 3. 10. 1. ancient Law [h]. For the Law of the twelve Tables does not acknowledge an emancipated Son ſo as to make him an Heir, having a Regard to Children in the Power of the Father: But the *Prætor* granted the *Bonorum Poſſeſſio* to him, even contrary to the Tables of the Will, if a Will was made, and the Father did in ſuch a Will paſs by or diſinherit his emancipated Child. For the *Prætor* conſider'd natural Kindred and Relation, which cannot be taken away by any civil or poſitive Law. Again, the *Civil* Law entirely excluded thoſe that were of the Kindred by the Mother's Side, from ſucceeding to an inteſtate Eſtate, called *legal* Succeſſion. But the *Prætor* calls them in the third Place to ſuch a Succeſſion, and has given them the *Bono-*
[i] D. 38. 8. *rum Poſſeſſio*, by an *unde Cognati* [i]. Nor indeed did the *Prætor* only thus correct and ſupply the ancient Law, in reſpect of inheriting inteſtate Eſtates, but alſo in reſpect of the Eſtates of ſuch Perſons as died making a Will. For if a Stranger, that was a Poſthumous Perſon, was appointed Heir, though he could not take the Heirſhip on himſelf by the *Civil* Law, ſuch Inſtitution being not valid; yet by the *Prætorian* Law he was made a *Bonorum Poſſeſſor.* viz. when he was aided by the *Prætor.* And as a Perſon might heretofore, by the Aid of the *Prætor*, obtain an Inheritance by means of the *Bonorum Poſſeſſio*; ſo ſuch Perſon may now even by the *Civil*
[k] L. 3. 10. 1. Law [k] obtain it, according to a Conſtitution of *Juſtinian.* The *Bonorum Poſſeſſio* was introduced ſometimes to mitigate the Rigour of the general Law, ſometimes to ſupply its Defects, ſometimes to correct it, and ſome-
[l] L. 3. 10. 1. times to confirm it [l]. In Effect the *Bonorum Poſſeſſor* differs nothing from the Heir (as aforeſaid) only that the Law gives to one his Power, and the *Prætor* to the other.

[m] D. 38. 9. 1. 7. D. 29. 2. 30. 1. Now this Grant of the *Prætor* is twofold [m]. The firſt is *Decretal*, whereby the *Prætor* does in ſome Caſes, upon hearing of the Cauſe, decree, not that one ſhould ſucceed the Deceaſed in his Inheritance, but only that he ſhall have the Right of Poſſeſſion for ſome Time, till it can be known whether the Matter alledg'd be true, or not.

Thus this Grant may be made to a Minor, till it be known whether he be the Child of his reputed Father, according to the *Carbonian* Edict: For if there be a Controverſy, whether ſuch Perſon ought to be reckon'd among the Children, upon a Summary Cognizance had of the Cauſe, Poſſeſſion ſhall be granted to him by Vertue of this Edict, as if there was no Diſpute had about this Matter, and Judgment ſhall be deferr'd to the Time of Pu-
[n] D. 37. 10. 1. pr. berty [n]. If there be no Caution given on the Part of the Pupil for proving him to be the Son of ſuch a Father, the Perſon who commenced the Diſ-
[o] D. 37. 10. 1. 1. pute ſhall have Poſſeſſion decreed him, together with the Pupil [o]. But if Caution be given (as aforeſaid) by Sureties, this Poſſeſſion does not only extend to the actual obtaining of Poſſeſſion, but it alſo gives the Pupil a
[p] D. 37. 10. 15. Power to demand Debts, and to proſecute other Matters [p]. *Secondly*, ſuch Grant may be made to the Wife, in reſpect of her Husband's Goods, till it be known whether ſhe be with Child, or not. For the *Prætor* may, upon the Proſpect of a Birth, or Child to be born, put the *Venter* into Poſ-
[q] D. 37. 9. 1. ſeſſion of the Husband's Goods, even contrary to the Tables of the Will [q], if the *Venter* be not diſinherited; and the Child that is in the Womb ſhall
[r] D. 37. 9. 2. 2. be reckoned among his Children [r]. If a *Venter* be put into Poſſeſſion of the Goods, one or more Curators are wont to be aſſign'd to take Care of the

the Goods [s]. But as a *Venter* cannot be diſinherited by the modern Law [t], and the Difference between a Son in the Father's Power, and an emancipated Son taken away, the ſame Reſpect is ſhewn to diſinherited and emancipated Children. This *Decretal* Kind of Poſſeſſion was granted to an emancipated Child, who is either diſinherited, or elſe paſſed by in Silence, that he might have Time to try whether the Teſtament was *Inofficious*, or not, and leſt he ſhould be injur'd thereby [u]. And thus the *Prætor* granted the Poſſeſſion to emancipated Children, as if they were in the Father's Power: But yet in ſuch a manner that the emancipated Child ſhould only have one Moiety of the Goods, and the other Children the Remainder. But this Edict was afterwards repealed by the *Novels* [x], on deſtroying the Diſtinction of Children in the Father's Power, and emancipated Children.

[s] D. 37. 9. 1. 17 & 18.
[t] C. 3. 28. 33. 1.
[u] D. 5. 2. 81. D. 37. 8. 1.
[x] Nov. 118. c. 1.

The ſecond Kind of *Bonorum-poſſeſſio* was by Edict, when the *Prætor* gave the Poſſeſſion of the Goods unto Perſons in a certain Degree, without hearing the Parties *Judicially* [y]. And this Grant was *extraordinary* or *ordinary*. The firſt was that, which was made, either by ſome ſpecial Law, Decree of the Senate, or Conſtitution of the Prince, unto certain Perſons. The latter was that, which was made, *firſt*, where there was a Teſtament, and the Grant was *ſecundum Tabulas* [z], or according to the Will; which was a Grant of the Goods to him who was already inſtituted Heir by the Teſtament, and, by Strictneſs of Law, could not act: Or elſe contrary to the Tables of the Will; which was a Grant of the Goods *contrary* to the ſaid Tables and Diſpoſition of the Teſtament, when the Children or Parents, *&c.* were paſſed by in the Teſtament without juſt Cauſe ſhewn. But when a Grant is made *contra Tabulas*, it is reaſonable there ſhould be a *Collation* or Contribution of all the Goods (which at any Time came from the deceaſed Perſon) made into the common Stock, unleſs the Teſtator order'd the contrary; leſt he that has the Grant, contrary to the Tables of the Will, ſhould be admitted into an equal Diviſion of the Inheritance, and not make an Allowance for that Part which he had received before from the Teſtator, whilſt he was living. Not but that this *Collation* may be made upon the Goods of a Perſon that dies alſo *Inteſtate*, and ſhall oblige all the *Deſcendants*, whether they ſucceed in the Male or Female Line [b], but not thoſe that ſucceed as *Aſcendants* or *Collaterals* [c], or that take as Legatees by Teſtament. Hence I ſhall cloſe this Title of the *Bonorum-poſſeſſio* with the Title of *Collations* in the *Code* [d], which carries with it an evident Equity. For when the *Prætor* admitted emancipated Perſons to the Poſſeſſion of the Goods, contrary to the Tables of the Will, and gave them a Share of the Father's Goods, with thoſe Perſons that were in the Father's Power, he thought it but juſt and equitable, that they throw their own Goods into an Average or common Fund with the Father's, whoſe Goods they coveted [e].

[y] D. 29. 2. 30. 1.
[z] I. 3. 10. 3.
[a] D. 37. 6. 1.
[b] Nov. 118. c. 6.
[c] C. 6. 21. 16.
[d] C. 6. 20.
[e] D. 37. 6. 1.

Tho' the Word *Collation* be a general Term, as it is ſometimes taken for a Contribution of a certain Sum of Money for carrying on of ſome publick Work, and ſometimes for the Compariſon of a Man's Hand-writing, and ſometimes taken (according to the *Canon* Law) for the conferring of a vacant Benefice, *&c.* Yet it is here uſed for the throwing of a Man's own proper Goods into the common Stock of the Inheritance, that the ſame may be equally divided with the Hereditary Goods, Share and Share alike [f]. The Reaſon of introducing this Kind of *Collation*, was, that a Man's Children in his Power, being his Heirs, might not be injur'd by Perſons emancipated, unto whom the *Prætor* granted the *Bonorum-poſſeſſio*. For heretofore Perſons emancipated had a full Property of whatever they acquired; and if the *Bonorum-poſſeſſio* was granted to them, contrary to the Tables of the Will, they came in equally with the *ſui Hæredes*, or Children in the Power of the Father, and ſhared the Father's Goods with them;

[f] Bald. in l. 9. c. 6. 20.

them; and likewiſe ſuch Goods as were acquir'd by Children, in the Power of the Father, which went to the Father in Virtue of his paternal Power. And hence an Injury aroſe to the ſaid Children that were the Father's Heirs; becauſe ſuch emancipated Perſons did not only keep what they had acquir'd themſelves, but alſo ſucceeded with their Brothers to the common Stock of the Father: Which had been a manifeſt Injuſtice, both to the Children and Grandchildren, if the *Prætor* had not enjoined this Contribution to all the emancipated Children, and taken Care that they ſhould bring in their own Goods into the common Stock, to be equally divided, in the ſame Manner as if they had acquir'd ſuch Goods from the Father of them all [g]. But regularly, thoſe Goods are brought into a *Collation* or *common* Fund, which came from the Aſcendant, whilſt living, for the Maintenance and Proviſion of the Deſcendant [h]. But not Gifts and Rewards for Services, nor the Price of Ranſom from Captivity in War [i]; tho' Money paid for a Fine, or to ſave one from Puniſhment, ought to be brought into the Contribution; for the Fault of one ought not to be prejudicial to another. So the Portion, the Jewels, the precious Garments, and gold Chains, given to a Daughter in Marriage; but not the Expences for the Marriage-feaſt; for that ſeems rather to be given for the Credit of the Father, and not as a Part of the Portion [k]. Nor the Charge of Neceſſary Education, for every Child has already had ſuch a Share. Nor the Charge which the Father had been at in Books for his Son [l], nor the Charge which the Father laid out for his Son, that he might take a Degree, or acquire any other honourable Title [m]; for if the Son dies, his Succeſſor can have no Advantage by it. Upon this Account therefore the Coſts expended in Equipage, for a Son to go to the Wars, ſhall come into the common Contribution [n], becauſe he receives Pay from the Publick. *Collation* chiefly obtains in inteſtate Succeſſion [o], and alſo by the *Novels* in Teſtamentary Succeſſion, unleſs it be expreſly remitted [p]. This Contribution may either be made actually and really, or elſe by giving Caution to contribute [q], or by giving Caution *De defendendo*, that thoſe Perſons, to whom the Contribution is made, ſhould be diſcharged from the Neceſſity of paying any Thing [r]. If a Perſon ſhall refuſe to contribute or give Caution, he ſhall have the Benefit of Hereditary Actions deny'd him [s], or be compelled hereunto by imploring the Office of the Judge. This Right of *Collation* cannot be taken away by any Pact or Covenant, though it may by the Father's Will [t]. Parents or Children muſt apply to the *Prætor* for this Grant of the *Bonorum-poſſeſſio* within a Year after it comes to their Knowledge, that they had a Right to petition for it [u]. Others within a Hundred Days, or elſe they loſt the Benefit of it; and this was ſo appointed, that the Creditors might not be delayed. But now the *Bonorum-poſſeſſio* is not in Uſe: For the Succeſſion by Teſtament, and by Law, comprehends every Caſe.

[g] C. 6. 20. 1 & 2.
[h] C. 6. 20. 12.
[i] C. 8. 51. 17.
[k] C. 6. 20. 17.
[l] D. 10. 2. 50.
[m] D. 37. 6. 16.
[n] C. 6. 20. 20.
[o] D. 37. 6. 1. C. 6. 20. 7.
[p] Nov. 118. c. 6.
[q] D. 37. 6. 1. 9.
[r] C. 6. 20. 2.
[s] D. 37. 6. 8.
[t] D. 37. 6. 5. 1.
[u] I. 3. 10. 5.

In the Laws of *England*, as to Goods and Chattels, the Statute of *Edward* the third [x] enjoin'd the *Ordinary* to grant Letters of *Adminiſtration* of the Goods of an Inteſtate to his next and moſt lawful Friends, who were to have the Benefit of an Executor. This ſeems to be in Imitation of the Grant of the *Bonorum-poſſeſſio* by the *Prætor*. The 21ſt *Hen.* VIII. cap. 5. directs, that Adminiſtration of the Inteſtate's Goods ſhall be granted to his Widow, or next of Kin to the Inteſtate, or to *both*, as the Ordinary ſhall think fit. And then the Statute of 22 & 23 of *Car.* II. cap. 10. order the Diſtribution of the Surpluſage, after Debts and Funeral Expences are paid, among the Kindred, *viz.* one third to the Wife, the Reſidue amongſt the Inteſtate's Children, and ſuch as legally *repreſent* them, if any of them are dead; other than ſuch Children (not Heirs at Law) who ſhall have an Eſtate by Settlement of the Inteſtate in his Life-time, equal to the other Shares. Children (other than Heirs at Law) advanced by Settlements or Portions, not equal to

[x] 31. E. 3. c. 11.

to the other Shares, ſhall have ſo much of the Surpluſage, as ſhall make the Eſtate of all to be equal. If there are no Children nor legal Repreſentatives of them, one Moiety ſhall be allotted to the Wife, the Reſidue equally to the next of Kindred to the Inteſtate in equal Degree, and thoſe who repreſent them. No Repreſentatives ſhall be admitted among *Collaterals*, after Brothers and Siſters Children. And if there is no Wife, all ſhall be diſtributed amongſt the Children; and if no Child, then to the next of Kin to the Inteſtate, in equal Degree, and their Repreſentatives.

TIT. XXVII.

Of the Jus Accreſcendi, *or Right of Survivorſhip, in reſpect of Legacies, Contracts,* &c. *and when it has Place, and when not; and of the* Edictum Succeſſorium.

THE *Jus Adcreſcendi*, or *Accreſcendi* is that Right, whereby a vacant Portion of a Perſon that is joined together with others in an Heirſhip, Legacy, Donation *in Proſpect of Death*, &c. accedes and falls to the Survivors in Poſſeſſion *y*. As for Example, *Titius* dies, and makes *Caius*, *Mævius* and *Sempronius*, joint Heirs or Legatees unto ſuch an Eſtate. Now on the Death of either of theſe Heirs or Legatees, his vacant Portion falls to the other two. For the *Jus Accreſcendi*, or this Right of Survivorſhip, only obtains in ſuch Things, as are left by Laſt Will and Teſtament, and not in Contracts which are adjudged according to the Form whereby they are entred into. This Right of Survivorſhip was introduced by a Law of the Twelve Tables, and it reſpects the Thing, or the Eſtate, and not the Perſon of a Man; and therefore, according to *Bartolus* *z*, it deſcends to Heirs. And as the Teſtator may grant this Right; ſo he may likewiſe impeach or forbid it: And it ſeems to be thus prohibited, by inſerting this Clauſe in the Appointment of an Heir, *viz. And I forbid him to demand more*, &c. To the end that this Right ſhould have Place, it is neceſſary that the Will ſhould be made according to Law.

y D. 50. 16. 142.

z In l. 83. D. 29. 2.

I ſay, that this Right of Survivorſhip only obtains in ſuch Things, as are left by Laſt Wills and Teſtament, and the like; and not in Contracts, *&c.* For there is no Room for the *Jus Accreſcendi* in Donations *inter Vivos*, called *ſimple* Donations, ſince theſe are like unto Contracts; unleſs they flow from the Emperor's Bounty and Liberality *a*. Thus if a Man buys an Eſtate for himſelf and *Titius*, the Eſtate purchaſed is only ſaid to go to the Purchaſer, not by Virtue of the *Jus Accreſcendi*, but on the Account of the Vender's Intereſt, leſt he ſhould become a Tenant in common againſt his Will. The *Jus Accreſcendi* is not between thoſe Perſons unto whom an Uſufruct is left or bequeathed ſeparately, *alternis vicibus*, viz. when one enjoys the Uſufruct one Year, and the other Perſon another: For if one of the Perſons dies, his Part ſhall go and accrue unto the Proprietary, and not to the Fructuary; becauſe each of them had their proper Times and Seaſons for receiving the entire Fruits without the Concurrence of the other Fructuary. And thus the Right of Survivorſhip is a Right of retaining or gaining the Share of him who has not a concurrent Right or Property in the Thing, or of him who has ceaſed to have ſuch a concurrent Right or Property *b*.

a C. 10. 14. l. un.

b D. 32. 1. 8.

But

But an Uſufruct is ſometimes acquir'd by the *Jus Accreſcendi*; but not unleſs the Uſufruct be bequeathed jointly [c]. And thoſe Perſons are ſaid to be joined together in Intereſt, who are ſo connected either by Law or Man, that they are looked upon as one Perſon [d]. Hence the *Jus Accreſcendi* accrues and has Place between Coheirs, as being joined together by the Teſtator's Appointment; as when he ſays, *I make* Titius *and* Mævius *my Heirs* in Solidum: Yet a Teſtator may prohibit the *Jus Accreſcendi*, by ſubſtituting another Heir in the Place of one of them, upon the Heir's Death, or by a Waver of the Heirſhip. This (I think) the Teſtator may do, when he has made them Heirs diſtinctly, but not when he has made them Joint-heirs; becauſe he cannot in his Will order that the Laws ſhould not have Place therein [e].

[c] D. 7. 2. 1. pr.

[d] D. 30. 1. 34. pr.

[e] D. 30. 1. 55.

There are ſeveral Caſes wherein the *Jus Accreſcendi* does not obtain; as in Donations *inter Vivos*, call'd *ſimple* Donations, and the like; unleſs, as before excepted, they flow from the Emperor's Grant. For that which the Prince or Emperor gives unto two Partners, accrues to the Survivor, if one of them dies without an Heir [f]. In a Subſtitution, ſtil'd *Subſtitutio Fideicommiſſaria*, the *Jus Accreſcendi* has no Place, if one of the Feoffees, or Perſons in Truſt, renounce his Truſt. But it is otherwiſe in *direct* Subſtitutions: For in a *direct* Subſtitution the *Jus Accreſcendi* has Place; leſt otherwiſe the Teſtator ſhould die partly Teſtate, and partly Inteſtate. Which Reaſon ceaſes in a Subſtitution given in Truſt; for the Heir appointed gains that Part of the Heirſhip which is renounced. And thus, if a Teſtator has an Heir, it does not accede or accrue unto the other Perſon [g]. Nor has the *Jus Accreſcendi* any Place in Services: But the *Jus Decreſcendi* has, according to *Bartolus* [h]. In theſe and in many other Caſes the Right of Survivorſhip does not obtain. I ſhall next remember to the Reader wherein it does proceed. And,

[f] C. 10. 14. l. 2. un.

[g] D. 36. 1. 1. fin.

[h] In L. 16. D. 8. 6.

Firſt, If a Thing purchaſed will not admit of a Diviſion; for then the Whole goes to the Perſon, after the Death of the Joint-poſſeſſor [i]. *Secondly*, The *Jus Accreſcendi* has alſo Place between Coheirs, (as before related), being named in a Will, but not ſo much in Virtue of their being joined together by the Teſtator's Appointment; though that alſo obtains, as already remarked, as through a Rule of Law, which judges it abſurd to retain one Part of the Heirſhip, and to repudiate the other; and thus to make the Deceaſed die partly Teſtate, and partly Inteſtate [k], if this Right were not admitted. It has likewiſe Place between Heirs at Law, who ſucceed *ab Inteſtato*, by the tacit Conſent of the Perſon deceaſed; becauſe Nearneſs of Blood and Equality of Degree join them together [l]. And thus the *Jus Accreſcendi* has Place, whenever a Part of the Inheritance, or a Thing bequeathed to two Perſons jointly, is determin'd in one of the Heirs or Legatees, and accrues to the other [m]: As, when I bequeath an Eſtate to *Caius* and *Mævius*, and one of the Joint-tenants dies, the Legacy ſhall, *in Solidum*, go to the other. For, after Acquiſition had, the Right of Survivorſhip accrues to the other.

[i] D. 8. 4. 5. D. 18. 1. 64.

[k] D. 50. 17. 7.

[l] D. 31. 1. 61. 1.

[m] D. 32. 3. 89.

The *Edictum Succeſſorium* is an Edict touching the Succeſſion to the Goods of a Perſon dying Inteſtate: For as Perſons, who, as Children, deſire to obtain the *Bonorum-poſſeſſio*, ought to ſue for the ſame within a Year; ſo, if ſuch Perſons, as are prior in Degree, do not ſue for it, or demand it as they ought to do, which is the ſame thing; thoſe who are next to them in Kindred, may, according to this Edict, demand the ſame [n]. This Edict was introduced by the *Prætor*, to prevent the Delays which Parents, Children, and other Kindred, gave unto Creditors, by not ſuing for the *Bonorum-poſſeſſio* within a convenient Time [o]. It preſcribed an Order of Succeſſion unto the Goods of the Deceaſed, and was of great Service, in the Confuſion as Things ſtood before it was decreed. But now this Title of the *Edictum*

[n] D. 38. 9. 1.

[o] D. 38. 9. 1. pr.

Edictum Succeſſorium is grown out of Uſe, ſince the *Civil* and *Pretorian* Law are reduced to an Agreement, and the *Bonorum-poſſeſſio* being antiquated, all Perſons are ſaid to be Heirs, who ſucceed to the whole Inheritance, either by Teſtament, or by Inteſtate Succeſſion. See *Groenwegen* on the *Inſtitutes* [p]. [p] I. 3. 10. 5.

TIT. XXVIII.

Of an Inofficious Teſtament, *and of a* Querela Teſtamenti Inofficioſi, *when given, and to whom, and when it reſcinds ſuch a Will*, &c.

BECAUSE it often happen'd, that Parents diſinherited their Children, or (at leaſt) paſſed them by in Silence, without any juſt and ſufficient Cauſe; it was therefore firſt introduced by Cuſtom [q], (for it was not in the Beginning eſtabliſh'd by any Law), That Children thus diſinherited or paſſed by, might form a Complaint or Action, againſt their Father's and Mother's Will; which Complaint was ſtiled *Querela Inofficioſi Teſtamenti* [r]: And this wholſom Inſtitution was afterwards confirm'd by a written Law touching an *Inofficious Will*. And by ſuch Complaint, they might declare and ſet forth, That they were diſinherited or paſſed by, contrary to Juſtice, and the Duty of a Parent; founding the Equity of their Action upon this, *viz.* That the Perſons who diſinherited or paſſed them by in their Wills were not in their right Senſes at the Time when they made their Will. But yet it ought not to be ſaid, that they were entirely Mad, and the like; but, on the contrary, it ought to be averr'd, that the Will is good, but that it was not made with a true Motive of paternal Piety and Affection: For if the Teſtator was not truly and really in his Senſes at the Time of making the Will, he could not have made the ſame. For an *Inofficious Will* is here ſaid to be that, which is rightly made in reſpect of the Solemnities; but invalid, becauſe it is made *contra Officium Pietatis*, againſt the Duty of paternal Affection and filial Piety, and the like [s]; ſince ſuch Perſons are diſinherited and paſſed by, who ought not to be ſo; as Children, Parents, Brothers and Siſters [t].

[q] D. 3. 1. 32. D. 28. 6. 2. D. 27. 10. 1.

[r] D. 5. 2. 1 & 2.

[s] D. 5. 2. 2.

[t] D. 5. 2. 3. 1.

A *Querela Inofficioſi Teſtamenti* is a kind of preparatory Way unto a *Petitio Hæreditatis*; which is an univerſal Civil Action *bonæ Fidei*, whereby a Perſon ſues to be declared Heir, and to have the Inheritance, of Right belonging to him, to be reſtored to him, by him who poſſeſſes the ſame as Heir or Poſſeſſor thereof: For Children unjuſtly diſinherited cannot demand or ſue for the paternal Inheritance 'till ſuch time as the Father's Will has been reſcinded by this *Querela*. And thus, an *Inofficious Will* being reſcinded by this *Querela* or Plaint, a Claim or Demand of the Heirſhip may be made on the Account of ſuch *Inofficious Will* [u]: And the Perſon unjuſtly diſinherited or paſſed by, upon reſcinding of ſuch *Inofficious Will*, ſhall be declared Heir Inteſtate, by Virtue of a *Petitio Hæreditatis*.

[u] C. 3. 31. 3 & 34.

This *Querela*, or Claim of the Heirſhip, is not a diſtinct Remedy from the *Petitio Hæreditatis* itſelf, as ſome of the Doctors would have it, ſaying, That a Teſtament is only reſcinded by this Method, and that a *Petitio Hæreditatis* follows, upon reſcinding of the Will: Whoſe Miſtake is ſufficiently

ciently refuted by the ſeveral Laws here quoted in the Margin [x]. Where-
fore, we may alſo ſtile a *Querela* to be an univerſal Action, whereby ſuch as have been unwarrantably diſinherited or paſſed by in a Will, demand to have ſuch will reſcinded, as being made contrary to that Affection which is due from a Father towards his Children. The Office of the Judge is in this Caſe implored; and the Perſon that exhibits a written Will muſt aver, That he is diſinherited or paſſed by without juſt Cauſe, contrary to the Duty of Piety; and then pray to have ſuch Will reſcinded, as being unjuſt [y]. A *Petitio Hæreditatis* is wont to be joined or added unto this Complaint, That, upon reſcinding the Will, the Complainant may be declared Heir, and have the Inheritance or Heirſhip adjudged to him: So that this is not properly a diſtinct, but one and the ſame Remedy in Effect. I have ſaid, That a *Querela* is then granted, when a Perſon is unjuſtly diſinherited or paſſed by: For any Perſon may be removed from the Succeſſion, on a juſt Account [z].

According to the ancient Law, the Cauſes of Diſinheriting were not definitely determined by any Laws, but depended on the Judgment of thoſe Perſons who took Cognizance touching an *Inofficious Will*, whoſe Buſineſs it was to conſider the Merits and Demerits of the Perſon diſinherited [a]. And the *Centumviri* at *Rome* were the Perſons that had the Cognizance of a *Querela Inofficioſi Teſtamenti*, and alſo of a ſimple Petition of Heirſhip, and of other Cauſes of greater Importance: And from hence, according to *Feſtus*, theſe Cauſes were termed *Judicia Centumviralia* [b]; and a *Querela*, call'd *Judicium Centumvirale* [c]. But, from their being arbitrary Cauſes, *Juſtinian* will have the Teſtator to aſſign certain and proper Reaſons for Diſinheriting; and as ſuch he reckons them up in the *Novels* [d], in reſpect of Children and Parents, and likewiſe in reſpect to Brothers and Siſters [e]. And whereas, formerly, a Son was obliged to prove, that he was excluded from the Heirſhip without any juſt Demerits of his own [f], the Emperor afterwards would have it, that Parents ſhould expreſly inſert in their Wills the very Acts of their Childrens Ingratitude or Diſobedience; and the written Heir was to prove the Truth of theſe Cauſes or Reaſons [g]. Yet if a Teſtament was made without expreſſing theſe Reaſons, it was not to be adjudged null, but was to be reſcinded by a *Querela Inofficioſi Teſtamenti* [h].

This *Querela* is granted to Children, Parents, Brothers and Siſters, and to ſuch Perſons to whom the lawful Portion is due [i]; and it might be granted againſt the Will of any Perſon whatſoever [k]; unleſs he was a Soldier in actual Service [l], or a *Filius-familias* who diſpoſed of his *Peculium* acquired by his own Induſtry [m], or unleſs he was a Clergyman [n]. *Firſt*, It was granted unto Children diſinherited by any Parent, and paſſed by in Silence by the Mother, or the Grandfather by the Mother's Side [o]. For natural Reaſon, as a certain Kind of tacit Law, has in ſuch a manner given the Heirſhip of the Parents unto the Children, by calling them (as it were) to the due Succeſſion of their Eſtates, that Parents cannot otherwiſe diſpoſe thereof, unleſs it be for ſufficient Reaſons [p]. After Children, a *Querela* is, in the ſecond Place, granted unto Parents, who are admitted to the Heirſhips of their Childrens Eſtates, on Account of their great Tenderneſs and Affection towards them [q]. And this *Querela* is given to all Parents, of whatſoever Denomination they are [r], if they are diſinherited by their Children, or (what is the ſame thing) paſſed by in Silence [s]: For theſe Things make no Difference in the Line of *Aſcendants* or *Collaterals*. After Parents, in the third Place, this *Querela* is granted to Brothers and Siſters [t]: For Brotherly Affection next in Degree, follows the Love of Parents to their Children. But formerly it was only given to Brothers by the whole Blood, call'd *Fratres Germani* or *Conſanguinei*; and not

[x] D. 5. 2. 8. 8. D. 5. 2. 27. 3. D. 5. 2. 20 & 21. 2.
[y] D. 5. 2. 8. 12.
[z] D. 48. 20. 7. pr.
[a] D. 37. 4. 3. 5. C. 3. 28. 19.
[b] D. 5. 2. 13 & 17.
[c] D. 5. 2. 13.
[d] Nov. 115. c. 3 & 4.
[e] Nov. 22. c. 47.
[f] D. 5. 2. 5. 1.
[g] Nov. 115. c. 3.
[h] Nov. 115. c. 3 & 4.
[i] I. 2. 18. 1. D. 5. 2. 1.
[k] D. 5. 2. 8. 3.
[l] D. 5. 2. 27. 1.
[m] C. 3. 28. 3. 37.
[n] Nov. 123. c. 8.
[o] I. 2. 13. 5.
[p] D. 48. 20. 7. pr.
[q] D. 5. 2. 15. D. 38. 6. 7. 1.
[r] D. 5. 2. 1 & 30.
[s] D. 5. 2. 14.
[t] D. 5. 2. 1. pr.

not to Brothers by the half Blood [u], ſtiled *Fratres Uterini*. But the Emperor *Juſtinian* taking away this Diſtinction of the *Agnati* and *Cognati*, annulled this Difference entirely in all Succeſſions; and therefore, by the *Novels*, a *Querela* now ſeems to be granted to the *Fratres Uterini*, or Brothers by the Mother's Side [x]. But it is not granted to Brothers and Siſters *ſimply*, but only when the written Heirs are branded with Infamy, or any Note of Turpitude [y]. In the Number of which Perſons, we may alſo reckon a *ſpurious* Iſſue: For though they do not deſerve Infamy, nor are they branded by any Law with the ſame, yet it cannot be deny'd but that they are blemiſhed in their Births [z].

[u] C. 3. 28. 27.
[x] Nov. 118. c. 4.
[y] C. 3. 28. 27.
[z] Deut. 23. 2.

If a Perſon has obtain'd the *lawful* Portion, he ſhall not be admitted to this Complaint or Remedy [a]: And therefore a Man may ſafely diſpoſe of his Eſtate by Will; provided he leaves the *lawful* Portion to his lawful Heirs; which Portion was heretofore a fourth Part [b], and is at this Day a third Part of the whole Inheritance [c]. This *lawful* Portion in reſpect of Children, was introduced by the *Civil* Law, as appears by the Text, where *Juſtinian* ſays, That the Law (meaning the *Civil* Law) lays a Neceſſity on Parents, of leaving a *lawful* Portion of their Eſtates unto their Children. And hence it is, that this *lawful* Part is alſo due unto ſuch as are Children by Adoption, which, by the Law of Nature, were unknown unto Mankind. And moreover, not only a fourth Part, but even the whole Inheritance was, by the Law of Nature, due unto Children. Thus, by the *Civil* Law, a fourth Part of the Teſtator's Eſtate in his Poſſeſſion at the Time of his Death, after a Deduction of Debts and Funeral Expences, was formerly due to the Children: But at this Day, if there are only four Children, or under that Number, living, a third Part thereof is due [d]. And if there are more Children than four, then one Moiety of the Whole is due to to them: And the ſame Law holds good even in reſpect of Parents.

[a] D. 5. 2. 8. 6.
[b] C. 3. 28. 6.
[c] Nov. 18. c. 1.
[d] Nov. 18. c. 1.

It has been a Queſtion, indeed, Whether this *lawful* Portion ſhall be increaſed in reſpect of Brothers? And the better Opinion of the Lawyers is, That it ſhall; becauſe it is augmented to all Perſons that may complain of an *Inofficious Will*. Some of the Lawyers heretofore ſaid, That it was not by Right of Law, but by Accident, (as when a diſhoneſt Perſon is appointed Heir), that this *Querela* lay for Brothers; but that ſuch Perſons to whom a *Querela* lay by Right of Law, might have an Action for the lawful Portion; as Parents, Children, Grandchildren, *&c.* But this is not inferr'd from the *Novel* here quoted [e], which not only increaſes the *lawful* Portion of thoſe Perſons to whom a *Querela* accrued by an ordinary Courſe of Law, but it generally confirms this Augmentation to all Perſons that might by any means, before that Law made, have had a *Querela Inofficioſi Teſtamenti*. Formerly this *lawful* Portion was left *quocunque Titulo*; but now it is not left to Children otherwiſe than by the Title of *Inſtitution* [f]. And *Fachinæus* ſays, that *Juſtinian* has eſtabliſh'd this as a general, ſolid, and laſting Foundation, *viz.* That Children ſhall be appointed Heirs by their Parents, unleſs they ſhall be diſinherited on a very juſt Account, though they have a *lawful* Portion left them by way of Legacy, or on any other Title whatſoever.

[e] Nov. 118.
[f] Nov. 115. c. 3.

Thus this Action of a *Querela* is granted unto thoſe to whom the *lawful* Portion is due. *Firſt*, Unto lawful Children, without Diſtinction of Sex or Degree [g], whether they are in the Power of the Father, or emancipated [h]: but only with this Difference between Children in the Power of the Father, and Children emancipated, *viz.* That the firſt being paſſed by by the Father, they may alledge the Will to be null, and the emancipated Children may have the *Bonorum-poſſeſſio* granted them, contrary to the Tables of the Will [i]. But natural Children cannot ſue out this Remedy. *Secondly*, It is granted to Parents, whether paſſed by or diſinherited, againſt the Teſtaments

[g] I. 2. 18. 1 & 2.
[h] I. 2. 18. pr.
[i] D. 5. 2. 23.

k I. 2. 18. 1. Teſtaments of ſuch Children as may make a Will k. But of theſe Perſons I have ſpoken before. The Effect of a *Querela* heretofore, was, that it damned the whole Will, becauſe it was ſaid to be made by a Perſon not of
l I. 2. 18. pr. ſound Mind and Memory l: But now it only evacuates the Inſtitution and
m Nov. 115. c. 2. Appointment of the Heir m.

A *Querela Inofficioſi Teſtamenti* paſſes to the Heirs of the Perſon injur'd,
n C. 3. 28. 34. and to Chilſdren indiſtinctly n; but not unto extraneous Perſons, unleſs the
o D. 5. 2. 6. ſame be *prepared* by the Perſon deceaſed o. And a *Querela* is ſaid to be prepar'd, when a Perſon has a Purpoſe of Complaining, and has declar'd his Mind, as having threatned an Impeachment of the Will, or tendred a Libel
p C. 3. 28. 5. againſt the ſame, in the Life-time of the Teſtator p. It lies againſt Heirs of
q D. 5. 2. 8. 2. what Condition and Dignity ſoever they are q, and againſt their Repreſen-
r C. 3. 28. 10. tatives r, and ſometimes alſo againſt a particular Legatary, who being ſuſ-
s D. 5. 2. 29. pr. pected of Colluſion, comes to defend the Will s, unleſs he be defended by a Privilege that is left him t. But this Action of a *Querela* ceaſes ſeveral
t D. 5. 2. 8. 3. Ways. As *firſt*, when the Diſinheriſon is juſt and lawful. *Secondly*, if the Plaintiff may obtain his Right by ſome other Remedy: For a *Querela*
u I. 2. 18. 2. is the laſt Aid and Refuge a Man has u. *Thirdly*, if the Plaintiff renounces
x D. 5. 2. 17. or remits the ſame, either expreſly x, or tacitly (for it ought to be ſued
y C. 3. 28. 36. 2. within five Years y), it is an Abatement of the Action. *Fourthly*, if the Plaintiff be appointed Heir to the *lawful* Portion, either in the Whole, or in Part: For in Caſe he had the whole *lawful* Portion by the Title of *Inſtitution*, he could ſue for no more; and he who had only a Part could not reſcind the Will by a *Querela*, but was driven to ſue for the Reſidue by a
z I. 2. 18. §. ult. a Condiction *ex Lege* z. As the *lawful* Portion is due unto Children by the
a D. 37. 2. 7. common Vow or Tie of Parents a, and to Parents on the Account of their
b D. 5. 2. 15. pr. Tenderneſs b, ſo it is due unto Brothers in Oppoſition unto the Heir ap-
c C. 3. 28. 27. pointed c. There is a *lawful* Portion of the Inheritance alſo due, though a
d D. 5. 2. 8. 6. Perſon dies inteſtate d. At this Day, though a Teſtament be reſcinded by a
e Nov. 115. c. 2. *Querela*, yet ſimple Legacies and Legacies in Truſt are due e.

By the Law of *England*, a *Querela* of an *Inofficious Will* is not heard or regarded. In the Diſpoſition of Chattels, the Cuſtoms of ſundry Places vary, and of theſe we have ſome Memorials left us by the ancient Writers
f Lib. 7. c. 5. of our Law; as by *Glanvil* f and *Bracton* g. But of *common Right* the
g Lib. 2 c 26. n. 2. Teſtator always had the free Diſpoſition of his own Goods and Chattels, as the ſame Authors obſerve. Wherefore, that Writ *de Rationabili Parte Bonorum*, which lies as well for the Wife as the Children, to recover againſt Executors ſome Part of the Father's Goods, is not a general Writ, as the
h Fol. 142. b. original Regiſter of Writs remarks h, but only peculiar to ſome certain Counties, where Cuſtom prevails and requires, that after Debts are deducted the Reſidue of the Eſtate of the Perſon deceaſed ſhall be divided into three Parts: One Part to go to the Wife, another to the Children, and the Teſtator
i Glanv. Lib. 7. c. 8. ſhall have the free Diſpoſal of the third Part i. This Cuſtom indeed ſeems to be borrowed from the *Roman* Law.

As a *Querela Inofficioſi Teſtamenti* uſually prepares and leads the Way unto a *Petitio Hæreditatis*, and is often attended by it, I ſhall here ſay ſomething of this Demand or Petition alſo, becauſe I cannot find a more proper Place to inſert it, without creating a new Title. Now a *Petitio Hæreditatis* is an univerſal real Action *bonæ Fidei*, which lies againſt a Thing or an Inheritance, and is given to him who avers himſelf to be an Heir, whether he be ſo by a Laſt Will and Teſtament, or be an Heir Inteſtate; and hereby he demands and prays to be declared Heir of ſuch an Eſtate, and thereupon to have the Inheritance reſtor'd and given to him, by the Perſon that is in the unjuſt Poſſeſſion thereof, as Heir or Poſſeſſor, or who, by ſome Act of Fraud and Deceit, has quitted the Poſſeſſion of it. And likewiſe it matters not, whether the Perſon be Heir to the Whole, or only

to

to a Part of the Eſtate; provided he brings his Action *pro modo ſui Juris*, according to the Intereſt he has therein. But if he ſhould acknowledge the Heirſhip to be in Vertue of a Teſtament which was afterwards reſigned (perhaps) by a *Querela*, he may (notwithſtanding) claim it, as an inteſtate Heir, if any Right accrues to him.

This is called an *univerſal* Action [k], becauſe there is no particular Thing ſued for, but the whole Heirſhip is demanded, which is an univerſal Right [l]. Nor is it any Objection to ſay, that Part of the Inheritance only is ſued for by this Action, ſince ſuch Part belongs to the whole Inheritance; and he who ſues for a particular Thing as an Hereditary Thing, has an univerſal Action; for he deſires to be declar'd Heir, that is to ſay, Lord of the collective Subſtance. It is called a *real* Action [m]; becauſe it lies againſt a Poſſeſſor, on the Account of that which he poſſeſſes [n]. It is alſo ſaid to be a *Civil* Action; becauſe, tho' the *Prætor* grants it in his Edict, yet it is given by Vertue of the *Civil* Law, whereby all Inheritances are ſued for [o]. This Action lies as well on the Account of a Will, as on the Score of an inteſtate Heirſhip, and may be brought by all Perſons who deſire to be declared Heirs. But in the firſt Place it is granted unto written Heirs [p]. Afterwards, if a Teſtament be evacuated or declared void, it is given unto Adminiſtrators or inteſtate Heirs, to recover the Poſſeſſion of the Inteſtate's Eſtate [q]. But it is not given till after the Death of the Perſon, whoſe Inheritance is in Queſtion; For a Perſon in his Life-time has no ſuch Thing as an Heir [r]: And then 'tis not given to the Heir, till he has proved the Will or accepted of the Heirſhip. It ought to be brought in the Place, where the Defendant or Poſſeſſor of the Goods has his Dwelling, according to *Bartolus* and *Baldus* [s], or where the greater Part of the Inheritance is ſituated; and the Plaintiff ſhall have his Choice [t]. It lies againſt him, who [t], as Heir or Poſſeſſor, poſſeſſes the Inheritance, or, at leaſt, Part thereof, and againſt his Heir [u], and againſt him, who knows himſelf not to be the Heir, and yet contends for it.

[k] D. 6. 1. 1.
[l] D. 50. 16. 24.
D. 50. 17. 62.
[m] D. 5. 3. 25. 18.
[n] D. 5. 3. 13 & 14.
[o] D. 5. 3. 1 & 2.
[p] D. 5. 3. 8.
[q] D. ut ſupra.
[r] D. 18. 4. 1.
[s] In l. un. C. 3. 20.
[t] C. 3. 13. 7.
[u] D. 5. 3. 9. 10. & 13.

TIT. XXIX.

Of Exheredation *or* Diſheriſon *of Children, how it ought to be made, and for what Reaſons: Of the old and new Law touching the ſame*, &c.

TESTAMENTS are principally not valid, upon three Accounts, *viz. Firſt*, if they want the proper Solemnities preſcribed them by Law. *Secondly*, if the Teſtament be made by him who has not a Right and Power of making a Will. And *thirdly*, if the Perſon ſhall not expreſly name and appoint an Heir, or ſhall appoint ſuch to be his Heir, or Heirs, as the Law diſallows of, or ſhall not (at leaſt) expreſly by Name diſinherit ſuch as the Law permits and enjoins. Hence the Lawyer *Caius*, obſerves; that, among other Things, neceſſary for the ordering of Wills, the Deſignation or Inſtitution of Children to be Heirs unto their Parents, or an expreſs Exheredation of them, is a principal Law, or Part. By *Exheredation*, which our *Engliſh* Lawyers call *Diſheriſon*, I mean the Depriving or Taking away the Inheritance from a Man, unto whom the Law has given it [x]:

[x] Nov. 115.

For to diſinherit, is, properly ſpeaking, to remove him from the Heirſhip, who is *ipſo Jure* appointed Heir. Wherefore, this Word *Exheredation* is only uſed in reſpect of ſuch Perſons whom we ſtile *ſui Hæredes*, or Heirs by Right of Blood: For as to Strangers, or extraneous Perſons, Exheredation is vain and idle [y]; becauſe the Heirſhip does not belong to them *ipſo Jure*. But extraneous Perſons are then ſaid to be diſinherited, when ſuch as are written Heirs, are for ſome Cauſe or Event, or other, deprived of the Heirſhip [z]. But this Word may, by Impropriety of Speech, be apply'd, even to ſuch Perſons as are paſſed by in Silence. The *Civil* Law will have Exheredation to be made in a regular and ſolemn Manner [a]. And to the end that the ſame may be ſaid to be rightly and ſolemnly made, it is neceſſary that it ſhould be done by an expreſs naming of the Perſon, to be diſinherited, in the Teſtator's Will: And ſuch Exheredation ought to be made *purely*, and not *conditionally*; and he ought likewiſe to be excluded from the whole Inheritance [b].

[y] D.45.1.132.
[z] D. 35.2.27. D. 29.1.18. D. 28.2.44.
[a] D. 28.2.19. I.2.13.5.
[b] D. 28.2.19.

Wherefore, in treating of *Exheredation*, I ſhall firſt conſider what the old Law was, touching the Exheredation of Children, and by what Form they were diſinherited; becauſe that Law ſeems to have a great Regard to Children. *Secondly*, I ſhall ſhew after what manner they are diſinherited at this Day. And *thirdly*, I will make ſome Remarks hereon. Now every Teſtator, that had a Son in his Power, was by the old Law, either bound to make him his Heir, or elſe by Name to diſinherit him in his Will: For if he paſſed him by in Silence, his Will was of no Effect, and was ſo little to be regarded in Law, that he could have no Heir from ſuch a Will, tho' ſuch Son thus paſſed by, ſhould die in his Father's Life-time; becauſe the Will was *ipſo Jure* [c] (according to the *Civil* Law) null, from paſſing by his Son, who was in his Power at the Time of making his Will. But as to Exheredation, according to the ancient Law, there was a great Difference between Sons and Daughters, between Perſons born and Poſthumous Children, *&c.* But the ancient Law only extended itſelf to Male Children of the firſt Degree, and not unto Daughters: For the Ancients did not obſerve this in reſpect of them, or other Children of either Sex in a remoter Degree. But this is not ſo according to the *Pretorian* or new Law, which ſupports the Will with Equity and good Conſcience, if the Son ſurvives the Father, and be diſinherited [d]. I ſay, this Law did not obtain in reſpect of Daughters and other Children, deſcending by a Male Line, meaning, Grandchildren of either Sex. For it was not neceſſary to diſinherit them by Name, but they might do this *inter cæteros*, or generally; and they being paſſed by, did not defeat a Will, but had the *Jus accreſcendi* [e]. And thus the Form of Exheredation is twofold, *viz.* either by Name, or elſe *inter cæteros*, which we call a *ſpecial* and a *general* Diſheriſon.

[c] I.2.15.pr.
[d] D.37.4.1. D. 28.3.17. Arg.D. 37.12.1.
[e] I.2.13.pr.

Heretofore Poſthumous Children could not be appointed Heirs; it being uncertain to what Father they did belong. But becauſe a Will is rupted, if a Poſthumous Child be born alive and perfect, according to a human *Species*, it is now received; That even Poſthumous Children may be either appointed Heirs, or elſe muſt be diſinherited [f]. But there is a great Difference to be made between Children born in the Father's Life, and Poſthumous Children, as before hinted. For if a Teſtator paſſes by his Son, that is born in his Life-time, his Teſtament is null and void *ipſo Jure* [g]: But if a Poſthumous Child be paſſed by in Silence, the Will ſubſiſts *ab initio*, and muſt be reſcinded by the Decree of the Judge [h]. All Poſthumous Children, whether they be Male or Female, do rupt the whole Will by their Nativity, if they are paſſed by [i]; but Females born in the Father's Life-time, do not do ſo: But a Father is compelled to leave ſome Legacy unto his Poſthumous Daughters, if they are diſinherited *inter cæteros*, by a general Exheredation, leſt they ſhould ſeem to be paſſed by through Forgetfulneſs;

[f] I.2.13.1.
[g] D. 28.3.1 & 3.§.3.
[h] I.2.13.1.
[i] I.2.13.1.

fulneſs; but it is not the ſame Thing to Daughters born in the Father's Life-time [k]. Again, all Poſthumous Children ought to be diſinherited, in expreſs Terms, or by Name: But it was otherwiſe, in reſpect of Grandchildren born in the Teſtator's Life-time [l]. By *Poſthumous* Children, properly ſpeaking, we mean thoſe, that are born *poſt humationem Patris*, after the Father's Death [m]: Which Notion, drawn from the Etymology of the Word, not only pleaſes the Lawyers, but the Grammarians likewiſe. But, according to *Accurſius* [n], there is another *Species* of Poſthumous Children, or Births improperly ſo called, which has a Relation to ſuch as are born before the Teſtator's Death, but after the making of his Will: For by the *Civil* Law, even thoſe ſeem to come under the Name of Poſthumous Children, which yet are not ſo in Propriety of Speech; and therefore in municipal Laws, this Term is not to be ſo taken and made uſe of, according to *Bartolus* [o]. Grandchildren, that are born after the Death of their Grandfather, the Son dying before the Father, may likewiſe be ſtiled Poſthumous Children: And theſe are to be appointed Heirs, according to an Inſtitution of the Lawyer *Gallus Aquilius* [p].

[k] I. 1. 13. 1.

[l] I. 1. 13. 1.

[m] D. 50. 16. 164.

[n] Gloſ. in Rub. C. 6. 29.

[o] In l. 29. D. 28. 2.

[p] D. 28. 2. 29.

Adoptive Children, as long as they were in the Power of their adoptive Father, were either to be appointed Heirs, or elſe to be diſinherited (for they had the ſame Right with thoſe begotten in lawful Wedlock [q]): But if theſe Children were emancipated by their adopted Father, they were not by the *Civil* Law reckoned among Children; becauſe they ceaſed to be *ſui Hæredes*: Nor were they ſo by the *Pretorian* Law; becauſe they at the ſame Time loſt the Name of Children [r].

[q] I. 2. 13. 4. D. 1. 17. 1.

[r] I. 2. 13. 4. D. 38. 6. 4.

The Premiſes was what the ancient *Roman* Law introduced. But the Emperor *Juſtinian* alter'd this in ſeveral reſpects, and by a new Law took away all that Diſtinction of the ancient Law, in reſpect of Sex and Degree, and ordained, That all Perſons, whether they were in the Power of a Father, or were emancipated, might either be appointed Heirs, or elſe by Name be diſinherited; and it matters not, whether they are already born, or are in the Womb to be born hereafter [s]. Yet by this new Law, a Soldier is not obliged to make his Children his Heirs, or to diſinherit them by Name: For his Silence in reſpect of Heirſhip is valid; and paſſes for diſinheriting of them [t]. So that a Soldier's Will is not only valid, without ſuch an expreſs Diſinheriting, but it cannot be defeated by a *Bonorum Poſſeſſio contra Tabulas*, nor by a Complaint of an inofficious Will [u]. But yet ſuch Soldier's Children might demand and ſue for the *lawful Children* (as it is called) by a perſonal Action, termed *Condictio ex Lege* [x]. Nor is the Mother or Grandfather by the Mother's Side bound to make their Children their Heirs (for under the Word *Children*, we may alſo here reckon Grandchildren [y]) or by Name to diſinherit them, but may paſs them by in Silence: For the Silence of the Mother and Grandfather by the Mother's Side, and other Aſcendants by the Mother's Side is equivalent to an expreſs Exheredation of the Father; becauſe the Children of theſe Perſons are not under their Power [z]. But yet if they are in the Mother or Grandfather's Will paſſed by in Silence, without a *juſt Cauſe*, the Will may be ſet aſide as an *inofficious* Teſtament [a]. If Children are paſſed by in *Silence* by the Father, the Will is void, as has been already noted; and if they are diſinherited without ſufficient *Cauſe*, the Will is *inofficious* [b]: If *with* Cauſe, it ought to be expreſſed in the Will, for the Light of the Judge.

[s] C. 6. 28. 4. I. 2. 13. 5.

[t] D. 38. 2. 12. C. 6. 23. 9 & 10.

[u] C. 3. 28. 9. Nov. 115. c. 3.

[x] C. 3. 28. 30. & 32.

[y] D. 50. 16. 220.

[z] I. 2 13 7. D. 37. 4. 4. 2.

[a] Nov. 115. C. 3.

[b] I 2. 12. pr.

[The Law of *England* requires not an expreſs Diſheriſon, as the *Roman* Law did, but leaves this Matter to the Love of the Father, through a Preſumption of natural Affections, that a Father will not diſinherit his Children without a juſt Cauſe, as for very ill Manners, *&c.*]

Now the juſtifiable Cauſes of Diſinheriting are at this Day fourteen in Number [c]. Some whereof are for ſtriking or curſing the Parents, or endeavouring

[c] Nov. 115. c. 3.

endeavouring to kill them; or accuſing them in criminal Cauſes, unleſs on the Behalf of the Prince or State; or for refuſing to give Security for a Parent, that he may be diſcharged from Priſon. Again, it is a ſufficient Cauſe, if the Son turns Stage-player, or keeps Stage-players Company without his Father's Conſent; if the Son becomes Heretical, and the like. But in *Holland* Hereticks enjoy the ſame Right, in reſpect of Hereditary Succeſſions, as the Orthodox do. See *Groenvegen de LL. Abrogatis* [d]. There are eight Reaſons almoſt of the ſame Nature, to juſtify Sons in diſinheriting their Fathers [e]: But there are only three reckon'd ſufficient among Brothers and Siſters [f]. It ſeems juſt, according to the *Civil* Law, that the Cauſes of Exheredation or Diſinheriting ſhould be always expreſſed, and the Magiſtrate made Judge of them, that no Room may be left to Fancy, Paſſion, Neglect, Importunity, Authority, and the like. By the Law of *England*, the Teſtator has ſo large and ample a Liberty given him, that though he has Children of his own lawfully begotten; yet he may appoint others to be his Heirs or Executors, ſecretly *omitting*, or openly excluding and diſinheriting according to his Pleaſure. For our Law has left that ſolemn Way of Diſinheriting Children, unto which the *Roman* Laws bound the Subjects of that State, unto the Love of Parents, which it preſumes Nature has ſo firmly implanted on the Minds of all Fathers, that it cannot be eradicated, unleſs it be for the moſt profligate Behaviour of their Children. And therefore all Perſons have the free Diſpoſition both of their real and perſonal Eſtates, as well in reſpect of thoſe which they have purchaſed themſelves, as in regard of thoſe which they have by Deſcent from their Anceſtors, unleſs it be a Fee-tail. For we cannot diſpoſe of ſuch an Eſtate, unleſs we firſt diſſolve or cut off the Entail by a Fine, or Recovery [g]. See *Plowden* in the Caſe of *Stavel* and *Zouch*. Yet our ancient Law-writers, as *Glanvil* and others, ſay, That Fathers were not permitted to deviſe an Inheritance, which they had received from their Anceſtors, unto any one beſides the next Heir [h]. Upon which Account they have it, that the Heir is anſwerable for the Father's Debts, ſo far as the Eſtate extends. But Laws of latter Times ſeem to have ſet Bounds to this Neceſſity [i]. And therefore the Heir is not at this Day oblig'd to diſcharge the Debt of his Anceſtor, unleſs it be ſo ſpecially mention'd in a Deed of Contract, and the Inheritance be ſufficient for this End and Purpoſe. In reſpect of Chattels and perſonal Eſtates, *Bracton* thinks [k] they ought to be diſtributed, *viz.* After the Debts of the Deceaſed are paid, ſuch Chattels as remain are to be divided into three Parts; one Part of which ought to go to the Children, a ſecond to the Wife, and a third Part was left to the Diſpoſal of the Teſtator. If there are no Children, then one Moiety is reſerved to the Diſpoſal of the Deceaſed, and the other goes to the Wife. But if there be no Wife, then one Moiety to the Children, and the other to the Deceaſed. But this rather ſeems to be Counſel, than a Command. For a little after in the ſame Place, he ſays, that neither the Wife nor Children can take more of the Husband or Father's perſonal Eſtate, than is ſpecially bequeathed unto them, unleſs it be of ſpecial Grace and Favour; as for great Merits to him in his Life-time. And for this he gives a good Reaſon, *viz.* That if he ſhould be compelled to leave any Thing unto his extravagant Children, or to his undeſerving Wife, at the Time of his Death, it would be an Encouragement unto Diſobedience, Riot and Perverſeneſs: Wherefore, it is neceſſary that he ſhould be free in this Matter. For by this Means both his Wife and Children will be incited unto Vertue and Merit: which otherwiſe (perchance) they would not follow, if they knew they muſt inevitably obtain a certain Part of the Teſtator's Goods, even without his Will.

[d] In Nov. 115. c. 3.

[e] Nov. 115. c. 4.

[f] Nov. 22. c. 47.

[g] 4 H. 7. c. 24. 32 H. 8. c. 6.

[h] Glan. lib. 6. c. 17 & 18. Bract. lib. 2. c. 26.

[i] 32 H. 8. c. 1.

[k] Lib. 2. c. 26. n. 1.

I have

I have before remembred, That Exheredation is nothing elſe but a Depriving of Children (to ſpeak properly) of the Heirſhip or Inheritance. And hence a Perſon cannot be ſaid to be deprived of the Heirſhip, unto whom the ſame is not due according to Law [l]: And, therefore, Exheredation cannot be ſaid to lie in reſpect of Strangers, or extraneous Perſons. And upon this Account it is not properly adapted unto Collaterals; becauſe no one is by Law forced to make them his Heirs, unleſs it be when a Man has appointed ſuch a Perſon for his Heir, who is of a bad and infamous Character: In which Caſe the lawful Heirſhip is due to the Brother, according to *Baldus* [m]. Thoſe Perſons are ſtiled *extraneous*, unto whom the *Bonorum Subſidium* is not due. A Perſon that diſinherits his Children, ſeems to diſinherit them by Name: But a Perſon is not bound to diſinherit extraneous Perſons by Name; but it is enough to paſs them by in Silence. Children diſinherited, are preſumed to be diſobedient and undutiful to their Parents, unleſs they prove themſelves to be otherwiſe: But Parents diſinherited are preſumed to be affectionate to their Children, unleſs the contrary be proved. Wherefore, Children, that bring a Complaint againſt the Will of their Parents, ought to prove that they have conſtantly paid them all Manner of Duty and Obedience which Nature requires. But an Orphan Daughter is not deemed to be undutiful, becauſe ſhe cultivates Friendſhip and a good Agreement with her Husband againſt the Will of her Mother [n].

[l] Bart. in L. 132. D. 45. 1.

[m] In L. 29. D. 28. 2. 16.

[n] C. 3. 28. 20.

Though a Father may diſinherit his Daughter for committing Fornication, or living a libidinous Life before the 25th Year of her Age; yet a Son cannot diſinherit his Mother for being Guilty of Whoredom [o]: But a Son is not obliged to make her his Heir, if ſhe paſſes to a ſecond Marriage, or to leave her any Thing: Which ſee hereafter under *Marriages*. A Perſon does not ſeem to diſinherit thoſe Children which he does not know that he has [p]. As for Example, *Titius* making his Will, made *Seius* his Heir, and had other Children, *viz.* *Caius* and *Sempronius:* And believing *Sempronius* to be dead, wrote thus in his Will, *viz.* *And for all my other Sons and Daughters, I diſinherit them.* *Quære*, whether *Caius* and *Sempronius* are hereby both diſinherited? Touching *Caius*, doubtleſs, he is. But in reſpect of the Error which the Father had about *Sempronius*, whom he thought to be dead in his Life-time, it was a Queſtion with the Judge, and reſolved in the Negative. If the Son commits any Act of Diſobedience or Ingratitude againſt the Father, for which he may be diſinherited, and the Father remits the Injury by Pact, the Son ſhall not upon that Account be diſinherited, according to *Paul. de Caſtro* [q]. A Son may be diſinherited, not only for one of thoſe fourteen Cauſes reckon'd up in the *Novels*, but even for other Cauſes not expreſſed there, provided there be the ſame, or a *greater* Reaſon: And this is the common Opinion of the Doctors, as *Jaſon* avers. As a Father, by bleſſing or ſpeaking well of his Son in his Will, is not deemed to make him his Heir; ſo, by curſing, or ſaying ill of him, he is not adjudged to have diſinherited him; becauſe Words of Indignation ordain nothing.

[o] Paul. de Caſtro. Conſ. 416 Vol. 4.

[p] D. 28. 2. 25.

[q] In l. ult. C. 2. 3.

TIT. XXX.

Of the Inventories of Goods, *how many Kinds of them, and the Time and other Circumſtances of Making the ſame; and of Paſſing Accounts, and the like.*

HAVING already, under the Title *Of a Written or Appointed Heir*, according to the Rules of the *Civil* Law, explain'd the Reaſon of ſuch an Inſtitution or Appointment; I ſhall here ſpeak of the principal Conſequences or Effects thereof, which in chief are Three: *viz.* The *firſt* is, in our Law-books, ſtiled the *Jus Deliberandi*, which I ſhall firſt conſider in this Place. The *ſecond* is, The Right of an *Inventory*; and under this Head, I ſhall diſcourſe of the Method and Form of Making the ſame. And the *third* is, The Acceptance of the Heirſhip, of which I have already treated under the Title of *Heirs*; but ſhall here, notwithſtanding, lightly touch thereon.

The *Jus Deliberandi*, or Right of Deliberating, was a Power granted the Heir, within a certain Time, to conſider with himſelf, whether he would accept of the Office and Truſt of an Heirſhip accruing to him, or whether he would refuſe and diſclaim the ſame [r]: For it is not the Part of a prudent, but rather an Argument of a raſh Man, to enter and poſſeſs himſelf of an Inheritance without mature Deliberation; beauſe if he has once taken the Heirſhip on himſelf by meddling, he ſtands engaged to anſwer all hereditary Creditors, though the Inheritance be not ſufficient to diſcharge the Debts of the Teſtator, or Inteſtate, deceaſed: And thus an Heirſhip by Will, as well as an Inteſtate Heirſhip, which we in *England* term an Executorſhip and Adminiſtratorſhip, were often wont to prejudice both theſe Kinds of Heirs. Whereupon, in Proceſs of Time, the Benefit or Right of thus *Deliberating* began to be in Uſe, and was granted to Executors and Adminiſtrators, that they might conſider with themſelves, whether it was expedient for them to enter on the Heirſhip, as above-mention'd, and to intermeddle with the Eſtate and Goods of the Deceaſed.

[r] C. 6. 30. 19.

Now this Time for the Heir's Deliberation was not ſettled by any Law, nor was it aſcertain'd by the *Prætor*'s Edict, but left entirely to the Diſcretion of the Judge, upon hearing of the Matter. But I muſt obſerve, That Teſtators were ſometimes wont to appoint Heirs within a certain Period of Time, by limiting the Number of Days; within which Time they were either obliged to accept of the Heirſhip, or to renounce the ſame; and this Term of Deliberation thus given to the Heir by the Teſtator, *Ulpian* ſtiles *Cretio Dierum* [s]: And the Heir appointed was bound, within this Time prefix'd, either to take this Heirſhip on himſelf, or he was excluded by Time alone, without any other Act. But before this Term was expir'd he could not be barr'd the Heirſhip, tho' he ſhould at ſome Time before have diſavow'd the ſame; ſince he might within this Time come and repent. But this Aid or Power of *Deliberation* is out of Uſe at this Day, by the Means of an Imperial Conſtitution [t].

[s] C. 6. 30. 17.

[t] C. 6. 30. 22. 2.

For this Right of Deliberating being found defective, and not ſufficient for the Information of the Heir, to let him into a true Knowledge of the State of the Inheritance, the Emperor *Juſtinian* did, for this and other wiſe Reaſons,

Reaſons, hereafter to be remember'd, introduce the Benefit of an Inventory, as a ſafer Method to indemnify Heirs againſt the full Demand of hereditary Creditors and Legataries ſuing for Debts and Legacies beyond the Amount of the Inheritance itſelf, which our *Engliſh* Lawyers term *Aſſets*. So that if they ſuſpected the Ability of the Inheritance, they might accept of the Heirſhip without any Deliberation and Danger of being compell'd to pay the Creditors beyond the Extent of the Inheritance itſelf, if they made an Inventory thereof, and therein faithfully deſcribed and ſet down the whole Subſtance of the Inheritance, according to the Form deliver'd in the *Code* [u]. And upon this Foundation principally it was, that the Emperor, changing the whole Right of *Deliberation*, and all thoſe Points of Law which gave Occaſion thereunto, preſcribed this new beneficial Method of ſatisfying all hereditary Creditors and Legataries in their Demands on or from the Inheritance, as being grounded on a much better Equity, and is more in Uſe at this Day, than the former Courſe of proceeding by *Deliberation*.

[u] C. 6. 30. 22.

But though I may obſerve, That there are ſeveral Sorts of Inventories mentioned in our Law-books, as that of Tutors and Curators, Debtors and Creditors, fiſcal Inventories, *&c.* as well as this relating to Heirs; yet I ſhall only in this Place treat of this Kind, as more immediately to our Purpoſe: which is nothing elſe but a Deſcription of all the Goods and Eſtate of the Perſon deceaſed [x], made in the Preſence of all Perſons having an Intereſt therein; or (at leaſt) on a due Citation of ſuch to be preſent at the making thereof, if they think it their Advantage ſo to be. And this Inventory ought to be made according to the Form directed in the *Code* [y]. For the Heir ſhall begin to make it within thirty Days after the opening of the Will, or within thirty Days from the Notice given him of being Heir, or within thirty Days after the Adminiſtration or Inteſtate Heirſhip is granted him. And if he ſhall make an Inventory within ſixty Days after he has begun the ſame, he ſhall not be liable to Creditors and Legataries beyond the Aſſets thus recorded [z]: But if he ſhall not make it, he ſhall not only be liable to Creditors beyond the Subſtance of the Inheritance, but ſhall alſo loſe the *Quarta Trebellianica*. If a Perſon does not make an Inventory, doubtleſs he loſes the Benefit of the *Falcidian* Law; becauſe this is expreſly provided for on this Law, on the ſcore of preſumptive Fraud and Knavery. But a *quaſi*, or an *improper* Heir, ſhall only loſe ſo much as the *Falcidian* Law allows. Therefore, whoever will reap the Advantage of this Law, ought to make an Inventory [a]: For if a Man deſpiſes the Law, he renders himſelf unworthy of the Benefit of it.

[x] Nov. 1. c. 2.

[y] C. 6. 30. 22.

[z] C. 6. 30. 22. 4.

[a] C. 6. 30. 22. 4.

[By the Laws of *England*, though a Perſon ought to make an Inventory, under Pain of making himſelf liable unto Creditors and Legatees, for his preſumptive Fraud; yet I do not find any Time preſcribed for this Purpoſe: Nor does the Benefit of the *Falcidian* Law prevail with us. By an Edict of *Charles* V. [b] Emperor of *Germany*, the Benefit of an Inventory ought to be obtain'd from the Prince; and the Inventory ought to be perfected within forty Days after ſuch Grant purchaſed. By the Cuſtom of *Holland*, no certain Time is prefix'd, but an Inventory may be demanded at any Time, at the Inſtance of Creditors [c]; and ſo it is practis'd in *Frieſland*: But whoever does not exhibit an Inventory on ſuch Demand, and the Decree of the Judge thereupon, is ſaddled with all the Teſtator's Debts and Legacies, as a knaviſh Perſon. In *France* we have a Conſtitution of *Lewis* XIV. [d] touching an Inventory, which I have taken Notice of elſewhere, under the Title of *Heirs*.]

[b] A. D. 1544. Art. 39.

[c] Groenv. de LL. Abr.

[d] A. D. 1666.

The Doctors will have it, That there are many Solemnities requir'd in Making an Inventory. As, *Firſt*, It ought to be made touching thoſe Things which the Deceaſed was poſſeſs'd of, and left behind him at the Time of his Death; and the Time for Making it is within the Term above-mention'd: For it ought to be compleatly finiſh'd within three Months from the Heir's being made acquainted with the Teſtator's Appointment of him as Heir, or from the Knowledge of his being Heir Inteſtate. But if the

the Goods be not preſent and at hand, but the Whole or the greateſt Part of the Teſtator's Subſtance lies in ſome other Province, then the Space of
[e] C. 6. 30. 2. 3. a whole Year is allow'd [e] for the making of an Inventory by Proctors and Agents well inſtructed and commiſſion'd for this Purpoſe. Some, indeed, have doubted, whether the making of an Inventory ought to be begun
[f] In L. 22. C. 6. 30. preciſely within the thirty Days: Wherein *Bartolus* and *Cynus* [f] determine in the Negative: For, ſay they, it is ſufficient, if it be perfectly finiſh'd within the three Months. *Secondly*, 'Tis neceſſary for the Heir to cauſe all Creditors and Legataries to be judicially cited for their Appearance on a certain Day, and at an Hour certain of that Day, as already hinted; that being preſent, they may ſee the Inventory begun, proceeded on, and finiſh'd by ſuch Heir: And if the Creditors be certainly known, every one of them ought to be ſpecially cited by their particular Names; otherwiſe, a general Citation, by way of publick Proclamation, is ſufficient, if the Creditors be not certainly known: But if ſuch Creditors be not in their uſual Places of Reſidence, their Friends ought then to be cited, or (at leaſt) three Witneſſes made uſe of to ſupply the Abſence of theſe Perſons. This Solemnity is not obſerved with us here in *England*, in the making of an Inventory. *Thirdly*, This Inventory ought to be written in the Hand of ſome Notary Publick hereunto requeſted; for the Hand-writing of a pri-
[g] C. 6. 30. 22. v. *Præſtabat.* vate Perſon is not ſufficient to give Evidence thereof [g]: Yea, tho' the Heir ſhall be able to ſhew an Account or Scroll of the Goods of the Deceas'd, under the Hand-writing of the Deceaſed; yet he ſhall be excluded the Benefit of an Inventory, if he purſues not this ſolemn Method of a Notary; becauſe the Inventory ought to take its Beginning from the Perſon of the Heir, and not from that of the Deceaſed; Notaries are not uſed in *England* in this Caſe. *Fourthly*, 'Tis neceſſary that two or three Witneſſes, at the Beginning and perfecting of the Inventory, ſhould be preſent, who have the Inſpection of the whole Subſtance of the Inheritance laid before them; and by theſe Witneſſes the Inventory ought to be
[h] Nov. 1. c. 2. proved [h]: And if the Creditors and Legataries (perchance) be abſent, then (beſides theſe two) three other Witneſſes ſhall be uſed; and the Witneſſes ought to be well known to the Heir, this being Special and Particular in an Inventory: For in other Inſtruments, when Witneſſes are apply'd,
[i] Nov. ut ſupra, C. 6. 30. 22. it is not neceſſary for the Parties contracting to be acquainted with them [i]. *Fifthly*, 'Tis requir'd, that the Heir ſhould ſubſcribe himſelf to the Inventory, averring all Things to be lawfully done therein without Fraud and Deceit: And if he ſhould be ſo illiterate as not to know how to ſubſcribe himſelf, or write his own Name, another Perſon (according to ſome) may ſubſcribe himſelf in the Heir's Name; tho' the better Opinion is, that he ſhall ſubſcribe in his own Name by his Mark, teſtifying there is nothing attempted to be done in this Matter through fraudulent Means. Others will have it, that the Perſon thus ſubſcribing in the Heir's Name, ought
[k] C. 6. 30. 22. 2. to be ſome other Notary than the Notary aſſumed to write the Inventory [k]. In Popiſh Countries, where Superſtition prevails much more than true Religion, the Sign of the Croſs ought to be prefix'd and ſet at the Head of the Inventory; tho' the Omiſſion of this Solemnity (they own) does not vitiate the ſame, as not being directed in the *Code*. Others aver, that an Inventory ought to be made and enrolled in the Judge's Preſence, to avoid a Suſpicion of Fraud: But this Opinion is not only impugn'd by Lawyers of
[l] Bart. Conſ. 54. n. 7. the greateſt Learning [l], but even by conſtant Practice. For as the Imperial Conſtitution mentions not the Judge's Preſence, it wou'd be an Hardſhip on the Heir to introduce the ſame, eſpecially ſince the Judge's Preſence is not eaſily had. Therefore, in reſpect of Heirs or Executors, it is well enough if it be made extrajudicially before one Notary: But in order to give it Credit and Authority againſt Debtors, and Perſons whoſe Names

are

are therein ſpecify'd, 'tis neceſſary that it ſhould be made in the Judge's Preſence [m]. The laſt Thing neceſſary to an Inventory, is, that all the Hereditary Goods, both Corporeal and Incorporeal, be inſerted therein, *viz.* Moveables and Immoveables, Debts and Credits, Profits and Diſprofits, and even Things belonging to the Right of Strangers, as Things depoſited and lent by way of *Commodatum*, Pawns, Hypotheques, *&c.* if they be found among the Goods and in the Poſſeſſion of the Deceaſed at the Time of his Death. When I ſay, That Things in the Cuſtody of the Deceaſed, at the Time of his Death, by way of *Depoſitum*, *Commodatum*, *&c.* ought to be deſcribed in the Inventory; I mean, they ought to be ſet down with an Annotation of Allowance, or a Petition for deducting the ſame: For ſhould thoſe Things be omitted, much Fraud might enſue to Creditors and Legataries, under Pretence of Things depoſited with the Deceaſed, or lent him by way of *Commodatum*, &c.

[m] D. 26. 7. 57.

But ſome are ſo rigid as to have the Inventory vitiated in ſuch a Manner, if any one or more of theſe Things are omitted, that the Heir is thereby liable to hereditary Creditors and Legatees beyond the Amount of the Eſtate, on the Score of ſuch Omiſſion: But *Paul. de Caſtro* [n] ſays, No, if theſe Things were *bona fide* omitted; For if other Goods ſhall come to the Knowledge of the Heir after the Inventory is finiſhed, he ought *de Novo* to add them thereunto, which is the common Practice. Wherefore, the Doctors deliver this Caution to be obſerved in Practice, *viz.* That the Heir, in making an Inventory, does make a Proteſtation at the Foot thereof, that he has cauſed all Things to be inſerted therein, which have hitherto come to his Knowledge; and that if any Thing has been omitted, which ſhall be otherwiſe diſcover'd, he deſires to add them thereunto, ſo ſoon as he ſhall be made acquainted with the Omiſſion: And, on the contrary, if any Things be therein enter'd, which ought not to be deſcribed, he prays they may be deemed as not inſerted. So that by this Proteſtation he renders himſelf ſafe againſt all unwilful Omiſſions, and may at any Time afterwards add unto the Inventory ſuch Things as ſhall come to his Knowledge. Add hereunto, that when an Inventory is made, the Value of Things by honeſt Appraiſers ought to be deſcribed therein.

[n] In L. 22. C. 6. 30.

If Goods ſhall be concealed and omitted thro' Deceit, the Heir loſes the Benefit of the *Falcidian* Law, according to the *Digeſts* [o], only in reſpect of the Things concealed; and if the Heir was a Bondman or Vaſſal, he loſt the *Jus abſtinendi* [p], or the Right of Waving the Heirſhip, after it deſcended to him: But by the *Novels* he now loſes the whole and entire Benefit of the *Falcidian* Law, in reſpect of all Legacies whatſoever [q]. For the Heir, by not making an Inventory, or fraudulently making an imperfect one, is by Law preſumed to have ſubſtracted and withholden ſo much of the Inheritance, as the *Falcidian* Law has given him: And he that abuſes the Power and Truſt repoſed in him by Law, deſervedly loſes the Privilege and Advantage thereof [r]. But yet he is not liable to Creditors and Legataries beyond the Extent of the Inheritance, but only ſubject to Reſtitution in Twofold of the Goods thus concealed [s].

[o] D. 35. 2. 24.
[p] D. 29. 2. 7. 4.
[q] Nov. 1. c. 2.
[r] D. 3. 11. 63. C. 1. 9. 11.
[s] C. 6. 30. 22.

As to the further Puniſhment of an Heir, that neglects the making of an Inventory, or that abuſes the Confidence which the Law repoſes in him, it has been, *firſt*, a Queſtion, Whether, by ſuch Neglect or Abuſe, he ſhall not loſe the Advantage of the *Lex Trebellianica*, as he does the Benefit of the *Falcidian* Law? And herein the Matter has been ſo warmly diſputed among the Doctors, that it is hard to diſcern which is the common Opinion. *Bartolus* will have the common Opinion to be, that he ſhall not loſe this Advantage: And others confirm the negative Side of the Queſtion. *Secondly*, It is a Queſtion, whether a *Fidei-commiſſarius*, or an Heir in Truſt, may be

[t] In L. 11. D. 35. 2. 5. compelled to make an Inventory? *Bartolus* [t] ſays; That he may; becauſe an univerſal Heir in Truſt is reputed to be in the Place of a direct or ſimple Heir: But an Inventory made by a ſimple Heir is of no Advantage to the Heir in Truſt, unleſs ſuch ſimple Heir aſſigns this Right to him. If the Heir makes an Inventory, and aftewards dies, the Heir of ſuch Heir ſhall have the Advantage thereof; becauſe the Deceaſed and his Heir are one and the ſame Perſon in Law [u].

[u] Nov. 48. pr.

But, in regard both to ſimple Legataries and Legataries in Truſt, a Teſtator may remit the making of an Inventory; becauſe it was in his Power not to have given ſuch Legacies, and might if he had pleas'd, even after ſuch Bequeſts made, have revoked the ſame: And, therefore, *à fortiori*, he may prejudice ſuch Legatees, by remitting unto the Heir the making of an Inventory; but in reſpect of Creditors, according to *Guid. Papa* [x], &c. he cannot do the ſame. And thus though a Releaſe or Diſcharge from rendring an Account in a future Adminiſtration cannot be expreſly made or bequeathed; yet the Teſtator may remit unto a Guardian the Buſineſs of making an Inventory, if the Pupil be not injur'd thereby: For tho' the Teſtator has ſo order'd it; yet the Judge or Ordinary may, for the Pupil's Advantage, according to *Jaſon* and the Doctors [z], compel a Guardian to make an Inventory. For the Magiſtrate may rather chuſe to follow the Pupil's Advantage, than the Order and Writing of the Teſtator, if he finds the not making of an Inventory to be hurtful to the Ward. And ſo, upon a juſt Account, he may remit unto the Guardian or the Teſtator's Executor, the Buſineſs of making an Inventory; as when it is not expedient or convenient that the Sum and Subſtance of the Pupil's Eſtate, or of the Goods of the Deceaſed, ſhould be made known and manifeſt to the World [a]. That a Guardian and an Heir, with us called an Executor, is bound to make an Inventory, appears from the Text and Gloſs of the Law here quoted [b]: And ſuch an Inventory he is obliged to make before he adminiſters or intermeddles with any of the Goods of the Perſon deceaſed, unleſs he be aſſigned only to a certain *Specie*, or Part thereof. And, in the Making of this Inventory, a general Proclamation or Citation of all the Creditors or Legataries is ſufficient, *viz.* That if any of the ſaid Perſons ſhould think it his Intereſt, he ſhould appear [c], and in no wiſe neceſſary that all of them ſhould be cited by their reſpective Names. But ſuch a general Citation is not enough, when there is only one certain Perſon to oppoſe the Inventory [d]; for then he muſt be cited in ſpecial.

[x] Quæſt. 352.

[z] In L 13. C. 5. 51.

[a] D. 38. 17. 2.

[b] C. 1. 3. 28. 2. v. *Debitum.*

[c] C. 7. 40. 2.

[d] D. 25. 3. 1. 1.

As to the Paſſing of Accounts upon the Inventory, the Heir or Executor ought to obſerve and follow the ſame. He ought to ſet down all Receipts and Diſburſements thereon, and to deliver in to the Ordinary a Scroll or Schedule of all the Particulars upon Oath, in caſe of minuter Matters; but if the Sums are large, then he ought to prove the Payment thereof by Witneſſes and Acquittances: And unto the Paſſing of this Account, the aforeſaid Perſons are cited in the ſame manner, as in the Caſe of an Inventory, to object to the Account if they find Reaſon, otherwiſe the Judge confirms and paſſes the ſame. It has been a Queſtion among the Lawyers, whether the Teſtator may remit unto his Heir the Buſineſs of paſſing an Account: And the common Opinion is, he cannot, becauſe this is a Matter that depends on *common Right* and the Law itſelf, which the Teſtator cannot diſpenſe with. But touching this Matter, ſee the Title of *Accounts* hereafter.

The End of the THIRD BOOK.

BOOK

BOOK IV.

Of ACTIONS and OBLIGATIONS, the Third Object of the Law.

TIT. I.

Of Obligations *in general*; *how divided into* Civil, Prætorian, *and* mix'd: *Of Obligations ariſing from* proper *and* improper *Contracts*; *and*, laſtly, *of Obligations ariſing from private Treſpaſſes and Offences*, &c.

I HAVE already, towards the Beginning of this Work, obſerved, that the whole Law, which Men make uſe of, has either a Relation to Perſons, Things or Actions. And, having in the foregoing Books treated of Perſons and Things, and how the Property of Things may be acquir'd, both by the Law of Nations and the Civil Law, I ſhall here ſpeak of Actions. But becauſe an Obligation is the Mother of all Perſonal Actions eſpecially [a], and as the Mother precedes the Daughter, according to the Order of Nature, I ſhall therefore, in this and the following Titles, diſcourſe of Obligations, Contracts, and Offences in general, from whence every Obligation ariſes, and conſequently an Action. And our daily Experience ſufficiently aſſures us, that there is not a more uſeful Subject in all Civil Life, throughout the whole Body of the Law, than this of Obligations; ſince there is nothing more frequent than Contracts and Obligations, not only among Merchants, but alſo among Men of all Ranks and Conditions.

[a] D. 3. 3. 42.

I have before remembered, That there are ſome Things which are ſtiled *Corporeal*, and others which are called *Incorporeal*: And among theſe laſt we may reckon Services, Inheritances, and Obligations. But having already ſpoken of the two former *Species* of Things, *viz.* of Services and Inheritances, it remains for me here to handle the Matter of Obligations. But this Title, in the *Inſtitutes*, contains little or nothing elſe but a Definition of an *Obligation* taken from the efficient Cauſe and Effect thereof, and ſome certain Diviſions given of Obligations. For as we cannot come at the Knowledge of Particulars without the Knowledge of more General Things; I have, for this Reaſon, judged it neceſſary to enquire what an Obligation is, and how one Obligation is diſtinguiſhed from another, as *Juſtinian* has done before me [b].

[b] I. 3. 14. 1 & 2.

Now

Now the Word *Obligation* is a general Term, which not only includes a *Civil*, but alſo a *Natural* Obligation, and ſometimes an Obligation which is both Natural and Civil joined together, called a *Mix'd* Obligation. An Obligation is alſo diſtinguiſh'd either into ſuch as ariſes from a *proper* or an *improper* Contract, or elſe from a *proper* or an *improper* Treſpaſs, as I ſhall note again by and by. But the Lawyers define an Obligation to be a Bond of Law, whereby we are neceſſarily tied either to the Payment or Performance of ſomething, ac-
[c] I. 3. 14. pr. cording to the Laws of that State or City whereunto we belong [c]: And it is the Parent or Mother of all Judicial Actions; for there is no Action which has not its Riſe from ſome Obligation or other. I here ſpeak of a *Civil*, and not of a *Natural* Obligation, becauſe a *Natural* Obligation does not produce an Action at Law, as having no Power and Effect in Law; and, conſequently, in Propriety of Speech,
[d] D.46.1.16.3. it cannot be called an Obligation [d]. For he only can be ſaid to be a Debtor, who can be convened in a Judicial Action: And therefore, he who only owes a Thing by *Nature*, as Gratitude to a Benefactor,
[e] D.50.16.10. fin. and the like, is not ſtrictly, but only improperly, ſaid to be a Debtor [e]. Indeed the Perſon, who receives a Debt, that is founded on the Law of Nature, is underſtood to have received his own, but he cannot ſue for it in a Court of Law: As a Father cannot by any Action at Law require any filial Piety from his Son, though the ſame be due from the Son to the Father of Natural Right. By the Word *Bond*, in this
[f] D.44.7.3. Definition [f], I rather mean the Effect of a Bond, than a Bond itſelf: Becauſe a Contract, or an Offence committed, is properly ſtiled the Bond, whereby Men are tied or obliged.

As an Obligation is a Bond of Law, which neceſſarily obliges a Man to perform or pay that which is due, it may rightly be divided into a *Simple* and a *Mix'd* Obligation. And again, a Simple Obligation may, moreover, be divided into an Obligation which is only Natural, and into an Obligation which is only Civil: And a *Mix'd* Obligation may,
[g] §. 3. I. 3. 14. n. 17. according to *Vulteius* on the *Inſtitutes* [g], be divided into an Obligation that is Natural and Civil together. Now every Civil Obligation, of which I ſhall here principally treat, if we conſider the Nature of it, does, by a Neceſſity of Law, oblige Men unto ſomething or other, though the Force of an Obligation may ſometimes be hindered through the Weakneſs of the Cord, and is likewiſe defeated by an Exception: Yet it does not entirely ceaſe to be an Obligation, till after ſuch Defeat.

I have above hinted, that an Obligation is either meerly Natural, or meerly Civil, or elſe of a mix'd Nature. An Obligation *meerly Natural* is a Bond of Equity, whereby we are obliged to give or do a Thing, though no Action ariſes thereupon by the Civil Law for the
[h] D.46.3.95.4. Non-performance of it [h]. And this may be ſub-divided into an *Ef-*
D.50.17.84.1. *fectual* or an *Ineffectual* Obligation, or (as ſome ſay) *in pleniorem* and *minus plenum*. An *Ineffectual* Obligation is that, which is not deſtroyed or aſſiſted by the Aid of the Civil Law. And ſuch an Obligation, *firſt*, is an Obligation to Gratitude; and, *ſecondly*, an Obligation from a Will leſs ſolemn. An *Effectual* Obligation is a *Natural* Obligation, which has almoſt the ſame Effects as a *Mix'd* Obligation, barring only an Action which it does not produce: For ſuch a Natural Debt may
[i] D.16.2.6. be compenſated with any other Thing that flows from the Covenant [i]. Sureties and Pledges may accede thereunto: But a Natural Debt, diſ-
[k] D.44.7.10. charged through Error and Miſtake, cannot be recover'd again [k], as a Civil Debt may. An Obligation *meerly Civil*, is ſuch as is meerly founded on the Civil Law, whereby a Perſon is ſo bound, that an Action lies

lies againſt him *ſummo Jure*; which yet in Equity, or by the *Prætorian* Law, may be defeated by an Exception [l]. As when a Perſon has promiſed any Thing, being thereunto compelled through Fear, or being thereunto induced by ſome Error and Miſtake; or when the Debtor, after an Obligation entred into, covenants with his Creditor not to ſue him [m]. A *Mix'd* Obligation is that, which is partly *Natural*, and partly *Civil*; and is a Bond of Equity as well as a Bond of Law, whereby a Perſon ſo binds himſelf that an Action lies againſt him. *Mix'd* Obligations are either *Civil* or *Prætorian*. *Civil* are thoſe, which are conſtituted by the Laws of the Twelve Tables, and which are approved of by ſome Civil or Municipal Law. And *Prætorian* Obligations are ſuch as the *Prætor* has introduced in Vertue of his Juriſdiction [n]. *Civil* Obligations, I ſay, are ſuch as are eſtabliſh'd by the *Roman* Law in General, or approv'd of by ſome particular Law, as an Obligation in Vertue of the *Aquilian* Law, and the like: For there are ſome Obligations that are of the Invention of the Law of Nations; and ſome that are founded on the *Roman* Civil Law. *Prætorian* Obligations, which the Judge or *Prætor* ordain'd in Vertue of his Juriſdiction, are ſometimes in our Books ſtiled *Honorary* Obligations [o], becauſe the *Roman Prætor* bore Honours. And this of *Civil* and *Prætorian* Obligations, was the principal Diviſion of all Obligations according to the *Roman* Law [p]; and was made in reſpect of the ſeveral Laws from whence every Obligation proceeds.

[l] D. 13. 5. 3. 1. D. 50. 17. 112.
[m] I. 4. 13. 1 & 2.
[n] I. 3. 14. 1.
[o] D. 5. 4. 1.
[p] D. 13. 6. 1 & 17. I. 3. 14. 1.

Again, Obligations, in reſpect of their ſeveral Cauſes or Conſiderations, on which Account they are produced, are divided into four *Species*, becauſe every Obligation ariſes either from a *proper* or an *improper* Contract, or otherwiſe from a *proper* or an *improper* Treſpaſs [q]. There are four *Species* of Obligations, which ariſe from Contracts properly ſo called. For as theſe Contracts are ſuch as are made either by ſome Thing done, or elſe by Words, or *thirdly* by Writing, or *fourthly* by Conſent alone: So there are ſo many *Species* of Obligations that are founded on theſe ſeveral ſorts of Contracts, called *proper* Contracts. The firſt is ſtiled a *real* Obligation, and is contracted five ſeveral Ways, *viz. Firſt*, By a Loan made; *Secondly*, by a Payment of that which is not due; *Thirdly*, by a *Commodatum*, or a Thing lent for a certain Time and Uſe, and to be returned in the ſame Species: *Fourthly*, by a *Depoſitum*; and *Fifthly*, by a Pawn received. *Verbal* Obligations, or ſuch as are contracted by Words, conſiſt in naked Promiſes and Stipulations. An Obligation contracted by Writing, is, when a Perſon does in Writing acknowledge himſelf to be a Debtor to ſuch a one, whether the Money was actually received by him or not: And ſuch a Perſon ſhall not have an Exception *non Numeratæ Pecuniæ*; becauſe he has acknowledged himſelf to be a Debtor; and this is agreeable to the Law of *England*, according to *Glanvil* [r], *Britton* [s], and *Fleta* [t]. Theſe Kinds of Obligations in Writing, are, with us, of a more exalted Nature than Stipulations, and bind more than them. For if Writing intervenes, it is not neceſſary to expreſs the Conſideration. See *Plowden*'s Reports [u] in *Sherington*'s Caſe. If a verbal Contract be made touching any Matter, and an Obligation be afterwards from thence drawn into Writing, the firſt Contract is entirely extinguiſh'd, and produces no Action, but only the Written Obligation can be ſued. An Obligation in Writing cannot be deſtroyed by any verbal Pact *de non petendo*. An Obligation contracted by Conſent alone, is, when a Perſon engages to do a Thing without any Thing deliver'd, or Stipulation made, or any Promiſe drawn into Writing, as in Bargain and Sale, Hiring and Letting to Hire, and the like; and this is the Contrivance of the Law of

[q] I. 3. 14. 2.
[r] Lib. 10. c. 12.
[s] Cap. 28.
[t] Lib. 2. c. 56.
[u] Fol. 308.

Nations. Theſe *proper* and *improper* Contracts, *&c.* (of which hereafter) are the four ordinary Fountains of all Obligations. But ſometimes Obligations do, by a Peculiarity of Law, ariſe from various Forms of Cauſes, which rather depend on Equity than on any ſtrict and certain Law [x].

[x] D. 12. 1. 32.

I ſhall next ſpeak of ſuch Obligations as are not properly ſaid to ariſe from a Contract: But yet becauſe they are not ſubſtantiated by a Malfeazance or Treſpaſs, ſeem to ariſe from an *improper* Contract [y]. Therefore, when any one has managed or done Buſineſs for another Man in his Abſence, Actions ariſe between them *hinc inde*: And theſe are called *Actions for Buſineſs done*, and the like [z]. Theſe Actions are ſo called, becauſe they do not ariſe from a Contract, or from a *proper* or an *improper* Treſpaſs [a], properly ſpeaking. For a Contract is only between two or more Perſons; and no one is obliged by a *proper* Contract but he who conſented thereunto [b]. A Miſdemeanor or Treſpaſs, in *Latin* term'd *Maleficium*, is not contracted without ſome Fault or evil Deſign in the Perſon that commits it. But oftentimes an *improper* Treſpaſs or Miſdemeanor is couched under the Word *Maleficium*, or a Miſdemeanor; and ſo is an *improper* Contract under the Appellation of a Contract [c]. And thus all *Mix'd* Obligations ariſe either from a *proper* or an *improper* Treſpaſs or Miſdemeanor [d].

[y] I. 3. 28. pr.

[z] I. 3. 28. 1.

[a] D. 44. 7. 4.

[b] D. 2. 14. 1.

[c] D. 50. 16. 19.

[d] D. 44. 7. 1.

A *Civil* Obligation is taken away and diſſolv'd by a contrary Civil Act, as by a Sentence, or by Acceptilation, (of which hereafter) but not by a Natural Act. And it is one Thing to toll an Obligation *ipſo Jure*, and another to toll it by the Help of an Exception. For when an Obligation is taken away *ipſo Jure*, it is ſimply annihilated as if it had never been in the Nature of Things: And this Power the Law has, which makes a *Non-ens* of an *Ens* or Being. Thus *Acceptilation*, which is a feign'd kind of Payment, does *ipſo Jure* toll an Obligation, and the Debtor is by this Means diſcharged, as if he had naturally paid the Debt; and if he ſhall be afterwards condemned in the Debt, the Sentence is null and void, whenever *Acceptilation* ſhall be pleaded and appear. But to toll an Obligation by the Help of an Exception, is not entirely to annihilate the Obligation, but only to quaſh and weaken it, in ſuch a Manner as it ſhall have no Operation in Law, when the Exception is objected to it: For if an Exception be not objected to it, then a Condemnatory Sentence is valid *ipſo Jure*, and the Debtor is juſtly condemned: And this a Pact *de non petendo* does. For Example, *Titius* is bound to me in a Debt of Ten Pounds, and I covenant with him not to ſue him: The Obligation is not hereby taken away, but that I may implead him by Law: But then an Exception ſhall ſtop the Suit; for when he objects the ſaid Covenant, I am thereby repelled, and the Action is quaſhed. Neither a *Civil*, nor a *Natural* Obligation is diſſolved by a *Ceſſion* of Goods, though it produces a good Exception in Law, and ſuſpends the Force of an Obligation for a Time: The Extinguiſhment of an Obligation being one Thing, and the Ceſſation of it another; for when an Obligation is once extinct, it never revives again [e]. A *Civil* as well as a *Natural* Obligation is *ipſo Jure* diſſolved Twelve ſeveral Ways, *viz.* By Payment, Acceptilation, Novation *Voluntary* and *Neceſſary*, by Delegation, Compenſation, Confeſſion of a Debt, a lawful Tender, and ſometimes by a naked Conſent, and the like; of all which hereafter. An Obligation is only made by Verbs of the Future Tenſe [f].

[e] D. 46. 3. 98. 8.

[f] I. 3. 16. 1.

[All *Civil* Obligations, according to the Law of *England*, are principally divided into two Kinds, *viz.* either into ſuch as have their Riſe from the Common Law, or elſe into ſuch as have their

their Riſe from ſome Statute of the Realm. Of the firſt, we have an Example in that vulgar Obligation, which we ſtile a *Penal* Obligation, and in other Obligations of the like Nature. And of Obligations which ariſe from ſome Statute, we have an Inſtance in thoſe which are founded upon a Statute-merchant, Statute-ſtaple, *&c.* And theſe Obligations are wont to be reduced into Writing, and an Action is brought upon the Statute. See the Statute of *Acton Burnet* [g], &c. [h]]

[g] 1 Edw. I. c. 1.
[h] 38 Edw. III. c. 4.

In *real* Obligations, *viz.* in ſuch as ariſe from ſomething done, without the expreſs Conſent of the Parties, a Pupil and a Madman may be obliged, even without the Conſent and Authority of his Tutor or Curator: As for Example, in an Eſtate which I have in common with a Pupil or Madman, if I lay out any Money of my own thereon, ſuch Pupil is, in this Caſe, bound to pay me ſuch Expences as I have been at on his Part. And it is the ſame thing, if a Pupil, that is capable of Deceit or an ill Deſign, does me any Damage in that Eſtate which is in common to us both; for even then he is thus obliged. When ſeveral Perſons are bound, *in Solidum*, in the ſame Bond or Obligation, and ſtand on the ſame Bottom, they may all and every of them, in that Caſe, be condemned *in Solidum*: But it is otherwiſe when they are not all bound by the ſame Tie, but by a different Obligation [i].

[i] D.45.1.75.8.

An Obligation inſerted in a publick Deed or Inſtrument, is of ſo great Force in Law, that, in reſpect of the Evidence thereof, it is in our Books ſtiled *Probatio Probata*; nor is there any more valid Proof requir'd. And, moreover, no ſtronger Proof can be found, whereby a Debtor may be compelled to the Payment of a Debt, and to make Satisfaction unto his Creditor. But if the Cauſe or Conſideration of a Debt be inſerted into ſuch an Inſtrument, the Obligation (though inſerted) makes no Proof thereof, nor is it valid: And to the End that an Obligation ſhould be valid, and make Proof, it does not only require a good Cauſe or Conſideration to be inſerted, but even that ſuch Cauſe or Conſideration ſhould be apt, certain, and intelligible.

When any Thing is promiſed under an impoſſible Condition, neither a *Civil* nor a *Natural* Obligation is contracted [k]. Every Obligation, both *Civil* and *Natural*, may have Suretiſhip added thereunto for the Performance thereof: For a Surety may be apply'd to every Obligation, whether it ariſes from a Contract, or a Malfeazance, commonly call'd, with us, a Treſpaſs, whether ſuch Obligation be only *Natural*, or only *Civil*, or *Natural* and *Civil* together. And thus a Surety may accede to an Obligation, which ariſes from a *Depoſitum* or a *Commodatum*: As, when I have depoſited any Thing in your Hands, and you have been guilty of ſome Fraud or Deceit therein, I may, in this Caſe, receive Sureties from you, that you will make me Satisfaction for the Damage you have done me in the Thing depoſited with you. A *Natural* Obligation is founded on the Law of Nations; and ſo likewiſe is an Obligation which ariſes from *proper* Treſpaſſes and Miſdemeanors: But an Obligation flowing from an *improper* Treſpaſs or Miſdemeanor, is founded on the *Civil* Law; and ſo likewiſe is an Obligation that deſcends from an *improper* Contract. A *Natural* Obligation, that had a *Civil* Obligation join'd with it *ab Initio*, preſerves the Action which it produced, being joined with the *Civil* Obligation, though ſuch *Civil* Obligation be taken away. A *Natural* Obligation join'd with a *Civil* one, are not one Subſtance, but two Things.

[k] I. 3. 20. 11.

TIT.

TIT. II.

Of Contracts in General; how divided; and what are Contracts Stricti Juris, *and what are Contracts* Bonæ Fidei, *or founded on Equity; what Contracts are founded on the Law of* Nations, *and what on the* Civil *Law; and of the Interpretation of Contracts,* &c.

THE Word *Contract*, taken in a large Acceptation thereof, ſignifies a Covenant or an Agreement made between two Perſons or more: Which Covenant or Agreement produces an Obligation (at leaſt) on one Side. For by the Word *Contract*, I do not only mean to include ſuch an Obligation as obliges on both Sides, as Bargain and Sale, Hiring and Letting to Hire, *&c.* but even ſuch an Obligation as ariſes from one Side only, as a Loan, Stipulation, and the like. Nor do I intend to include thoſe Contracts only, unto which the Laws have given a proper and certain Name, which are therefore call'd *Nominate* Contracts, as Bargain and Sale, Hiring and Letting to Hire, Partnerſhip, *&c.* (a certain and nominate Action ariſing from theſe Contracts); but even thoſe which want a peculiar Name, and are therefore ſtiled *Innominate* Contracts; there being more Matters and Things for their Objects, than we have Names to expreſs them by. And for theſe laſt no certain Action lies, but only an Action *Præſcriptis Verbis*; that is to ſay, an Action conceived in a Form of Words proper and agreeable to the Nature of the Buſineſs: And ſuch is an Action of Permutation, or an Eſtimatory Action, and the like.

I ſay, *taken in a large Acceptation*; becauſe I wou'd, in this Definition, include a *Pact*, a *Donation*, and a *Promiſe*, which are in ſome meaſure ſtiled Contracts; and do produce an Obligation (at leaſt) on one Side of the Parties. For a *Donation* produces an Obligation in the *Donor*, as he is bound to abide by his *Donation*: And a *Promiſe* accepted, induces an Obligation on the Perſon making ſuch Promiſe, by obliging him to fulfil the ſame. But a Contract, in the ſtrict Senſe of the Word, may be formally defin'd after this manner; *viz.* To be an external Act between two or more Perſons, ſped by the Conſent of each of them, and which mutually obliges both of them *. It is called an *External Act*, by way of *Genus*: For he who makes a Contract, does ſome outward Act; though every one that does an Act, does not make a Contract. And we uſe the Word *External*; becauſe when a Contract is executed between two or more, it ought to be expreſſed by ſome external Sign or Token; ſince one Man ſees not into another's Heart. It is ſaid, *by the Conſent of each of them*, &c. by way of Difference; to diſtinguiſh a *Contract*, in its ſtrict Signification, from a *Donation*, *Pact*, and the like; which does not produce a mutual Obligation (as we call it) *ultro citroque*. Some Perſons hold a Contract to be a mutual Obligation, *&c.* but ſuch Definition is not *formal*, but only a *caſual* Definition, derived from the Effect which a Contract produces; for a Contract is not *formally* an Obligation, but only produces an Obligation.

* D. 2. 14. 7. 1 & 2.

Now to ſhew that a Contract produces an Obligation, we are to conſider, that an Obligation is that Bond, whereby Perſons contracting, are obliged either

either to do, or not do ſomething [1]. And upon this Foundation it is, that every Contract produces an Obligation (at leaſt) *in Foro Conſcientiæ*, provided the Contract be not null and void in its own Nature, or elſe render'd ſo by ſome poſitive Law: Becauſe the Law of Nature commands, That a Promiſe made to another, and accepted by him, be ſolemnly kept and obſerved. Hence it appears, that every lawful Contract begets an Obligation; and he that violates an Obligation ariſing from a Contract, which conſiſts in a lawful Promiſe made, acts contrary to the Law of Nature. I ſay, *in Foro Conſcientiæ*; becauſe ſome Contracts produce not an Obligation *in Foro Externo*; as Nude-pacts not confirm'd by an Oath. Wherefore, every Contract produces an Obligation (at leaſt) *in Foro Conſcientiæ*; provided it be not made void by the Law of Nature, or by ſome private Law. For as private Men may add and apply Conditions to Contracts, in ſuch a manner as ſuch Contracts ſhall be valid, as long as thoſe Conditions ſubſiſt, and ſhall be invalid if they do not ſubſiſt: So, *à fortiori*, a Prince may apply Conditions of this Kind, in ſuch a manner, that the Contract ſhall be invalid, if thoſe Conditions are not perform'd, or (at leaſt) may be irritated and made void.

[1] I. 3. 14. pr.

All Contracts do belong and appertain to real Actions; and they ought to have their full *Subſtantials*, without which it is not lawful for any one to make a Contract. And the *Subſtantials* of Contracts are, *viz.* a Form, *lawful Matter* (I mean, ſuch Matter as the Law allows of), the *Conſent of both Parties*, the *Capacity*, *Ability*, and *Idoneity* of the Parties Contracting; and, laſtly, what we call *Bona Fides*, or Honeſt Dealing. The chief and eſpecial Form of Contracts, is that which is ſolemnly expreſs'd by Words or Writing: And all Contracts ought to have ſuch Form, otherwiſe there would be no *Conſtat* of a Contract. The Matter of Contracts ought alſo to be aptly founded, and ſuch as is lawful: For there are many Things which are not ſubject to Contracts, or, touching which, we cannot be ſaid to contract; and ſuch are thoſe Things which are not ſubject to the Commerce of private Perſons, as Things Publick, Sacred, Religious, Litigious, *&c.* Moreover, in all Contracts, the Conſent of each contracting Party ought to be had; and eſpecially in Contracts which are made and executed by Conſent alone, as in Contracts of Bargain and Sale, Hiring and Letting to Hire, Permutation, and the like. And therefore, no *ſimulated* Contracts are valid; becauſe, in ſuch Contracts, a full and perfect Conſent of each Party contracting is not had. And thus, as in every Contract, the Conſent of the Perſon contracting is requir'd; ſo if there be any Defect of ſuch Conſent, the Obligation itſelf is alſo defective. For when I ſay, That ſome Obligations are contracted by Conſent; I don't mean, that all Obligations require a Conſent; but, that there are ſome Obligations which are perfected by Conſent alone, without Delivery, or any other Solemnity.

Again: The Parties contracting, ought to be *Habiles & idonei ad contrahendum*: For there are ſeveral Perſons that cannot make a Contract; ſome, through a Defect of their own proper Age, as all Infants, Minors, *&c.* which have no Conſent; others, from a Defect of their own proper Power, ſuch as Children under the Power of the Father, Pupils and Prodigals, who are not qualify'd to make Contracts, becauſe they are not *ſui Juris*, but are under the Law and Power of Tutors and Curators; others, through a Defect of natural Power and Grace, as Perſons deaf, dumb, Madmen, and the like; others, by reaſon of the Frailty of Nature and Sex, as Women; and others, by reaſon of ſome Crime or Offence committed by them, meaning, ſuch as are publickly infamous, *&c.* There are others who cannot make a Contract, becauſe they are forbidden by ſome written and poſitive Law; ſuch as Judges, and their proper Officers, with the Parties litigant; for theſe cannot make a Contract with thoſe that are ſubject

to their Juriſdiction, during the Time of their Offices. Phyſicians alſo can make no Contracts with their ſick Patients, during the Time of their Sickneſs and Infirmity: And, for the ſame Reaſon, in the Judgment and Opinion of ſome Men, Surgeons cannot make a Contract with Perſons maimed and wounded, being their Patients, during the Continuance of their Wounds, *&c.* In the like manner, Advocates ought not to make Contracts, nor enter into any Pact or Covenant with their Clients, ſo long as the Suit or Proceſs of the Cauſe is depending: Becauſe if a Proctor or Advocate ſhould in the leaſt diſcourage their Clients in the Succeſs of their Cauſes, they would give up the whole Matter, through Fear of loſing their Cauſe. But this is to be underſtood only, pending the Suit; for, before and after the Suit they may make Contracts. The *Civil* Law has forbidden the aforeſaid Perſons to make Contracts, as above related, in order to prevent Wrongs and Oppreſſions which may enſue from thence: But I do not anywhere find, that the Laws of *England* have prohibited ſuch Contracts.

The laſt Matter of Subſtance to be conſider'd in Contracts, is, what we call *Bona Fides*, or Fair Dealing [m]: And this is neceſſary thereunto, not only at the Time when the Contract is enter'd into, but even when it is fulfilled. Wherefore, a Judge ought not only to examine whether a Contract be rightly enter'd into, and whether it be binding, or not, on the ſcore of ſome Fraud therein, but he ought likewiſe to conſider the Time of Fulfilling the ſame, and what one Party ought to perform to the other: And if the Contract was fraudulently enter'd into, then this Diſtinction ſhall be obſerv'd, *viz.* That if one ſhall make a fraudulent Contract with another, and it be a Contract *Bonæ Fidei*, it ſhall be null and void *ipſo Jure*, as if no ſuch Contract was made: But if it be a Contract *Stricti Juris*, and the ſame has been occaſion'd through Fraud, or founded thereon; then it is valid *ipſo Jure*, and ſhall not be render'd invalid, unleſs it be by an Action or an Exception of Fraud objected thereunto [n].

[m] C. 4. 10. 4.

[n] D. 4. 3. 7. 3. D. 45. 1. 56.

Hence it appears, that there are two Kinds of Contracts: Of which ſome are ſtiled Contracts *Bonæ Fidei*; and others call'd Contracts *Stricti Juris*. The firſt of theſe Kinds of Contracts *Juſtinian* terms Actions *Bonæ Fidei* [o]; wherein Good Faith and Equity ought to be more conſider'd, than the Words of the Contract themſelves; and they ought to be conſtru'd according to the Mind and Intention of the Perſons contracting; and the Place of ſuch Conſtruction, is the Uſage or Conſtruction of the Place or Country where the Contract is made. But in a Contract *Stricti Juris*, no more can be demanded or ſued for than is covenanted and agreed on therein, it being founded on Rigour of Law: And the Judge, in pronouncing Sentence, is bound to have a principal Regard to the Covenants of the Parties, without making any other Interpretation thereof than the Covenants ſtrictly admit of. Contracts are ſaid to be contracted *Bonæ Fidei*; becauſe in them the Judge extends his Office in a more exuberant manner, as to thoſe Matters which are *Bonæ Fidei*, than he does in Contracts *Stricti Juris*. All Contracts which are made with the Prince, have the Nature of Contracts *Bonæ Fidei*: And a *Feudal* Contract is alſo ſaid to be a Contract *Bonæ Fidei*. All Contracts, whether Contracts *Bonæ Fidei* or *Stricti Juris*, require Honeſty and Fair Dealing in the Parties Contracting, (as aforeſaid); though, in reſpect of ſome Things, this *Bona Fides*, call'd *Equity*, is rather adapted to Contracts *Bonæ Fidei* than *Stricti Juris*, as *Baldus* notes [p]; becauſe all Contracts *Bonæ Fidei* may by a Pact be reduced to Contracts *Stricti Juris*, as when the Parties covenant a Thing which may be added or diminiſh'd. And, on the contrary, all Contracts *Stricti Juris* may, by a Covenant that Equity ſhall be obſerved, become Contracts *Bonæ Fidei* [q]. Contracts *Bonæ Fidei*, which are made and perfected

[o] I. 4. 6. 29.

[p] Conſ. 343. lib. 1.

[q] Bald. ut ſupra.

perfected by Conſent alone, do not ſtand in need of the Aid and Solemnity of Words, becauſe in Contracts of this kind Conſent is ſufficient. If there be any Fraud or Deceit in Contracts *bonæ Fidei*, which is the Cauſe or Foundation thereof, it vitiates the Contract *ipſo Jure*, as before hinted; and the Perſon that is thus deceived, ſhall not be bound thereby to perfect the ſame, if the Matter remains *entire*, and nothing be done therein: But if the Matter does not remain *entire*, (for that a Delivery, or ſomething elſe, has follow'd thereupon) an Action *of Deceit* lies for the Reſtitution of the Thing deliver'd, and likewiſe to reſcind the Contract; for that it proceeded only *de Facto*, and not *de Jure*. And Deceit is then ſaid to give Cauſe, or to be the Foundation of a Contract, when any one is by Fraud and Deceit induced to enter into any Contract *bonæ Fidei*, which otherwiſe he would not have enter'd into. By the *Canon* Law, all Contracts are Matters of Equity or *bonæ Fidei*.

It has already been remarked, That there are ſome Contracts ſtiled *Nominate*, and others called *Innominate* Contracts: And ſome may be term'd *Cuſtomary* Contracts, becauſe they were introduced by the Cuſtom of the Place; as when a Perſon has promis'd to frank Goods for five Years. For this is not a Contract of Bargain and Sale, nor a Contract of Hiring and Letting to Hire, but a Contract introduc'd by Cuſtom, that a Perſon ſhould tacitly ſell *cum Pacto Francandi*. But in this Paragraph I ſhall only take Notice of a *Nominate* and an *Innominate* Contract. Thoſe are ſtiled *Nominate* Contracts, which do immediately, *à principio*, produce an Action, as ſoon as they are made and perfected, whether they are made by Conſent alone, as Bargain and Sale; or elſe by ſomething done, as a *Mutuum*, and the like: But the bringing or ſuing out ſuch Action is barr'd, and in nowiſe given to him that has not fulfilled the Contract on his Part [r]; and this Law proceeds and takes Place, if ſuch Neglect be objected to the failing Party. For in Contracts, which do mutually oblige on both Sides, the Plaintiff, or he who ſues in vertue of the Contract, is bound on his Part not only to fulfil it, but alſo to prove that he has fulfilled his Part of the Contract: For in *Nominate* Contracts one Perſon cannot ſue and implead another, unleſs he has firſt fulfilled the Contract on his own Part [s]. In *Nominate* Contracts, the Action is not grounded and brought to reſcind the Contract, by Reaſon of Non-performance, or Non-obſervance thereof; but to oblige the Party contracting to obſerve and fulfil his Contract. As for Example, if I buy a Horſe upon a Contract, that ſuch Horſe ſhall be deliver'd to me upon Payment of a certain Sum of Money; I pay the ſaid Sum of Money, and the Vender (notwithſtanding) refuſes to deliver the Horſe: Hereupon (I ſay) I may have an Action, not to reſcind the Contract by Reaſon of the Vender's Non-obſervance thereof; but an Action to oblige the Seller to obſerve the ſame, by a Delivery of the Horſe ſold. In *Nominate* Contracts there never is any room for Repentance or Foregoing the ſame; yea, though the Matter be *entire*, or (as we phraſe it) *re integra*, ſo that the Contract may be diſſolv'd thereby; but a good Action at Law lies to compel the Party to fulfil the ſame [t]. But in Correlative Contracts, if there be a Diſſolution cauſed or effected on one Side, the whole Contract is diſſolv'd or at an end [u]. But in *Innominate* Contracts, which are not Relative and Mutual, there is room for Repentance, and we may forego the Contract. And there are *Innominate* Contracts *ſimply* made, and reſpecting each other, which follow, *viz. Tranſaction*, *Permutation*, a *Nude-Pact*, and Contracts of the like Nature [x]. But in *Innominate* Contracts, which are Mutual and Relative,

[r] D. 19. 1. 13. 8. & Gloſs.

[s] D. 21. 1. 25. 10.

[t] D. 13. 6. 17. 3.

[u] D. 18. 5. 5.

[x] Gloſ. in L. 36. D. 2. 14. pr.

tive, there is room for Repentance, on the part of him that has fulfill'd the Contract, unleſs ſuch Contract be ſtrengthen'd and fortify'd with an Oath, or a Stipulation: For if ſo, then there is no room for Repentance or drawing back. Theſe reſpective *Innominate* Contracts are of ſo weak a Nature, that they ſeem not to produce a Natural Obligation; or if they produce it by reaſon of Conſent given by the Perſon Contracting, yet this Obligation is far weaker than any other Natural Obligation, which is not reſpective or reciprocal, but has only an Exiſtence on one Side: For ſuch an Obligation will not give a Retention, nor bar a *Condictio Dati.*

Every Man is free to Contract or not to Contract *à principio*, but after an Obligation is once contracted, one of the Parties contracting cannot renounce ſuch Contract, being once entred into, without the Conſent of the other. Therefore, if you once contracted with any one about the Sale of Goods, or about the Leaſe of a Houſe, and the like, you cannot forego that Obligation contrary to the Will of the other Party [y]. And this holds more eſpecially true in reſpect of all *Nominate* Contracts. But though in *Innominate* Contracts there is often room for Repentance [z]; yet this Repentance ceaſes, if there be any Stipulation added thereunto, whereby ſuch Contract is ſtrengthen'd and confirm'd, as juſt now hinted: For in *Innominate* Contracts no Obligation, no not ſo much as a Natural one, ariſes, before a fulfilling of the Contract does enſue; and though this fulfilling thereof ſhould even intervene on one Side, yet there is no room for Repentance. For he that has fulfill'd the Contract on his Part, may ſue for and recover the Thing, which he has given or paid in purſuance of the Contract: Which muſt be underſtood *re integrâ remanente*, or before the Perſon delivers it to him, or fulfils his Promiſe, and before he has ſuſtain'd any Damage; becauſe he has been at ſome Expence in preparing the Condition and fulfilling the Contract. Nor is it any Objection to ſay, That in *Innominate* Contracts (at leaſt) a Natural Obligation ariſes, and that this Obligation prevents the Recovery of the Thing paid; becauſe this proceeds, when the Natural Obligation is Simple and not Conditional: In which caſe it has the effect of *Retention*, but not when it is Relative, as in *Innominate* Contracts. Yet 'tis to be obſerv'd, that in *Innominate* (in Favour of Dower) there is no room for Repentance, though the Matter be *entire:* But this is a ſingular Caſe. Our Books ſay, *Ceſſat Pœnitentia, ubi adeſt Stipulatio:* Becauſe, *of Common Right*, if a Stipulation be apply'd in *Innominate* Contracts, an effectual Action and Obligation ariſes, before the fulfilling of the Contract enſues by either Party. In *Innominate* Contracts, a Condiction *ob cauſam* takes Place [a]: But if a Stipulation be apply'd in ſuch Contract, this Condiction *ob cauſam* ceaſes.

[y] C. 4. 10. 5.

[z] D. 12. 4. 5.

[a] C. 4. 6. 11.

There are four *Species* of *Innominate* Contracts, as *do ut des*; *do ut Facias*; *Facio ut des*; and *Facio ut Facias* [b]: And the Parties do hereupon mutually covenant and agree by a *Nude-Pact*. And thus *Innominate* Contracts are judged of according to the Manner of entring thereinto, and not according to the Manner of fulfilling the ſame; and an *Innominate* Contract has ſomething of the Likeneſs of a *Nominate* Contract. But in *Innominate*, the Perſon obliged to give or do any Thing, is not preciſely obliged thereunto, but he ſhall be diſcharged *Solvendo Intereſſe*, by paying the Damage or Intereſt that accrues to the adverſe Party [c]. For in *Innominate* Contracts, an Action only lies for Damage, or for that which is a Man's Intereſt to have, and not to compel the Perſon to do or give [d].

[b] D. 19. 5. 5.

[c] D. 19. 5. 5. 1.

[d] D. ut ſupra.

If

If an Act be celebrated or executed between certain Perſons, and ſuch Contract may have the Face and Appearance of a *Nominate* Contract, it is, according to *Bartolus* [e], deemed to be ſuch, if it be thus expreſs'd, or the Cuſtom of the Place be ſuch between the Parties contracting; otherwiſe it is accounted an *Innominate* Contract: But *Romanus* ſays [f], That in a doubtful Caſe it is adjudg'd to be an *Innominate* Contract. A *Nominate* Contract ſometimes, from the adding of a Pact, paſſes into an *Innominate* Contract; and ſometimes *è contra:* For a Contract is adjudged to be ſuch, as the Subſtance of it, and the Words of the Covenant themſelves will bear; and therefore one Contract paſſes into another, when the Words will admit thereof, and the Subſtance is repugnant to the firſt Contract. As when I ſay, *I make a Donation*, Mortis Cauſâ, *irrecoverably*, it paſſes into a ſimple Donation; becauſe, as it cannot be revoked, it is repugnant to a Donation *Mortis Cauſâ*; and, the Words of one Donation being adapted unto the other, thoſe Words, *Mortis Cauſâ*, ſtand for the Cauſe or Conſideration of the Donation, as *on the Proſpect of Death:* But it is otherwiſe, if the Words do not agree; as when I grant any Thing in a precarious Manner. Though a Stipulation added to a *Nominate* Contract, be a *Nominate* Contract in itſelf; yet if it be added to an *Innominate* Contract, it ſtill retains the Nature of the Contract into which it is added: And it is adjudged to be a *Nominate* Contract, or an *Innominate* Contract, as it more or leſs aſſimulates a *Nominate* than an *Innominate* Contract; and yet the contrary is obſerved in an odious Matter [g]. An *Innominate* Contract is a Contract of great Imbecillity, and does not produce an Action, till it be fulfilled on the Part of the Agent: But it is otherwiſe in reſpect of a *Nominate* Contract [h]. A Tender of Money is not ſufficient to demand an Action in an *Innominate* Contract, but an actual depoſiting the ſame is requir'd: But it is otherwiſe in a *Nominate* Contract [i]. At this Day the Uſe of an *Innominate* Contract is very rarely practis'd. *Nominate* Contracts had heretofore certain Forms preſcribed, which are therefore in our Books called *vulgar* Forms [k]; becauſe they accrued unto all Contracts of ſuch *Species*, only changing the Name and Price ſet forth in the Contract: But it was not the ſame in *Innominate* Contracts; becauſe the whole *Series* of the Matter was to be deſcribed. But theſe *vulgar* Forms are now grown obſolete and diſuſed.

[e] Quæſt. 3. n. 3.

[f] Conſ. 302.

[g] Alex. Conſ.

[h] Rom. Conſ. 86.

[i] Crav. Conſ. 331.

[k] D. 47. 2. 42. D. 19. 5. 1.

There is another Diſtinction of Contracts, *viz.* There are ſome Contracts which are in Writing, and others without Writing. A Contract in Writing has many Specialties annexed thereunto. For if a Contract be executed in Writing, and, by a Miſtake, the Day of the Contract be omitted, it cannot be added and ſupply'd by the Notary; though in another Contract, which is not made in Writing, it may be added [l]. Contracts are ſaid to be celebrated in Writing two ſeveral Ways, *Firſt*, When the Parties ſo expreſly agree, that it ought to be made in Writing [m]: And when the Parties thus agree, the Contract is not deemed to be perfected, till it be reduced into Writing. For if the firſt Contract were valid, the Notary afterwards making a Writing, could not be ſaid to be asked touching the firſt Contract, becauſe he can only be ſaid to be asked what is done before him, and there would be two Contracts, *viz.* the firſt made without Writing, and the other made at the Time of the Deed or Inſtrument executed, which cannot be. *Secondly*, A Contract is ſaid to be celebrated in Writing, when Writing is of the Subſtance of a Contract, as it is in ſome Caſes. Thus with us here in *England*, a Contract of Debt upon a Statute-merchant, or a Statute-ſtaple, ought to be executed in Writing,

[l] Guid. Pap. Deciſ. 585.

[m] C. 4. 21. 16.

and recorded before ſuch Perſons as are authoriſed by Statute to receive ſuch an Acknowledgment of the Debt contracted. With us here in *England*, Contracts in Writing are, or ſeem to be, of a more exalted Nature, and to bind more than meer Stipulations: For if Writing intervenes, it is not neceſſary to expreſs the Conſideration of a Contract. See *Plowden's* Commentaries in the Caſe of *Sherington* [n]. If a verbal Contract be made touching any Thing, and an Obligation in Writing be afterwards drawn thereupon, ſuch former Contract is wholly extinguiſhed, and does not give any Action, but only the Deed or Speciality has Operation in Law [o]: And herein the *Civil* and our Common Law do both agree.

[n] Fol. 308.

[o] Fitzh. N.B. Fol. 121.

As a Contract, properly ſpeaking, is ſaid to be, when an Obligation intervenes *hinc inde*, between two Perſons, or more, by Conſent; ſo if the Parties diſſent or diſagree about any Thing therein, it vitiates the Stipulation or Contract: Wherefore, the Parties contracting ought to hear each other on both Sides, and to have a right Underſtanding of the Matter contracted for: For if one underſtands one Thing, and another underſtands it of another, nothing at all is done therein [p]; and therefore we ought to abide by the Words of the Contract: And the Words of Contracts ought to be underſtood according to the proper Signification of them, and not to be taken looſely and improperly [q]; becauſe every Contract, Pact, Renunciation, and Obligation, as they are chiefly contrary to *Common Right*, are deemed Odious; every Departure from *Common Right* being adjudged ſo [r]. And as the Words of a Contract are to be underſtood ſtrictly, a Grandſon does not come under the Appellation of a *Filius* or Son; nor does the Maſculine Gender include the Feminine, according to the common Opinion of the Lawyers [s]. In Contracts made in *Latin*, and expreſſed in the Subjunctive Mood, when it is doubted whether the preterperfect or future Tenſe is meant; it ſhall be intended of the preterperfect, and not of the future Tenſe. To *reform* a Contract, is to modify it in reſpect of its Qualities, either by lopping off, qualifying, or in ſome reſpect altering the Form of the Contract, but yet retaining the Contract itſelf. As when I ſell you a Houſe for One hundred Pounds, and immediately we covenant and agree, that you ſhall only pay Eighty Pounds for it: And this is called the *Reforming* of a Contract: Which I here mention, becauſe our Books ſpeak thereof. As he, who acquires a Right by Verrue of a Contract, ought to accept of ſuch Contract, with all the Pacts and Clauſes therein ſpecially contain'd [t]; ſo he, that makes uſe of any Contract, ſeems to have receded from a Pact for the reſcinding any Clauſe or Covenant of ſuch Contract, and *tacitly* to have approved thereof. But if the Contract falls to the Ground, all thoſe Things which are comprehended in ſuch Contract, and the Pacts and Clauſes annexed thereunto, have no Operation at all [u].

[p] Bart. Conſ. 59. lib. 1.

[q] Alex. Conſ. 204. lib. 2.

[r] Abb. Conſ. 51. lib. 2.

[s] Alex. Conſ. 104. lib. 2.

[t] D. 40. 1. 23. D. 2. 14. 28. 2.

[u] C. 4. 6. 1.

Thoſe Things which belong to the Nature of a Contract, are looked on as Things expreſſed in ſuch Contract: And therefore, in a Loan or *Mutuum*, it is deemed to be agreed, That a Thing of the ſame Kind and Goodneſs ſhall be reſtor'd, otherwiſe the Borrower ſhall not be releaſed from an Action [x]. Now the Nature of a Contract is the very Force or Quality of the Contract itſelf, which is introduced according to the proper Bounds of the Contract, and is ſeparated from ſuch Things as may happen foreign to ſuch Contract [y]. But the Subſtance of a Contract is the principal Eſſence thereof, without which the Contract falls to the Ground and cannot ſubſiſt [z]. Hence it is, that though the Matter and ſolemn Form of a Contract are widely different from each other; yet they are couched under the Name of the Subſtance

[x] D. 46. 3. 33. 1.

[y] Gloſ. in L. 7. D. 18. 1.

[z] D. 7. 5. 2.

Subſtance of a Contract [a], as already remember'd. There are ſome Things, which ſeem *naturally* to belong to the Subſtance of a Contract, and others which do only by *Cuſtom* belong to the Subſtance thereof. The firſt, are ſuch Things which are ſo annexed to the Origin of the Contract, that they may be removed or taken away without deſtroying the Contract itſelf; as in a *Præcarium*, that the ſame ſhould be revoked at the Pleaſure of him who grants it [b]: And it is the ſame Thing in a Contract of Bargain and Sale, *viz.* That he, who is the Proprietor of the Thing ſold, ſhould trnasfer the Property thereof to the Buyer, and the Buyer ſhould pay the Price. But thoſe Things which are of the Subſtance of a Contract by *Cuſtom*, are ſuch as theſe, *viz.* That the Vender do ſtand to an Eviction of the Thing ſold [c], *&c.* And theſe Subſtantials may be taken away by a contrary Pact, without deſtroying the Contract.

[a] Bart. in L. 1. D. 12. 6.

[b] D. 43. 26. 17.

[c] D. 21. 1. 31.

In all Contracts or Conventions, Four Things are principally to be conſider'd. *Firſt*, The Matter of the Contract, which is fit to receive the proper Terms, touching which a Convention may be made. *Secondly*, The Perſons which give a Form thereunto, and by whom Conventions are made. *Thirdly*, That which is tranſacted therein, and the Quality of the Contract, which is propounded as perfected, when it goes before the Iſſue of the Contract, and denotes the Matter and Form thereof, in order to produce an Effect. And, *Fourthly*, The Action itſelf, which is the Effect and Conſequence of a Contract. Now, whatever Things we have the Property of, may, by our Act and Deed, become the Subject of a Contract, unleſs they are hinder'd by ſome ſpecial Prohibition. And we may be hinder'd either by Nature, or by Man, or by the Law, from making it. A Contract is forbidden by Nature, touching a Thing which cannot naturally happen or be perform'd by us. For, touching ſuch Things, there is no Obligation incumbent on us. And therefore, ſuch Things as are not *in Rerum Naturâ*, or which are impoſſible to be done, are accounted *pro non adjectis*, or, as Things within the Compaſs of this Axiom, viz. *impoſſibilium nulla eſt Obligatio.* So that a Pact or Contract which is impoſſible to be comply'd with, is not valid [d]. Thus, if a Perſon would, by a Pact or Covenant, ſet aſide the Right of Blood, in other Terms call'd *Agnation*, it is an invalid Act: For the Law of Nature has an everlaſting Perſeverance; the proper Matter hereof remaining untouch'd with its Form. Hence *Auguſtus* aboliſh'd and wou'd not ſuffer unto the *Roman* State that ridiculous Abdication of the *Greek* Children. Yet it muſt be own'd, that ſome Pact may be made by way of Fiction, touching Things; but it muſt be without any Regard had to their Poſſibility, *viz.* either that they may have been, or may be: As when a Man, through his own Fault, does not perform that which is due, when he might and ought to have done it, he ſhall be obliged to do it after the Loſs of that Thing, and the Thing is feigned to have a Being.

[d] C. 8. 38. 8.

Touching the Perſons who give a Form unto a Contract, and by whom Conventions are made, it is to be known, That every one who is endued with Reaſon may make a Contract, unleſs as before excepted; provided he has the Adminiſtration of the Goods or Eſtate touching which he is to contract, and is not hinder'd by Law: becauſe a Contract is a human Act, which ought to be executed in an human manner, according to a Diſpoſition of Law. But he that is not endued with the Uſe of Reaſon, has neither the Adminiſtration of his Eſtate or Goods; and therefore cannot execute a human Act, becauſe he has not the Right of making any Diſpoſition. Hence it follows, *Firſt*, That Madmen, when they have not their lucid Intervals, and Infants not yet come to the Uſe of Reaſon, cannot make a valid Contract; ſince a free Conſent is neceſſary to perfect the ſame: And ſo likewiſe is the Uſe of Reaſon which the aforeſaid Perſons are deſtitute of. And this is true, though they attempt to make a Contract, and bind

bind the ſame with an Oath. *Secondly*, A Prodigal, to whom the Law has interdicted the Adminiſtration of his Eſtate, cannot make a Contract: And therefore a Contract made with him, without his Curator's Conſent, is invalid. But of theſe Perſons I have already treated.

[e] In L.6. C.5. 11.

Solemnities of Contracts, according to *Baldus* [e], are ſaid to be thoſe Things which ſome Law or Statute requires, to give Strength and Validity to a Contract, beſides or beyond the original Form of the Contract. Hence it is, that a Pupil or Minor cannot, without the Conſent of Guardians, and the Decree of the Judge, ſell a real Eſtate, though ſuch Sale has all the Subſtantials of a Contract, as before mention'd: For if the Guardian's Authority and the Judge's Decree do not intervene in the Sale, ſuch Contract celebrated by a Minor is not valid [f]. And this Decree of the Judge, and the Guardian's Authority, which are requir'd in a Sale made by a Minor, beyond the Form and Perfection of the Contract of Sale, are call'd the Solemnities of the Contract [g]. A Solemnity which is requir'd in the principal Contract, is alſo neceſſary in the Ratification of that Act or Contract: For the Ratification of a Contract is call'd an *improper* Contract, whereby the Perſon ratifying ſuch Act is obliged not to contravene or impugn ſuch Act ratify'd by himſelf. Hence it happens, that ſuch Solemnity as is requir'd in the Contracts of Minors, is even neceſſary, when a Ratification thereof is made by themſelves in the Time of their Majority. If a Contract be made by a Minor without a Solemnity, and ſuch Contract be made for his Advantage, it is valid without any Regard had to the Solemnity omitted. Yea, though a Minor be not obliged by a Contract which is null and void when he comes to full Age; yet he ſhall have his Option, whether he will compel the Perſon contracting with him to fulfil the Contract, or not. And it is the ſame thing, if he continues ſtill a *Major*, and he be prepar'd to perform the neceſſary Solemnity, or does it when he comes to full Age.

[f] D. 26. 8. 9. pr.

[g] Gloſſ. & Bald. in L. 13. D. 6. 2.

There are Six Things which are requir'd to corroborate and ſtrengthen a Contract, in ſuch a manner as that an Action may be brought thereupon. As, *Firſt*, It is neceſſary that there ſhould be a Creditor and Debtor belonging to it. *Secondly*, The Thing contracted for, ought to be ſuch as may be the Object of a Stipulation, and not ſacred, *&c.* *Thirdly*, The Cauſe or Conſideration of the Contract ought to be honeſt, reaſonable, and poſſible. *Fourthly*, A Condition ought to exiſt; becauſe, before the Event of ſuch Condition, no Action lies. *Fifthly*, The *Modus* of ſuch Contract ought to be fulfilled. And, *Sixthly*, The Contract itſelf ought to be clear and intelligible; becauſe, if a Contract be doubtful, and cannot be underſtood, no Action ariſes from thence [h]. But, generally ſpeaking, doubtful Words are interpreted againſt him who founds his Intention on a Contract, or againſt him who produces the ſame. Uncertainty renders a Contract ineffectual upon ſeveral Accounts: Sometimes, by reaſon of the Generality of the Words, a Perſon may be diſcharged from that which was the Intereſt of the Stipulator to accept of [i]; as, when he who promiſed another an Eſtate, offers a Palm of Land [k], which is from the Uncertainty of the Promiſe void. Sometimes, from a preſum'd Error; as, becauſe it was agreed, that a Thing ſhould be expreſs'd in the Contract itſelf with more Certainty, which is found to be omitted [l]: And ſo in other Reſpects.

[h] Bald. Conſ. 279. lib. 2.

[i] D. 45. 1. 95.

[k] D. 30. 1. 37.

[l] D. 41. 1. 115.

If any Perſon brings an Action, or impleads another on the ſcore of a Contract which he has enter'd into, the Plaintiff ought to prove the Contract formed *certo Modo*: For it is not enough to prove the Treaty of ſuch a Contract, or that ſuch a Contract was treated of; becauſe the bare Proof of ſuch a Treaty is not relevant, unleſs a Proof be alſo made that that Treaty was concluded and agreed on; ſince there are many Things treated of, which are not finiſh'd and perfected by a Concluſion intended [m]. Now a Contract is underſtood to be formed *certo Modo*, when there is a Deed or Inſtrument

[m] D. 45. 1. 134. 1.

Inſtrument in Writing between the Parties contracting; and this Inſtrument having receiv'd its Completion, has been executed between the Parties on all Sides, *viz.* by a Subſcription of the Parties themſelves contracting, and by Notaries [n], *&c.* for 'till the Parties have ſubſcribed themſelves, the Contract is not perfected, And if the Deed of Contract is not executed and made perfect by all the Parties, in every Part thereof, it is lawful for one of the Parties contracting to recede from the Contract, though the other oppoſes the ſame. For if the Contract be not perfected in all Parts, it is only *Propoſitum in mente*, or a mental Purpoſe, which has no Operation at all in Law. A Contract is not ſaid to be perfected, though a Man ſhould ſay, *I am willing to contract*; becauſe it is one thing to contract, and another to be willing to contract: For the *Latin* Verb *Volo* moſt commonly imports ſomething *de futuro*; though ſometimes it denotes a Thing *de præſenti*, as may be ſeen in the Title *Of Laſt Wills and Teſtaments*.

[n] C. 4. 21. 17.

'Tis very much the Intereſt of every Perſon contracting, to know the Condition of him with whom he contracts; becauſe if he be ignorant thereof, and receives any Damage or Detriment thereby, he ought to impute ſuch Damage to his own Fault, for that he made no better Enquiry into his Condition, there being afterwards no Room for Repentance or drawing back from the Contract. Therefore, if any one has lent Money to a Perſon under the Power of the Father, and ſuch Perſon has ſquander'd away this Money in immoderate eating and drinking, or in whoring, and the like, the Creditor cannot by Suit recover his Money lent, though the Exception of the *Senatus-conſultum Macedonianum* (which provides for the Father and the Son) had never been given; for ſuch Money is entirely loſt to him, by the ancient *Civil* Law. Nor can the Creditor complain that he was circumvented; ſince he ought to know, that ſuch *Filius-familias* may enjoy and uſe this Benefit.

Again: If a Perſon enters into Partnerſhip with a Partner who is a prodigal or a negligent Fellow in Buſineſs, he ought not to complain of it, but muſt blame himſelf that he has aſſum'd ſuch a Partner. 'Tis alſo inferr'd from this Law, That he who accepts of an inſufficient Security, whether he does it knowingly or ignorantly, cannot afterwards ſet him aſide, and demand a more proper Surety; for he ought to have examin'd, and with more Diligence to have enquir'd into his Subſtance, before he accepted of him. Laſtly: If any one ſhall buy a Thing ſtollen, he is not only bound to reſtore the Thing to the Owner, but ſhall loſe the Price that he paid for it: And the Emperor's Anſwer may well enough be objected to him, *viz. Learn to traffick more cautiouſly, leſt thou art damnify'd by this way of Dealing, and doſt incur a Suſpicion of Theft.* By the Law of *England*, if a Man buys ſtollen Goods in a Market-overt or Fair, and the Goods are tolled, the Buyer may ſue the Seller for the Price paid, and ſhall not incur the Suſpicion of Theft.

It is laid down as a Rule in Law, That he who makes a Contract, is not preſumed to make ſuch Contract by any Compulſion or Fear [o]; becauſe it is a Crime or Treſpaſs to put any Perſon under an Impreſſion of Fear; and a Crime or Treſpaſs is not preſumed [p]. And this Preſumption truly has Place, when a Contract is celebrated in any City or famous Place wherein there is a conſtant Adminiſtration of Law or Juſtice [q]. But this Preſumption has Place much more, if the Contract has been celebrated in the Preſence of Friends, who will not ſuffer their Friend to be put into ſuch Fear. Much leſs are thoſe Perſons preſum'd to put a Man in Fear, over whom the Perſon alledging it has an abſolute Power and Command. A Contract made either through a grievous or light Fear, is a valid Contract, according to the Law of Nature; becauſe there is a ſufficient Conſent and Will to make a Contract: For, according to *Ariſtotle*, Fear does not

[o] C. 2. 20. 20.

[p] D. 17. 2. 51.

[q] D. 4. 2. 23.

ſimply take away Conſent; but it is otherwiſe, according to the *Civil* Law. No one acquires any Right by Virtue of a Contract, though ſworn to, if ſuch be an unlawful Contract.

A Contract, in Propriety of Speech, is the Act and Deed of the Parties with all its Pacts and Cauſes; and it differs from the Inſtrument of ſuch Contract, which is the Act and Report of the Notary; containing the Day, Month, Year, Place, the Names of the Witneſſes, and their Subſcriptions [r]. *Secondly*, Becauſe the Pacts and Conditions put in a Contract are Part of the Contract, and cannot be ſeparated from it: And therefore, a Perſon who hires any Thing, and takes all fortuitous Caſes on himſelf, is ſaid to hire it for a leſſer Price [s]; and it is in this Senſe a Part of the Contract. Where the principal Contract is not valid, the Pacts which are acceſſory thereunto have no Operation in Law [t], according to this Rule, *viz. Ubi deficit Subſtantia, ibi deficit Accidens.* As there are ſome Things which are term'd the *Subſtantials* of a Contract, and of all Acts, an Omiſſion of which annuls the Contract; ſo there are ſome Things which are ſtiled the *Accidents* of a Contract, which may be omitted without vitiating the Contract. If a Man contracts to pay Money for a Thing which he has bought and purchas'd, and then gives a Bond for the Money thus contracted to be paid, the Contract is thereby diſcharged, and he ſhall not have an Action of Debt upon the Contract, but upon the Bond, (as before hinted). A Contract is previous to an Obligation, as an Obligation is to every Action: And it is ſometimes null and void, to the Prejudice of one Party, and not to the Prejudice of the other, as it is upon him who founds the Cauſe of his Contract upon Deceit and Knavery. But tho' the Perſon guilty of Fraud cannot have an Action on ſuch Contract as is founded upon Deceit; yet he, who ſuffers by ſuch a fraudulent Action, may [u]. A Contract may be perfected in reſpect of one Moiety, and not in reſpect of the other: As when I ſay, *I give this Thing*, or *this Money*, *to you*, and you ſay, *I accept thereof as to one Moiety*; the Gift in this Caſe is perfect in reſpect of that Moiety, and not in reſpect of the other [x]. In Contracts that are mutually binding, as ſoon as one of the Parties contracting has fulfill'd the Contract on his Side, the other Party that has not perform'd his Part, when he might have done it, is adjudged to be *in Morâ*, though there be no Time fix'd and appointed for the Performance thereof *y*.

[r] Bald. Conſ. 444. lib. 1.

[s] Bald. Conſ. 119. lib. 1.

[t] C. 4. 6. 1.

[u] D. 2. 14. 7. 7.

[x] D. 29. 2. 1.

[y] D. 19. 1. 13. 19.

The Words of a Contract ought to be referr'd to the Time when the Contract was made; and ought likewiſe to be taken *cum Effectu*, and in a Civil Acceptation of them. They ought to be underſtood in the Nature of the Contract, and the Subject-matter thereof: For the Effect of a Contract ought to be more regarded than the bare Words thereof; though, generally ſpeaking, they ought to be taken ſtrictly; it being Equity, rather to conſider the Deſign of a Contract, than the Words themſelves. A Fiction is not admitted in the Interpretation of a Contract; becauſe ſuch a Fiction does not obtain in a Contract and Diſpoſition of Law. But though the Time, when the Contract was made, ought to be conſider'd in the Interpretation of Contracts, as aforeſaid; yet the Time of the Contract is not conſider'd in thoſe Things which have a Retroſpect to Matters paſs'd; but the Condition exiſting is conſider'd. Every Contract ought to be underſtood *ad bonum & ſanum intellectum.* Enunciative Words do not induce any Obligations in Contracts, but do only ſerve to induce a Proof thereof. A Contract is proved by the Evidence of the Seals, if a Notary be wanting thereunto. A Contract ſeems to be made in that Place where a Diſcharge ought to be perform'd: And as Contracts are regularly underſtood to be ſolemnized and executed according to the Senſe and Cuſtom of the Country where they are made; ſo the Place or Country where the Contract is made, ought to be very much regarded in the Interpretation

pretation thereof. When two Contracts are contrary or incompatible unto each other, we ought to abide by the laſt of them: For, in ſuch a Caſe, the laſt diſſolves and aboliſhes all former Contracts.

Every Contract is diſcharged after the ſame Manner, as it was firſt made and enter'd into: For if it was made by Words, it may be diſſolved by Words; but if it was made by Writing, it ought to be diſſolved by Writing. And a Contract made by Conſent, is diſſolved by a contrary Conſent, if nothing enſues thereupon; and the ſame be *Res integra*. Regularly ſpeaking, all Contracts and Obligations paſs to Heirs, though Heirs be not mention'd therein. And hence that Clauſe of Notaries is ſuperfluous, when in Inſtruments they mention not only the Parties contracting, but even their Heirs. For every Covenant in a doubtful Caſe, is a real Covenant or Convention; and conſequently paſſes to Heirs, provided the Perſon that acquires any Thing thereby be mention'd in the Convention. If a Contract be fulfilled either by the Party himſelf, or by any other Perſon in his Name and on his Account, it is ſufficient. Contracts receive the Force of a Law from the Parties contracting; provided ſuch Contracts are not founded on Deceit, or eſtabliſh'd on Iniquity. Thus the Contract of the Prince or Emperor is deemed a Law, when it is made *abſque vitio*: But it is otherwiſe, when it is made *cum vitio*, as when it is contrary to the Law of Nature, or good Manners. And all Contracts are of ſuch a Nature, that if they are once enter'd into, they cannot be eaſily revoked; for *Quod placuit in Contractibus, diſplicere non poteſt*, ſays the Law: But the Nature may be changed by the Covenant and Agreement of the Parties contracting. All Contracts are introduced by, and proceed from the Law of Nations, except theſe four alone, *viz. Stipulation*, *Donation* on the Score of Marriage, an *Obligation in Writing*, and an *Emphyteuſis*. In all Contracts whatſoever, there are three Things to be conſider'd, *viz.* The Covenant, the Obligation, and the Action: And as an Obligation ariſes from the Covenant, ſo does an Action ariſe from the Obligation. The Appointment and Adding of a Penalty unto a Contract, is null and void, if the principal Contract itſelf be null and void, and contrary to Law.

Among *Nominate* Contracts there are five Kinds, which are founded upon mutual Conſent alone, as it has been already obſerved, *viz.* Bargain and Sale, Hiring and Letting to Hire, Partnerſhip, an *Emphyteuſis*, and a *Mandatum* or Commiſſion given. Wherefore, I ſhall in the following Titles firſt treat of theſe Kinds of Contracts; and then proceed to diſcourſe of ſuch as are grounded upon ſome Thing done, which are ſtiled *real* Contracts or Obligations, as a *Mutuum*, *Commodatum*, *Depoſitum*, and a *Pignus* or Pledge given; and *laſtly*, I ſhall ſpeak of Contracts or Obligations ariſing from Words ſpoken, and from Writing. And firſt *Of Bargain and Sale*.

TIT.

TIT. III.

Of Bargain *and* Sale, *the Eſſentials and Accidentals thereof; what Things may be bought and ſold, and who may conſent to this Contract; how it differs from Barter or Exchange, called* Permutation, *and how from Hiring and Letting to Hire: Of a Conditional Bargain, and who ought to riſque the Loſs of the Thing Sold, whether the Buyer or the Seller, and who ought to reap the Advantage of it,* &c.

HAVING already, under the foregoing Title, treated of Contracts in General, and therein obſerved that there are ſome Contracts which are founded on and perfected by mutual Conſent alone, I ſhall here conſider the firſt of thoſe Contracts under the Denomination of *Buying* and *Selling*, otherwiſe called Bargain and Sale: Whereby the Seller is obliged to deliver the Thing ſold, and the Buyer bound to pay the Price for the ſame [z]. It is a *Nominate* Contract, founded upon the Law of Nations, and ſaid to be perfected by *Conſent alone*, becauſe this Contract is perfected, as ſoon as the Buyer and Seller are agreed about the Thing, and have ſettled a Price touching the ſame, though ſuch Price be not paid down in Money, nor any Earneſt, nor any Writing made thereupon, or Thing deliver'd [a]. But yet this admits of two Limitations, *viz. Firſt*, Unleſs it be agreed between the Parties, That a Writing or Deed of Sale ſhould intervene, in which Caſe the Sale is not perfect, unleſs ſuch Deed or Writing be compleatly finiſh'd, ſubſcribed and executed according to Law [b]. And, *Secondly*, Unleſs an expreſs Condition, or a Condition implied, be added, that the Determination of the Price ſhould be referr'd to the Judgment of a third Perſon [c]. The ancient Lawyers, indeed, doubted, whether a Purchaſe was valid, if it was only agreed between the Perſons contracting in this Manner, *viz.* That the Thing ſhould be ſold for ſo much as *Titius* ſhould value it at. For Example; I would buy a Horſe of my Friend, who ſays to me, That I ſhall have it for the Price which *Titius* ſhall rate it at. Now if *Titius* ſhall ſet a Price thereon, the Contract is in this Caſe valid, according to *Juſtinian*, which, before his Deciſion, was doubtful: But if he who is named to ſet a Price thereon, either will not, or cannot determine the Price thereof, the Contract is not valid, through the Uncertainty of the Price of the Thing. And the ſame may be ſaid in reſpect of Hiring and Letting to Hire. If no third Perſon be expreſly named to determine the Price of it, but that it ſhall be according to a Price arbitrated by an honeſt Man, the Judge's Office may, in this Caſe, be implored to determine the Price thereof. But more of this by and by.

[z] D. 19. 1. 30. 1.

[a] I. 3. 24. pr.

[b] C. 4. 21. 17. I. 3. 24. pr.

[c] I. 3. 24. 1.

I have ſaid, that this Contract of Bargain and Sale ought to be perfected by Conſent, which ought to be mutual on both Sides [d]; and it ought to be certain, both in reſpect of the Thing and the Price itſelf [e]. Hence we may infer, that the eſſential and conſtituent Parts of this Contract are the *Merx* or Thing, the Price and the Conſent of Parties [f]. By the *Merx* or Thing, I mean the Thing which is bought and ſold: And by the *Price*, I underſtand a Sum of Money paid for it, whereby the Thing itſelf is eſtimated

[d] I. 3. 24. pr.

[e] D. 18. 1. 9 & 10.

[f] D. 18. 1. 1. 2. 36 & 37.

mated and valued [g]. If the Parties contracting diſagree, either in the Price, or about the Thing ſold, the Contract is imperfect; and therefore Conſent is eſſentially neceſſary. On the Buyer's Part, the Payment of the Price agreed on, and on the Seller's Side, a Delivery of the Thing or Commodity ſold, is the Conſummation of the Contract [h]. The Price of the Thing ſold ought to conſiſt either in Money paid down, or elſe promiſed to be paid, and not in other Things: For if it did, we could not diſtinguiſh, who was the Buyer, and who was the Seller, nor what was the Thing, nor what the Price; whereupon it will be rather called *Permutation*, which is a *Species* of Contract ſeparate from Bargain and Sale. I ſay, by the Word *Price*, we underſtand Money, which was invented as the Meaſure and Standard of all Things vendible and in Commerce. For before the Invention of Money, there was no ſuch Thing as Buying and Selling, but all Commerce was carried on by Barter and Exchange of Goods for Goods: Which Method and Dealing among Men, as it was attended with many Difficulties and Inconveniencies; ſo it was thought neceſſary to find out and diſcover ſomething as the Meaſure of Things vendible and commercial, whereby Traffick might be render'd more eaſy and commodious among Men; and this was by the Means of Money. A Buyer, or Debtor, makes Satisfaction by the Payment of any *Species* of Money, *naturally* ſpeaking. *Firſt*, Becauſe, in all Payments made, the Value of the Money paid, and likewiſe the Sum due, ought to be regarded, and not the Quality of the Money paid [i]. And, *Secondly*, Becauſe no Money coin'd or ſtamp'd with a Publick Impreſſion, according to Law, may be refuſed. 'Tis therefore a received Cuſtom in *Italy*, and other Places, for Payment to be made in any *Species* of Money, unleſs it be Braſs Money, in the Payment of a large Sum; becauſe the Receiver of Braſs Money in a large Sum, muſt be attended with ſome Inconvenience. But there is ſometimes a Compact or Cuſtom for Money to be paid in a particular *Species*, as Gold, and the like; and herein a certain *Species* is to be obſerved. And therefore, I ſay, *naturally* ſpeaking, in order hereby to exclude a contrary Cuſtom, Law, or Compact; ſince it may be eſtabliſh'd by Cuſtom, Law, or Compact, that Payment ſhould be made in Money of a certain *Species*, contrary to the Opinion of *Bartolus* and others, ſaying, That Gold Money may be tender'd even for a Debt in Braſs Money.

[g] D. 18. 1. 5. 1.

[h] D. 19. 1. 11. 2.

[i] D. 45. 1. 65.

Every Thing, which is the Subject of human Commerce, whether Moveables or Immoveables, may be bought and ſold, even an incorporeal Thing itſelf, as an Action, an Heirſhip, and the like [k]; not only that which is extant, and has a preſent Exiſtence, but even that which we have in view, and hope will happen hereafter, as the Reverſion of an Eſtate, *&c.* But there are ſome Things which cannot be bought and ſold, according to the Law of Nature and of Nations, as being Extra-commercial, *viz. Firſt*, Thoſe Things which have no Being in *rerum Naturâ*, and of which we can have no Hope they will ever exiſt [l]. *Secondly*, Things Sacred, Religious, and what we ſtile *Res Sanctæ*, are not the Object of Bargain and Sale; becauſe they do not lie in Civil Commerce [m]. And if any of theſe Things are ſold to an ignorant Buyer, the Seller ſhall be obliged to make good the Intereſt or Value thereof to the Buyer [n], who may otherwiſe ſuffer thereby: Nor, by the Law of Nature, can any one buy a Freeman, knowing him to be ſuch [o]; becauſe on the Head of ſuch a Perſon no Value can be ſet. By the *Civil* Law alſo there are ſome Things which cannot be bought and ſold at all: As, *firſt*, Things which are of a publick Nature, and which belong to the State and Commonwealth; and likewiſe ſuch as belong to a Corporation or Body Politick [p], unleſs this be done by the greater Part of ſuch Corporation, and the Names of the Individuals of the ſaid Corporation, which were then preſent at ſuch Sale, be expreſly

[k] D. 18. 1. 34. 1.

[l] D. 18. 1. 8. 1.

[m] I. 3. 24. 5. D. 18. 1. 22.

[n] D. 18. 1. 62. 1.

[o] D. 18 1. 70.

D. 18. 1. 32. 2.

[p] D. 18. 1. 6.

[q] C. 11. 31. 3. mention'd in the Sale [q]. Nor can Things ſtollen, or in the Poſſeſſion of
[r] I. 2. 6. 2. any one by forcible Means [r], nor Things given by way of Jointure, or
[s] I. 2. 8. 1. Dower, be ſold [s]; nor Things granted by way of *Emphyteuſis*, without
[t] C. 4. 66. 3. firſt requeſting the Conſent of the Lord and Proprietor of the Fee [t]; nor
[u] C. 8. 37. 2. Things which are Litigious [u], (pending the Suit), unleſs the Alienation of them be neceſſary; as on the Account of Partition, Dower, Donation *propter Nuptias*, Legacy, and the like [x]. And, *laſtly*, By the *Civil* Law,
[x] D. 31. 1. 69. 1.
[y] C. 6. 49. Things ſubject to Reſtitution cannot be ſold [y], unleſs it be in Favour of Dower, Alimony, Donation *propter Nuptias*, or in caſe of Neceſſity, or
[z] In L. 22. C. 6. 30. 4. for Charitable Uſes, *&c.* And then, according to *Bartolus* [z], it ought to be done by the Decree of ſome competent Judge. And the *Civil* Law likewiſe forbids all Poiſons to be ſold without Leave, through Fear of the ill
[a] D. 18. 1. 35. 2. Conſequences thereof [a].

Regularly ſpeaking, all thoſe Perſons may make a Contract of Bargain and Sale, who can give their Conſent; becauſe, as this is a Contract founded on the Law of Nations, and perfected by Conſent, it may be made between abſent Perſons, and by a Letter or Meſſenger; for Conſent may be
[b] D. 18. 1. 1. 2. given by a Meſſenger, or the Intercourſe of Letters [b]. But a Conditional
[c] D. 18. 1. 7. pr. Sale is not perfected, before the Condition has its Event [c]. A Sale of thoſe Things which conſiſt in Weight, Number, and Meaſure, as Corn, Wine, Oil, Silver, Coffee, *&c.* is perfected two ſeveral Ways, *viz. Firſt*, When Things are ſimply ſold, without any Regard had to their Weight, Number, and Meaſure. And, *Secondly*, When we conſider the Weight, Number, or Meaſure of the Things ſold. When Things are ſimply ſold, the Contract is deemed to be perfected, as ſoon as the Price is agreed on, whether we conſider the Action, or the Riſque of the Buyer, or not. But when we have a Regard to Weight, Number, or Meaſure, the Sale is Conditional, and the Contract does not ſeem to be perfect, till the Things ſold
[d] D. 18. 1. 35. are weighed, number'd, or meaſur'd [d]. Nor is this Contract ſaid to be perfected, before the ſame be executed in Writing, as it ought to be, if the
[e] C. 4. 21. 17. Parties article to have the ſame reduced into Writing [e]. A Day (which
[f] D. 18. 1. 41. may be added hereunto [f]) does not ſuſpend the Obligation of it, but only
[g] D. 50. 16. 213. the Delivery, and the Fulfilling of the Contract [g].

It has been a Queſtion among ſome, Whether a Delivery of the Thing ſold be neceſſary unto the perfection of this Contract; or whether Conſent alone be ſufficient? To which I anſwer, That Conſent alone, expreſſed by Words, or ſome external Sign, does perfect the ſame, as to its Subſtance,
[h] D. 18. 1. 34. 3. and the Buyer may have an Action for the Delivery thereof [h], and alſo to
[i] D. 18. 6. 13 & 15. make good all manner of Loſs and Damage [i]. If Goods are ſold in Groſs, and without Weight and Meaſure, the Sale is perfected by a Delivery of
[k] C. 4. 48. 2. the Keys, where ſuch Goods or Wares are kept, unto the Buyer [k]. But if Goods are ſold from a Ship, inſtead of delivering the Keys, it is ſufficient to put the Cuſtody of the Ship into the Hands of the Buyer [l], and the
[l] D. 41. 2. 51. fin. like. By the *Civil* Law, a Buyer, from the Time of the Thing deliver'd
[m] C. 4. 49. 5. to him, ought to pay *Uſe* or Intereſt for the Purchaſe-Money not paid [m]; and ſo likewiſe ſhall he who receives the Fruits of an Eſtate or Thing, before the whole Price is paid: But, I think, this is otherwiſe by the *Engliſh* Law. Fruits hanging on a Tree, or growing on the Soil at the
[n] D. 19. 1. 3. 1. Time of a Purchaſe made, though they are ripe, yet belong to the Buyer [n]: But if they are ſever'd from the Soil, though not carried away, yet they belong to the Seller of the Eſtate; and if the Buyer receives them, he ſhall
[o] D. 19. 1. 2. fin. be oblig'd to refund them to the Seller of the Land [o].

When Wine is ſold *ad Menſuram*, the Seller ſhall run the Riſque of the Wine being changed, running out, *&c.* before it be meaſur'd: But when it is not ſold by Meaſure, but as a certain Body, or in Groſs, the Buyer ſhall immediately run the Riſque, or ſtand to the Hazard. Thus the

Riſque

Riſque of the Sharpneſs of Wine ſold in Hogſheads, immediately appertains to the Buyer, after Taſting, and Approbation thereof; (a Note or Evidence whereof, is, Having the ſame conſigned over, or the Buyer ſetting his Mark to it [p]); unleſs the Seller has affirmed touching the Goodneſs of it, and knew that the Goodneſs of it wou'd be changed within a few Days. For in that Caſe, unleſs he warns the Buyer of the Fault of it, the Seller ſhall abide by the Loſs [q]. What is here ſaid in reſpect to Wine, holds alſo good in regard to Oil, Corn, and the like, which grow worſe and are entirely ſpoiled after Sale [r]. *Titius* ſold unto *Caius* all the Wine in ſuch a Cellar, and deliver'd him the Keys thereof: In this Caſe, if the Wine be changed or grow worſe, *Caius* ſhall ſtand to all the Loſs thereof. But if *Titius* ſell Wine unto *Caius*, in a certain Quantity, as twenty Gallons, and the like, the Seller ſhall here abide by the Loſs, if the Buyer was not in Delay in receiving the ſame. A Vender is guilty of Delay in delivering of a Thing, if on the Day of Delivery, Weighing, Meaſuring, and the like, he has not ſummoned or given Notice to the Buyer to come and ſee theſe Things perfected [s]. But if the Seller gives ſuch Notice, it excuſes him from Delay, and the Buyer incurs a Delay by not coming. The Danger of Theft, and the like, belongs to the Buyer, unleſs the Seller has taken the Cuſtody on himſelf for a certain Time [t]; but after ſuch Time is expir'd, he is not liable [u]. If the Seller has taken the Cuſtody *indefinitely*, without any Time added and limited, he ſhall not be obliged thereunto *ad infinitum*, but only for a reaſonable Time [x]: And therefore, after Notice given to the Buyer to take away the Goods, the Seller is not obliged to take Care thereof [y]. If any fatal Damage ſhall happen to Goods in the Cuſtody of the Seller, as an Earthquake, Fire thrown into the Warehouſe by ſome miſchievous Fellow, a Tempeſt, Inundation, Shipwreck in Port, the Violence of Robbers, *&c.* he ſhall not be anſwerable, unleſs he has delay'd the Delivery of ſuch Goods, or hinder'd the Buyer from Taſting of the Wine [z], *&c.* If a Thing, that is ſold, be burn'd, the Loſs and Damage belongs to the Buyer; unleſs ſuch Fire happen'd by the Fault and groſs Negligence of the Seller [a]. But if a Thing ſold *ſub Conditione* periſhes before the Event of the Condition, the Vender ſhall ſuſtain the Loſs; unleſs it be covenanted that the Thing ſhall be preſerv'd at the Coſt and Hazard of the Buyer [b].

[p] D. 18.6.1.2.
[q] D. 18.6.15.
[r] C.4.48.2.
[s] D. 18.6.1.3. & l.4.
[t] D. 18.6.1.
[u] D. 18.6.1, 3, *&c.*
[x] D. 18.6.14. fin.
[y] D.18.6.1.4.
[z] D. 18.6.4.
[a] D. 19.1.11.
[b] D. 19.1.10.

A Perſon, that expoſes Victuals to Sale, may be compelled to ſell them for a juſt and reaſonable Price: For the ſuperior Magiſtrate may, in ſuch Things as are neceſſary to human Life, ſet a juſt Price thereon; it being the Concern of the Magiſtrate to provide for the Neceſſities of the State, and of ſuch as are ſubject to him. Hence *Bartolus* infers, that ſince Men cannot live without Cloaths and Lodging, which conſiſt in Houſes fit to Let, the Magiſtrate may aſcertain the Rent of them. Thus, in all well-govern'd States and Cities, they have a publick Officer or Magiſtrate to tax and aſſeſs a juſt Price on all Proviſions, which are of daily and neceſſary Uſe, being expoſed to Sale; and this we call the *lawful* Price of Things; ſetting aſide every humorous Inclination to the Thing expoſed to Sale. For, in the Sale of ſuch Things, it ought not to be left to the Diſcretion of Tradeſmen to do as they pleaſe and think fit [c]. In Things which are neceſſary, the true Price is conſider'd; but in Things which are not ſo, the Price agreed on is to be regarded [d]. By the *Canon* Law, a Biſhop may compel Perſons not to ſell Things dearer to Paſſengers and Perſons dwelling in the Place, than they are ſold in the Market; for no one ought to ſell his Goods for more than they are worth there. With us, Biſhops have nothing to do in this Matter; but Things are ſaid to be worth ſo much as they may commonly be ſold for, unleſs where there is a particular Aſſize ſet on them.

[c] C.4.59.1.
[d] D.15.3.5.

Though

Though a Seller ought to free himſelf from all Fraud and Deceit in the
[e] D.4.4.16.3. Thing ſold [e], as not to ſell Braſs for Gold, and the like; (for herein the Parties contracting are not agreed as to the Matter); yet theſe Perſons may circumvent each other in reſpect of the Price in ſuch Bargain and Sale; provided ſuch Circumvention does not exceed a Moiety of the juſt Price: For, in a Sale, Fraud is preſum'd, from an exorbitant Price. A Vender, by commending his Mercantile Goods is not liable to an Action of *Deceit*,
[f] D.4.3.37. if he does not do this for the ſake of deceiving the Buyer [f]; for every one is to praiſe his own Commodity, if it deſerves it. But it was otherwiſe in *Plato*'s Commonwealth: For he, in order to prevent the Evil of Lying, and that no one ſhould be enticed by the deceitful Words of the Seller, to buy a Thing dearer than the true and common Price thereof, made an excellent Law, much wanted amongſt our preſent Merchants and Tradeſmen, *viz.* That the Seller ſhould not give any Commendation of his Goods to be ſold, nor ſwear to the Value of them, under Pain of being ſcourged and whipt by every Citizen that was thirty Years of Age, hearing ſuch Perſon ſwearing thereunto: And if ſuch Citizen did not do his Duty herein, he was deemed a Betrayer of the Laws. And he who ſold any adulterous Wares, in Diſobedience to the Laws, might be accuſed by any Perſon before the Magiſtrate; and if he was an Inmate or Servant, he was to take ſuch adulterated Ware to himſelf. And if any Citizen, knowing the Perſons guilty, neglected to accuſe him, he was adjudged a Knave: But if he accuſed and convicted him, ſuch Wares were then devoted to the Gods preſiding over the Market. And the Seller taken in the Sale of ſuch Things, did not only forfeit the Thing itſelf, but had as many Laſhes given him in publick as he receiv'd Drams for ſuch Goods; and the Cauſe of his being whip'd, was to be publiſh'd by the Voice of the Common Cryer. By the *Roman* Law, the Purchace is valid, if a Man buys a married Woman, and thinks that he buys a Virgin: For Error is not allow'd, in this Caſe, to diſſolve the Contract *ipſo Jure*, but the Buyer is driven by
[g] D.19.1.11.5. his Action *ex Empto* to reſcind the ſame [g].

The Seller is not bound to deliver the Thing ſold, if the Price be not
[h] D.19.1.13.8. paid him [h], but may retain the ſame *in loco pignoris*, 'till ſuch Time as
[i] D. 18.1.32. the Price is paid him [i]; for the Buyer ought not to enjoy the Thing bought, and the Price both; and this proceeds from the Nature of the Contract. Nor does it become the Property of him who receives the ſame, unleſs a Price be paid for it, or the Purchaſer has Credit given him for the
[k] D. 18.5.22. Price [k]. The Seller is obliged to the ſafe Cuſtody of the Goods ſold, before the Delivery thereof: And therefore, the Vender of a Houſe is bound to make good the Damage of the Houſe, before he has quitted the
[l] D. 19.1.36. Poſſeſſion thereof, and deliver'd the ſame to the Buyer [l]. The Seller is likewiſe bound to the Buyer by the Deeds and Inſtruments containing the Right of the Eſtate ſold, call'd the Purchaſe-deeds; and alſo to declare
[m] D. 19.1.48. the Metes and Bounds of ſuch Eſtate [m]. If a Man buys an Eſtate of a private Perſon on this Condition, *viz.* That it ſhall pay no Tax or Tribute to the Government; he is not, by ſuch Pact or Covenant, exempted, but may be compelled not only to the Payment of future Taxes, but even to pay all Arrears; unleſs he has a ſpecial Covenant on the Seller to do
[n] C.4.47.2. the ſame [n].

A Perſon buying an Eſtate, or any Thing impawn'd or mortgaged to another, and which he, the Buyer, has improved and render'd of greater Value, ſhall be heard againſt the Creditor or Perſon to whom ſuch Eſtate is mortgaged bringing his Action for ſuch Eſtate or Thing, if he will
[o] C.11.2.2. pay off the Mortgage, and diſcharge the Thing itſelf [o]. And this proceeds, when the Buyer has made ſuch Improvements. But it is otherwiſe, if the Debtor who mortgaged the Eſtate has made thoſe Improvements;

ments; becauſe, then, Improvements are as an Acceſſion unto the Mortgage, and go along with it p. But if he who has purchas'd the Eſtate be willing to deliver up the Eſtate itſelf unto the Creditor or Mortgagee, then ſuch Purchaſer ſhall be paid for ſuch Improvements as he has made. And thus Acceſſions made unto an Eſtate mortgaged, as all Improvements are, are equally due unto Creditors upon a Mortgage, and render the Mortgage better, when ſuch Improvements are made by the Debtor who mortgaged the Eſtate. But 'tis otherwiſe, if theſe Improvements are made by another Perſon, to whom the Eſtate mortgaged paſſes *cum ſuo onere*. And if the Eſtate be evicted, he who improved ſuch Eſtate bought, but mortgaged to another, ſhall be diſcharged, or have the Eſtate, by paying the prime Value of it. See more of this under the Title *Of Mortgages*.

p D. 20. 1. 16.

An Eſtate or Thing bought by a Man's Wife, by the *Civil* Law becomes the Wife's, and not the Husband's, notwithſtanding the Law, which ſays, That whatever the Wife acquires, is deemed to be the Acquiſition of the Husband, and ſhall be reckon'd among the Husband's Goods: For this does not hinder the Contract made by the Wife herſelf to her own Uſe; yet it is preſumed the Wife paid for the ſame out of the Husband's Money. Wherefore, ſhe is bound to Account, for the Money thus laid out, unto her Husband, unleſs ſhe ſhall otherwiſe prove, that ſhe had that Money from ſome other Perſon; and in the mean time, what was purchaſed by the Wife, ſhall belong to the Wife, and not to the Husband. But if, in the Deed of Purchaſe which ſhe makes, it be ſaid, That ſhe paid for it out of her own Money, and bought it in her Husband's Preſence, he conſenting thereunto, ſuch tacit Conceſſion of the Husband ſhall be a Bar againſt him, and ſo far prejudice him, that it ſhall not be preſumed that the Money paid for it, was paid out of the Husband's Eſtate. By the Law of *England*, a Woman under Coverture cannot make a Purchaſe to herſelf by any means; becauſe, in this reſpect, ſhe is the ſame Perſon with her Husband.

A Man that buys a Thing *bonâ Fide* of a Poſſeſſor *malæ Fidei*, may defend himſelf againſt the Owner by Preſcription or Uſucapion: And he is ſaid to buy a Thing *bonâ Fide*, who really believes and ſuppoſes the Thing, which he has bought, to be the Goods and Property of the Seller himſelf, and that the Seller has the Right of Selling the ſame, without any Colluſion. Nor ſhall it be a Prejudice to the Buyer, for that he knew the Thing ſold to be bound or mortgaged to another, or that the Uſufruct thereof belongs to another. But a Man that *bonâ Fide* buys a Thing that is ſubject to Reſtitution, upon Eviction of the Thing, ſhall recover the Price or Value thereof, and ſhall have an Action *ex Empto* for Damages. But if a Man buys a Thing of a Diſſeiſor or violent Poſſeſſor, he ſhall not make it his own by Uſucapion, long Poſſeſſion, or Preſcription of Uſe. A Perſon, who buys a Thing, notwithſtanding Warning or Notice is given him, that the Thing ſold does not belong to the Seller, may be ſaid to be *in malâ Fide*, or guilty of diſhoneſt Dealing: But it is otherwiſe, if ſimple Notice be given him after he has purchaſed it. A Guardian or Tutor may buy the Eſtate and Goods of his Ward, with the Conſent and Authority of the reſt of the Guardians; provided he does it *openly* and *bonâ Fide*; otherwiſe he may not do it; this being forbidden, through a Preſumption of Fraud q. And this alſo holds good in every private or publick Adminiſtrator. For a Perſon that buys any Thing of a Ward or Pupil, without the Authority of his Guardian, or with the Authority of a falſe Guardian, does not ſeem to buy it *bonâ Fide*; nor ſhall he make it his own by Uſucapion, or Preſcription of Uſe. Yet ſuch a Purchaſer ſhall not be compelled to reſtore the Thing bought; unleſs the Money paid for it, and whereby the Pupil is enrich'd, be return'd to him again. A Perſon buying a Thing without the Guardian's Authority, is made liable to the Pupil; but the

q C. 4. 38. 5.

Pupil is not made liable to the Buyer, unleſs he be enriched thereby. A Man that buys a Thing of a Pupil in the Beginning, through Error of Law, cannot make it his own through Preſcription of Uſe, though the Guardian's Authority ſhould afterwards intervene. A Perſon that buys any Thing of a Pupil, ought to prove that he bought it with the Guardian's Conſent and Authority, and that no Law forbids him ſo to do: And if he buys any Thing of a Pupil being deceived with the Authority of a falſe Guardian, he ſeems to have bought the Thing *bonâ Fide*. A Man that buys a Thing by the Judge's Decree, is a Poſſeſſor *bonæ Fidei*, and has the Property thereof; and he who buys a Thing *bonâ Fide* may defend himſelf againſt the Creditor of the Seller by a Preſcription of ten or twenty Years, which the Seller cou'd not do.

If I ſell any Thing to you, and, in Virtue of Sale, I deliver the Thing ſold to you: In this Caſe, that Right which was in me the Seller thereby paſſes to you the Buyer, and no more. Wherefore, if I was the *direct* Owner and Proprietor of the Thing ſold, the direct and full Property thereof paſſes to you the Buyer: But if I have only the Uſufruct of the Thing ſold, then only the Property in ſuch Uſufruct paſſes to the Buyer; for he
[r] D. 18. 1. 32. that ſells a Thing, only transfers that Right which he has in the Thing [r]. When the Sale of a Thing is made, the Thing ſold paſſes to the Buyer, with all its *Onera* or Incumbrances. As for Example: If I ſell an Eſtate mortgaged or hypothecated, the Mortgage (which is the *Onus* or Incumbrance) ſhall paſs along with it: And ſo of other Things upon which there is an *Onus* or Incumbrance. An Uſufructuary may buy a Thing wherein he has the Uſufruct; and if he buys through Ignorance thereof, the Price of it ſhall be diminiſh'd by the Office of the Judge. Nay, a Man may buy that which is his own already under a Condition; becauſe, per-
[s] D. 18. 1. 61. haps, he may expect the Leaſe to be his own [s]. We oftentimes buy the principal Things themſelves, for the ſake of thoſe Things which accede thereunto; as an Houſe, on the ſcore of its fine Marbles, Paintings, and the like; and ſo we do an Eſtate, on Account of its Vaſſals belonging to it. If a Man ſells his Houſe, he is alſo underſtood to ſell the Statues,
[t] D. 18. 1. 52. C. 8. 10. 7. and all other Things which are incident and annexed unto the Houſe [t]: And if there be any Obſcurity in the Bargain and Sale, it ſhall rather affect the Seller than the Buyer; becauſe he might have expreſs'd himſelf
[u] D. 18. 1. 21. more clearly, if he had pleaſed [u]. If a Sale be made *alternatively* of ſeveral Things, it ſhall be in the Seller's Power to declare what Things are ſold: But if two Things are ſold *alternatively*, and the firſt-mention'd in the Sale is perempted or periſhes, the other remains ſold; ſo that the Loſs of the firſt belongs to the Seller, and the Loſs of the latter reſpects the Buyer: but if they are both loſt or periſh'd, the Price ſhall be due to the Seller.

Heretofore no one could Sell a real or immoveable Eſtate to any Perſon whatſoever, but only to ſuch as were related and near of Kin to the Seller, and this for the ſake of ſupporting the Dignity of a Family: Which Law is ſtill obſerved, where the *Feudal* Law governs, that is to ſay, where Eſtates are *Feudal*; and in ſeveral Places it was and is obſerved, where
[x] Rhenan. Rer. Germ. lib. 2. Eſtates are *Allodial* [x]. But at this Day this Law, in reſpect of *Allodial* Eſtates, now ſtands corrected in many Places; becauſe in theſe Eſtates every one may freely ſell and diſpoſe of the ſame as he pleaſes, to any Perſon whomſoever. By an *Allodial* Eſtate, I mean, an abſolute Freehold held of no Superior Lord, either mediately or immediately, and which is ſubject to no manner of Suit or Service: And for this Reaſon it is oppoſed unto a *Fief* or *Feudal*, which is always liable to ſome certain Service or other. For *Fiefs* were anciently granted on the Account of Fealty and Service due to the Lord of the Fee, the Property of the Eſtate ever remaining

maining in the Right of him that granted it; and only the Uſufruct paſſing to the Grantee, who was ſtiled the *Feudatary* [y]. [y] F. 2. 1.

Though that which is not yet in Being cannot rightly be ſtiled a Thing or *Res*, as future Fruits, and the like; yet they may be well enough purchaſed, as before hinted; for there is always this tacit Condition implied therein, *viz.* If the Things ſhall be produced. Thus, if a Man ſells unto another the Fole of ſuch a Mare, when it ſhall fall, or the Caſt of ſuch a Net for Fiſh [z], the Sale is good: For the Sale of a doubtful Event is an Event, though nothing ſhall happen from thence. But if it be by the Seller's Means that the Event does not enſue, the Buyer may have an Action *ex Empto* againſt the Seller. But though Things in Futurity may be bought and ſold; yet, by this Law, a Freeman cannot be bought, when he ſhall happen hereafter to become a Bondman [a], becauſe it is contrary to the Law of Nature and the *Civil* Law, to expect the Miſchief and adverſe Fortune of ſuch Freeman. But, by the *Civil* Law, a Son might be ſold by his Father, upon the Account of exceſſive Poverty, to relieve Hunger [b]; and, by the Levitical Law, for the Payment of his Debts [c]. Offices, *in their own Nature*, may be bought and ſold, unleſs there be ſome Law which prohibits the ſame; for Offices are rateable Things, and may be the Object of Price, as well upon the Score of that Eminency which the Perſons themſelves do enjoy, as on the Account of the Means of getting Money. I ſay in *their own Nature*: For, practically, it is not expedient that Offices ſhould be ſold; becauſe they would often be ſold to unqualify'd Perſons, and to the Detriment of the State: And therefore, the *Civil* Law forbids it. A Publick Way, Market, and the like, may not be ſold by a private Perſon, though the Sale refers to a Time when theſe Things ſhall come in the Hands of a private Man; becauſe the State has a Right of purchaſing the Reverſion before a private Perſon. A Man cannot buy Things given and deliver'd to him; becauſe, being the Proprietor by Donation and Delivery, he makes an idle and vain Purchaſe: But he may buy them in reſpect of the Poſſeſſion, if they be not deliver'd to him, and in reſpect of the Right which another may pretend to have in them.

[z] D. 19. 1. 11.

[a] D. 18. 1. 34.

[b] C. 4. 43. 2.
[c] Lev. 25.

Things Spiritual, of their own Nature, are not the Subject of Sale; as conſecrated Cups, Altars, Things Sacred, and the like: For theſe Things cannot be rated by Money in reſpect of the Uſe of them. Yea, according to the *Canon* Law, a Sale of ſuch Things is a kind of Sacrilege and Simony in the Perſon ſelling them. But though Spiritual Things, in their own Nature, are not ſaleable Commodities; yet, by Accident, in reſpect of the Materials and Workmanſhip made uſe of in fabricating the ſame, they may be ſold, even by the *Canon* Law, without Sacrilege or Simony. And by this Means, a Chalice, or an Eſtate, unto which the Right of Patronage belongs, may be ſold: But if the Price and Value of ſuch an Eſtate be enhanced on the Account of the Right of Patronage annexed to it, the Seller is ſtain'd with the Crime of Simony, according to the *Canoniſts*. *Secondly*, The Sale of any Church or Temple, made without the Prince's Authority, is invalid, though ſuch Church or Temple, in the Sale thereof, be only conſider'd in reſpect of its Materials, and the Expences laid out in Building the ſame: For a Sale of this Nature is irritated by the *Civil* Law [d]. But it is otherwiſe by the Law of *England*: For it is expedient for the Seller to have the Biſhop's Conſent, becauſe it is under his Care.

[d] C. 1. 2. 22.

The Word *Venditio*, or Selling, does not appertain to every Kind of Alienation; for it does not include an *Emphyteuſis*; nor the giving of a Pledge or Pawn: Nor, in the ſtrict Acceptation of it, does it extend itſelf to a *Donation* or *Permutation*. But it has been a Doubt, by what Name we ought to ſtile that Contract, whether by that of *Bargain* and *Sale*, or *Permutation*,

Permutation, or rather call it an *Innominate*, when ſome other Thing is given together with Money, (for a Sale without a Price is null and void) [e], *viz.* when Money is only given, as Part of the Price, together with ſome other Thing: As when I pay One Hundred Pounds for a Houſe, and, beſides this Money, I give a Horſe, or ſomething elſe: To which I anſwer, *Firſt*, That if the Price or Money much exceeds the Value of the Thing given with the Money, it ought to be deemed a Contract of *Bargain* and *Sale*, though the Words bear the Sound of *Permutation*, or of an *Innominate* Contract; becauſe that which much exceeds has the Eſſence of a *Principal*, and the Horſe is the *Acceſſory*: And therefore, this ſhall be deemed a Contract of *Bargain* and *Sale*; ſince ſo great a Price in Money is paid for the Houſe or Commodity ſold. *Secondly*, I anſwer, That it ſhall be reputed a Contract of *Permutation*, when the Thing given with the Money, exceeds the Value of the Money itſelf, tho' the Words ſhould ſound in Favour of *Bargain* and *Sale*, as appears from a Reaſon to be given hereafter. Wherefore, if the Value of the Horſe, in the Caſe propos'd, much exceeds the Value of the Money given together with the Horſe, it is called *Permutation*, and not *Buying* and *Selling*. *Thirdly*, When the Thing given and the Money, is of equal Value, or the Exceſs is not great, it ſhall be deemed ſuch a Contract as the Parties intended to execute. Wherefore, if the Parties deſign to execute a Contract of Sale, it is a Sale: But if they purpos'd a Contract of Permutation, it is Permutation. For a Contract has its Being from the Intention of the Parties contracting: But, in a doubtful Caſe, we ought to conſider the Words whereby the Contract was executed [f].

[e] D. 18. 1. 32.

[f] D. 45. 1. 54.

Bargain and *Sale* is diſtinguiſh'd from *Hiring* and *Letting to Hire*; for this laſt is, when the Workman or Artificer only reckons his Workmanſhip, and not the Materials: As when I deliver Gold to you to be made into a Ring, this ſhall be deemed a Contract of *Hiring* and *Letting to Hire*; becauſe you let your Work out to me unto Hire, and I hire your Workmanſhip. But when the Workman reckons his Workmanſhip and Materials, it is then adjudged to be a Contract of *Bargain* and *Sale*: As when a Goldſmith delivers a Ring, which he has wrought out of his own Gold, and I pay him for it. Yet there are ſome Caſes to be excepted out of this Rule. As when a Workman builds a Houſe on another Man's Ground: For then, though the Workman finds Materials, as Timber, Bricks, Tiles, and the like; yet he is deemed to work for Hire [g], becauſe the Proprietor of the Soil does, from that very Act, and that very Time, in which the Workman built the Houſe, and found Materials for ſo doing, acquire a Property in the Materials. For a Houſe built on another Man's Ground, goes to the Lord and Proprietor of the Land, as appears from the Title *Of Property and Ownerſhip* [h], already deduced.

[g] D. 18. 1. 20.

[h] Pag. 292.

In Bargain and Sale, a Pact is valid, if it be covenanted, that the Buyer ſhall reſtore the Thing ſold unto the Seller, if the Seller, or his Heirs, ſhall within a certain Time tender the Purchaſe-Money unto the Buyer, and thereupon the Seller and his Heirs have an Action *præſcriptis verbis*, if a lawful Tender be made of the ſaid Money; and if the Buyer be in delay of reſtoring, the Seller ſhall receive the ſubſequent Profits [i]. This Right, upon Agreement, that the Seller, or his Heirs, ſhall have the Power of buying back again the Goods or Wares ſold, before any other Perſon, the *Civil* Law [k] ſtiles *Jus Retractûs*, or a Right *de retro-vendendo*. Wherefore, the Heir who has this Right, ought to be the next or neareſt Heir, as he is ſaid to be whom no one goes before in Degree of Kindred [l]. Yet the Lawyers vary much in their Definition of a *Propinquus*, or neareſt of Kin: Some thinking, that the proximate Heir ought to be conſider'd in reſpect of him from whom the Things proceeded, without any Regard had

[i] C. 4. 54. 2.

[k] D. 19. 5. 12.

[l] D. 50. 16. 155. D. 28. 8. 1. 5. D. 28. 6. 34.

had to the Seller. But *Tiraquel* [m], with a better Appearance of Law, refers this *Proximity* to the Seller, and not to him from whom the Things firſt deſcended, or to his Stock. For when the Poſſeſſor dies, the neareſt of Kindred, from whom the Goods firſt came, ſhall not ſucceed to thoſe Goods, but the Poſſeſſor's neareſt of Kin [n]. The Kindred, among the *Hebrews*, claimed this Right *de retrovendendo*, without any particular Covenant [o]. And this Cuſtom is alſo approved of by the *Canon* Law [p], confirm'd in a Text of the *Feudal* Law [q], and follow'd in moſt Kingdoms, but not in *England*, for what Reaſon I know not.

[m] In Retr. Con. n. 1.
[n] D. 28. 6. 10. 2.
[o] Lev. 25. 23.
[p] X. 2. 41. 1.
[q] F. 5. 14. 15 & 16.

We have alſo another Pact in Bargain and Sale, ſtiled *Pactum Commiſſorium*. Which is, when it is covenanted, That the Thing ſold ſhould revert to the Seller, if the Reſidue of the Purchaſe-Money be not paid him by a Time prefix'd [r]: And thus a Perſon, who delivers an Eſtate, that it ſhould revert to him again, if the Price be not paid within a certain Time, may have an Action *ex vendito*, but not a real Action [s]; becauſe the Perſon did not make uſe of the Words mention'd in the *Lex Commiſſoria*, *viz.* That *the Thing ſold ſhould be looked upon as not purchaſed*. *Mævius* ſold an Eſtate unto *Flaccus*, and *Flaccus* paid part of the Purchaſe-Money on theſe Terms, *viz.* That if he did not tender or pay the remaining Part thereof within a Year, the Eſtate ſhould revert to *Mævius*. And it being a Query, Whether *Flaccus* might be convened in a *real* Action, it was held not; becauſe, as *Mævius* had transferr'd the Property, he could only have a perſonal Action, *ex Vendito*, for the Price: But if he had only deliver'd the precarious Poſſeſſion for a Time, a *real* Action would lie; becauſe the Property then remain'd with *Mævius*. Again, *Sempronius* ſold an Eſtate unto *Seius* on this Condition, *viz.* That if *Seius* did not pay the Purchaſe-Money by a Day appointed, the Sale ſhould be void, according to the *Lex Commiſſoria*. *Seius* paid not the Money: But when the Term was elapſed, *Sempronius* demanded the Purchaſe-Money, with Intereſt: In this Caſe, *Sempronius* ſeems to have foregone the Privilege of the *Lex Commiſſoria*; becauſe he had rather have the Price and Intereſt thereof than the Eſtate itſelf: And therefore, he cannot afterwards claim the Eſtate by a *real* Action; for he who firſt chuſes the Price, with Intereſt, cannot have the Benefit of the *Lex Commiſſoria* [t]. *Valerius* ſold an Eſtate to *Pamphilus*, and covenanted with him, That if the Purchaſe-Money was not paid by the Day appointed, *Pamphilus* ſhould be obliged to pay him Intereſt. In this Caſe, if *Pamphilus* does not pay Intereſt, he may be compelled hereunto. But if *Valerius*, in the Beginning of the Contract, had not made this Covenant, no Intereſt ſhould be due from the Time that *Pamphilus* was in Delay, unleſs he received the Meſne Profits of the Eſtate. But more of this hereafter, under the Title *Of Pacts*.

[r] D. 18. 3. 4.
[s] C. 4. 54. 3.
[t] C. 4. 54. 4.

Though in Bargain and Sale it be granted to buy a Thing for a leſs Price than the Thing is worth, and to ſell for a greater, and thus to circumvent each other in the Price of the Goods; provided the Deceit be trivial and the Damage ſmall: Yet it is not lawful to circumvent each other in faulty Goods; as to ſell a *Briſtol* Stone for a Diamond, or a faulty Horſe for a ſound one, and the like. For if the Seller conceals the Faults or Defects of the Thing ſold (whether moveable or immoveable) from the Buyer, or equivocates about the ſame, there may be what the Lawyers ſtile *Redhibitio* [u], that is to ſay, the Contract may be reſcinded, and the Seller muſt have his Goods, with the Profits of them, and may make Amends for Damages by Reaſon of thoſe Faults, which if the Buyer had known, he would not have bought at all; but with this Proviſo, that the Seller knew and concealed thoſe Faults. If the Seller was ignorant, the Goods may be return'd, but he ſhall not anſwer for the Damages occaſion'd by them [x]; no, though he commended his Goods in general Terms. There may alſo be

[u] D. 21. 1. 1.
[x] D. 18. 1. 45.

what the *Civilians* call a *Quanti Minoris*, namely, ſo much of the Price may be returned as the Thing ſold comes ſhort in Value by Reaſon of its
[y] D. 19. 1. 13 & 39. Faults [y], which, if the Buyer had known, he would not have given ſo great a Price. In living Creatures, the Faults muſt be ſo conſiderable as
[z] D. 21. 1. 4. 6. to leſſen the Uſe and Service of them [z], and ſuch as were ſecret and in-
[a] D. 21. 1. 1. 6. ward, not ſuch as were apparent [a], and the Buyer knew, or might have ſeen; ſuch Faults the Seller is not bound to declare, for they declare them-
[b] D. 18. 1. 43. ſelves [b].

As a Contract of Bargain and Sale is made by Conſent alone, without any actual Delivery of the Thing; ſo it may be diſſolved by Diſſent, unleſs it takes Effect from the Delivery of the Thing: In which Caſe it is not diſſolved,
[c] C. 4. 45. 1. unleſs the Thing be deliver'd back again [c]. For Example, if you have ſold me a Horſe, or the like, and you have not deliver'd it, nor I paid the Price, we may, by common Conſent, recede from this Act of Bargain and Sale; for the Contract then is *Res Integra.* But if the Thing has been deliver'd, or the Price paid, which makes it not to be *Res Integra*, neither of the Parties can forego ſuch Act of Bargain and Sale by a nude Conſent or Will, unleſs ſome contrary Act intervenes, *viz.* by my delivering back the Thing, or by your paying back the Money; in which Caſe the Contract is diſſolved. In *England*, no Contract for the Sale of any Goods for Ten Pounds or upwards, is valid, except the Buyer actually receives Part of the Goods, or gives ſomething in Earneſt for them, or unleſs ſome Note in
[d] 29 Car. 2. cap. 3. *Writing* be made of ſuch Sale and Contract [d]: And therefore, either of the Parties may forego the ſame. In *France* it muſt be in Writing, if it exceeds One Hundred Pounds: See *Domat* of the *Civil* Law, Tom. I. This I call a *voluntary* Departure from the Contract. But a Contract of this Kind may be reſcinded by an Action at Law upon the Account of Fraud, Force, and Error. As to Fraud and Deceit, we ought to conſider, whether it appears in the very Contract itſelf, or whether it was the *Cauſe* of the Contract. If Deceit was the Cauſe of the Contract, and the Inducement to
[e] D. 4. 3. 7. pr. it, the Contract is void *ipſo Jure* [e]. But if it was in the Contract itſelf, (by buying too dear or too cheap) it is not void, but may be made void by Action or Exception. In a Contract of Bargain and Sale, Deceit conſiſts in the Quality of the Seller's Mind, and not in the Price of the Thing: Or, in other Words, Deceit is proved from the Quality of the Fact, and not from the Smallneſs of the Price given; and, if ſuch Deceit intervenes, an Action lies againſt the Party deceiving. And thus a Sale, made for ſomething leſs than the Thing is really worth, is not reſcinded, unleſs Fraud or Fear intervenes; or unleſs the Buyer was circumvented in more than Half of the juſt Price, a due Regard being had to the Time of the
[f] C. 4. 44. 8. Contract [f]. To prove that a Thing was ſold for ſomething leſs than the Thing is really worth, it is ſufficient to ſay, That the Seller in the Beginning asked a greater Price than was afterwards agreed on. If a Purchaſe be made through Fear or Force, it may be reſcinded; becauſe this is a
[g] C. 4. 44. 1. Matter of ill Conſequence and Example [g]: And as Buying and Selling is a Contract founded upon Conſent; ſo there is nothing more contrary to Conſent than Force, Fear, and Error; and therefore it ſhall be reſcinded upon theſe Accounts. Hence it follows, that no one can be compelled to buy or ſell, unleſs it be (perhaps) for the publick Utility; and ſuch a Sale as is grounded upon Force or Error, is not valid, unleſs the Error be in
[h] D. 18. 1. 10. reſpect of ſome Quality, and not in the Subſtance of this Contract [h].

Bargain and Sale do ſo far require the Parties Conſent, that a Madman, who is not capable of giving his Conſent, cannot make ſuch a Contract, unleſs it be at the Time when he has his lucid Intervals. If the Seller be a Minor, the Decree of the Judge is then neceſſary; and the Judge of the Place where the Seller lives, or of the Place where the Thing is, is (according

to

to *Baldus*) a competent Judge in this Behalf. As this Contract is founded upon Conſent alone; ſo, if a Man ſhould ſay, *I am willing to ſell you an Horſe for ten Pounds*, (naming the Horſe in ſpecial) and another Perſon ſhould immediately ſay, *I will buy the Horſe*, or, *give you ten Pounds for the Horſe*, a Bargain and Sale is contracted between them. Though a Bargain and Sale has more of Fact than of Law in it, yet the Obligation of ſuch Contract is a Matter of Law.

TIT. IV.

Of Price, *and the Agreement thereupon, whether certain or uncertain; and of a Price referred to the Judgment of a third Perſon: How and in what Money it ought to be paid, &c.*

IT has been already remember'd, That in every Contract of Bargain and Sale, there ought to be a Price paid for the Goods bought and ſold; and, properly ſpeaking, this Price is that Sum of Money, which is given to the Seller for the Thing bought and ſold [i]. But the Word *Pretium*, or Price, is even ſometimes taken for the Word *Præmium* [k]; and ſometimes for the Word *Merces*, which has a Relation to *Hire* [l]. Now *Price*, in the general Senſe of the Word, is the common Eſtimation or Opinion, which Men have about the Value of Things in Commerce, whether Moveable or Immoveable; and even Incorporeal Rights and Actions fall under the Power of Eſtimation. The Price and Value of Things, ſtrictly ſpeaking, ought to be according to the true intrinſick Goodneſs of them, and the common Eſtimation of thinking Men, and not according to the Whim and Fancy of particular Men, and what it aſſumes extrinſecally: Nor ought we in ſuch an Eſtimation to conſider, what has only laſted for ſome ſmall Time, or which ſeldom happens. Again, in the Eſtimation of Things Commercial, we ought to conſider, whether they may be ſold with Eaſe, and without giving Caution on the Score of Eviction, and the like. For if they may be thus ſold, they ought to bear a greater Price and Value, than if they are ſold *cum gravemine*, which, of Conſequence, muſt ſink the Price thereof. Nor ought it to be regarded, how much the ſame Thing would ſell for at another Time: For a juſt Price is adjudg'd and prov'd, not from any paſt Bargain and Sale, but from the Rules and Meaſures of the preſent Market. A juſt Price for a real or immoveable Eſtate, is proved and computed according to the Value of the yearly Rents, which are iſſuable and received from thence [m].

[i] I. 3. 24. 1.
[k] D. 19. 4. 1. D. 42. 2. 10. fin.
[l] D. 47. 8. 2. 23.
[m] C. 4. 44. 16.

The Value and Eſtimation of Things may increaſe and decreaſe, upon ſeveral Occaſions. As, *Firſt*, In the Time of War, and on the Account of a Peſtilence; a great Dearth and Scarcity of Proviſions, and other Commodities, *&c.* And the Doctors adviſe Advocates ſo to deduce Poſitions and Articles touching the Quality of Things bought, when there is a Controverſy about the Price, as that they do not leſſen or increaſe too much the Price of the Things purchaſed. For a Thing ought not to be valued *ſimply*, but according to the Qualities of both its Goodneſs and Faults, *&c.* Again: The Prices of Things vary, according to the ſeveral Circumſtances thereof: As for Inſtance; according to the Variety and Diverſity of Places where they are expoſed to Sale; according to the intrinſick Goodneſs thereof; and

and alſo according to the Value of the Coin, and the Scarcity of Money; and likewiſe according to the Plenty and Scarcity of the Commodity itſelf, *&c.* But we do not meaſure the juſt Price of Things according to the Affection, Singularity, and Advantage of individual Perſons; for that is not according to the common Eſtimation of Men expert and skilful therein. A *juſt* Price, is ſometimes ſaid to be that, whereby neither the Buyer nor Seller is injur'd above one Moiety of the true and common Value: And in this Caſe, the Perſon injur'd ſhall not be relieved by
[n] C.4.44.2. reſcinding of the Sale [n]; for he muſt impute it to his own Imprudence and Indiſcretion. For the Law of Man diſtinguiſhes between a greater and a leſſer Fraud in reſpect of the Price of Things, and permits a leſſer for the ſake of avoiding a greater Confuſion, leſt Trade and Commerce ſhould be hinder'd thereby.

The Price of Things, in Bargain and Sale, may be ſaid to be Threefold. The firſt is call'd the *common* Price: The ſecond is ſtiled the *formal* or *conventional* Price: And the third is term'd the *legal* Price. The *common* Price is that, whereby Things of the like Kind and Goodneſs are rated
[o] D.43.11.1.1. and ſold in the ſame Place [o]. The *formal* Price of Things, receives its
D.35.2.63. D.39.6.18. fin. Form from the Covenant and Agreement of the Parties contracting; which Price, *Ulpian* ſays, differs from the Value and Eſtimation of Things, ac-
[p] D.35.2.62. cording to the true Value of the Thing [p]. For the Perſons contracting may mutually circumvent each other; that is to ſay, they may add more
[q] D.4.4.16.4. or leſs to the Price in reſpect of the true Value [q]. For there are ſeveral Things, which may either in reſpect of the Perſons contracting, or elſe in
[r] D.35.2.63. reſpect of the Things themſelves, increaſe or diminiſh the Price [r]; *viz.* either becauſe the Buyer has a greater Affection for the Thing, or that it is highly commodious for him, for which reaſon he will give more than the
[s] D.4.4.35. juſt or common Value [s]; or elſe becauſe the Seller wants Money, and then the Buyer has it for leſs than the common Value. The *legal*, or, more properly, the *lawful* Price, is ſaid to be that which the Law calls a juſt Price and the true Value of any Thing, ſetting aſide Whim and Affection, *viz.* when the Price is made according to the Return which the
[t] C.4.44.16. Thing itſelf yields [t]. *Juſtinian* thinks the true Price or Value of an Eccleſiaſtical Eſtate eſpecially, to be as much as may be collected from
[u] Nov. 120. c. 9. the Rents thereof for fifty Years [u].

To prevent Fraud, Avarice, and Monopolies, and that Trade might more eaſily be carry'd on, the Care of ſetting a Price on Goods expoſed to Sale, and particularly of Victuals, in the City of *Rome*, was committed to the *Decurio's* or Aldermen of the City, whom the Law ſtiles by the Name
[x] D.50.4.18.7. of *Epiſcopi* [x], or the Overſeers of Victuals: For they did not think fit to leave this Expedient to the Diſcretion of Huckſters, Victuallers, and the
[y] C.4.59.1. like, leſt they ſhould abuſe the People [y]. With Us, it is the Care and Buſineſs of the Clerks of the Markets, and other Perſons preſiding over Civil Affairs, to fix a juſt Price on vendible Commodities, which are of neceſſary and daily Uſe, whenever they are expoſed to Sale, having a due Regard to Times and Places when and where they are ſold. In
[z] A.D.1566. *France*, by a Conſtitution of *Charles* IX. [z] it was ordained, That the Judges ſhould ſet a Price on all venal Goods, eſpecially Victuals: And, to prevent Fraud and Wrangling, all Innholders and other Victuallers were order'd to hang up Tables in Publick, containing the Price of all Proviſions they ſold. And this Conſtitution was afterwards revived by an Edict of *Henry* III. of *France*.

The *legal* Prices of Things vary, as the *common* Price thereof does, according to the Plenty or Scarcity thereof; and therefore, an upright Judge ought thoroughly to conſider this Matter, in condemning Perſons for exceeding the juſt Rate. But in all Conventions and Covenants, where the Perſon does

does not buy according to the ſtated and legal Price, we generally conſider the Price of Things at the Time when the Contract was made, and other Circumſtances. In judging of a juſt Price, we ought to conſider the Value of the Thing, and the Rate of Money at the Time when a Purchaſe of Goods is made, and likewiſe the Place where it was made, without any Regard had to the anterior and poſterior State and Quality of the Thing [a]. But though a conventional Price be arbitrary, and according to the Diſcretion of the Buyer and Seller; yet it ought to be founded upon Equity; *viz.* it ought in ſome meaſure to agree with the Nature and Value of the Thing [b]. For if any one ſells a Thing of a great Value for a mean and low Price, it is not deemed a Contract of Bargain and Sale, but ſome other Contract [c], *viz.* either a Donation, or a feigned Contract [d]. For a Price is added to a Purchaſe, to equal and compenſate the Thing ſold, as much as poſſible: But a low Price is not ſufficient to equal a Thing of great Value. Hence it is, that if, among ſeveral Things ſold, it does not appear how much is ſold, we ought to have Recourſe to the Meaſure of the Price; and thus the Meaſure of the Price, the Quantity of the Thing, and the Quality thereof, do well declare what the Mind of the Perſons contracting was.

[a] D. 21. 2. 64. 1. C. 4. 44. 8. fin.

[b] D. 30. 1. 66.

[c] D. 41. 2. 10.

[d] C. 4. 35. 22.

I have already remember'd, under the Title of *Bargain and Sale*, That the Price agreed on between the Parties ought to be certain [e]: Wherefore, a Purchaſe is not valid, if it depends on the Will of the Buyer or Seller; though ſuch Price may be well enough referr'd to the Arbitration of a third Perſon to adjudge and determine the Value of the Thing ſold. But, in this Caſe, if ſuch third Perſon either will not or cannot determine the ſame, then ſuch Purchaſe is void, as having no Price annexed to it [f]. Thus alſo a Relation may be had to another Price, for the Certainty thereof: As, that you ſhall give me ſo much as you paid for a Thing of the like Kind; or, that you ſhall give me ſo much Money for it as you have in ſuch a Cheſt [g]. And thus the Certainty of a Price may be had, either by the Determination of the contracting Parties themſelves; or elſe by relation had to ſome Perſon or Thing; or, thirdly, by Demonſtration. The Perſon contracting, may reduce the Price to a Certainty, by a Queſtion and Anſwer made [h]: As, Will you give me ſo much for ſuch a Thing? *&c.* For it is only granted to the Proprietors of Goods by the Common Law, or of *Common Right*, to ſet a ſtated Price on their Goods [i]; yet, by a particular Law, the Magiſtrate may do it, and ſo may the Law itſelf. If there are ſeveral Witneſſes produced to prove the Value of a Thing ſold upon Contract, (as ſometimes it may be, when a Perſon ſends for Goods and does not agree about the Price) and one of them depoſes that it is worth five Pounds, another ſays that it is worth ten Pounds, and a third ſays that it is worth fifteen Pounds; the Depoſition of theſe Witneſſes ſhall be valid in reſpect of the leſſer Sum; becauſe the leſſer Sum is inclued in the greater, and herein they all agree.

[e] D. 18. 1.

[f] C. 4. 38. 15.

[g] D. 18. 1. 7.

[h] C. 4. 44. 8.

[i] C. 1. 9. 9.

It has been ſaid, That Buying and Selling cannot be, without a certain Sum of Money agreed upon, call'd the Price of the Thing ſold: Which is true in reſpect of the Bargain made, but not in reſpect of Payment; for Satisfaction may be made, upon Credit given, by ſome other Means than a Payment in Money. If the Parties contracting are ſimply agreed about the Price of a Thing, and it be not expreſly ſaid in what Kind or Quality of Money it ſhall be paid, the Price is then underſtood to be ſettled in the current and uſual Money that paſſes in the Place where the Contract is made [k]. And in this Senſe alſo Statutes are to be underſtood of the current Money, which ſpeak of Money. As no one is ſaid to be a Robber, who has paid the juſt Price of the Thing to the Owner thereof; ſo, he who receives the Price of a Thing, ſeems to have ſold it, if he receiv'd ſuch Price *ex certâ Scientiâ* for the Thing. The Smallneſs of a Price given for a Thing,

[k] D. 30. 1. 50. D. 31. 1. 70. fin.

a Thing, creates a Preſumption of Fraud; and therefore it ought to be enquir'd whether ſuch Thing was legally bought.

TIT. V.

Of Earneſt *given, and how forfeited on the Part of the Buyer; and what Penalty happens to the Seller who refuſes to perform his Part of the Contract: Of* Bargain and Sale *reduced into Writing and what follows thereupon: And, laſtly, Of Actions of Bargain and Sale.*

TITIUS ſold an Eſtate unto *Caius*, upon this Condition, *viz.* That if he did not pay the Purchaſe-money at the Time appointed, he ſhould loſe the Earneſt which he had given, and reſtore the Eſtate unto *Titius*; and this Pact was held to be a good Covenant [l]. Now *Earneſt*, is that Sum of Money or Thing which is given by the Buyer, on Account of a Purchaſe made, not as a full Payment of the Price, but in order to prove, with greater Evidence, that the Parties contracting were agreed about the Price of the Thing bought and ſold [m]. And it ſeems to be firſt introduced on the ſcore of Auctions, or large Sales of Goods, wherein a ſmall Sum of Money was given, in order to confirm the Bargain; becauſe it was found an Inconvenience to Trade, for Men to carry great Sums of Money with them in Carts and Waggons, *&c.* to Places of Sale; for that the firſt *Roman* Money was in Braſs and Copper. It is in *Latin* call'd *Arrha*, according to *Iſidore*, in his *Etymologies* [n], *à re pro quâ datur*, that is to ſay, from the Thing for which it was given; or, as others will have it, from the *Greek* Word ἀρραγὴς, importing the ſame as *firm*, in *Engliſh*; becauſe it confirms the Bargain. The Antients call'd it *Arabo*, as we may learn from *Varro* [o], *Plautus*, and *Terence*. And this was not only made uſe of as an Argument of a Contract of Bargain and Sale already perfected, but Earneſt was likewiſe given on the Account of Eſpouſals; which Kinds of Earneſt were in *Latin* ſtiled *Arrhæ Sponſalitiæ* [p]. But of this hereafter, under that Title.

[l] C. 4. 54. 1.
[m] D. 18. 1. 35. D. 18. 3. 6. D. 19. 1. 11. 6.
[n] Lib. 10. c. ult.
[o] Lib. 4. de Ling. Lat.
[p] D. 23. 2. 38. C. 5. 1. 3.

Earneſt in Buying and Selling is wont to be given two ways. *Firſt*, As it is an Argument or Proof of a Purchaſe made, as when a Ring is given [q]. And in this Caſe either of the Parties may forego the Contract with the Loſs of Earneſt, which is call'd *ſimple* Intereſt: And this Kind of Earneſt the Buyer may recover by perſonal Action *ex Empto*, if the Seller refuſes to ſtand to his Contract [r]. And it is the ſame thing when the Contract is diſſolved by common Conſent of Parties [s]. *Secondly*, When Earneſt is given as Part of the Price, and in Defalcation thereof; and then the Parties cannot depart from the Contract without Loſs. For if the Seller repents, and will forego the Contract, he ſhall reſtore to the Buyer double the Earneſt given; but if the Buyer repents, he loſes his Earneſt [t]. But the giving of Earneſt, is not a Matter of Subſtance in this Contract, (for the ſame may be valid without it); and it is only given, in order to induce the Parties to fulfil the ſame. And thus Earneſt is ſaid to be forfeited, if the Buyer does not comply with the Contract. The giving of Earneſt, is not a Contract of itſelf and in its own Nature; nor does a Contract ceaſe

[q] D. 18. 1. 35.
[r] D. 19. 1. 11. 6.
[s] D. ut ſupra.
[t] C. 4. 45. 2. D. 18. 1. 17.

to be *Res Integra* hereby, unleſs Earneſt be given as to a Part of the Price; and therefore, that which is given, may be recover'd *ſecundùm fidem Pacti* [u]. But as Earneſt is only a Token or Proof of the Contract, it ought to be return'd, unleſs it be made a Part of the Price, as it ſometimes happens. A Perſon that loſes his Earneſt is not obliged to any other Intereſt or Damage, if the Contract be not perfected by Payment of the Price, or a Delivery of the Goods [x]. In giving of Earneſt, the Buyer ſeems to place all his Hope of having his Contract made good to him; and therefore, it is not enough for the Seller to return the ſimple Earneſt, but he ought to forfeit double the Value thereof, otherwiſe (perhaps) he loſes nothing by his Perverſeneſs. The Proof of Earneſt given, may be made either by the Confeſſion of the Party receiving the ſame, or elſe by Witneſſes that were preſent, or by a Notarial Inſtrument.

[u] C. 4. 45. 2.

[x] C. 4. 21. 16.

A Contract of Bargain and Sale may be executed two ſeveral ways, *viz.* either without Writing, or elſe in Writing. A Purchaſe made without Writing is perfected immediately by Conſent alone, when the Parties are agreed touching the Price, though nothing be paid, nor the Thing deliver'd, nor any Intervention of Earneſt had. And thus, in this Caſe, the Bargain is ſo perfected in reſpect of the Obligation and Action, that one Party cannot forego the ſame contrary to the Will of the other. This Contract is ſaid to be perfect in three diſtinct reſpects. *Firſt*, In reſpect of Repentance or Departing from thence; for after any thing is done, as Goods deliver'd, or Price paid, neither Party can depart from it. *Secondly*, In reſpect either of the Riſque or the Advantage of the Thing ſold; for if the Buyer has paid Part of the Price, he ſhall enjoy the meſne Profits, otherwiſe not [y]. And, *Thirdly*, In reſpect of the Delivery of the Thing, and the Payment of the Price, which compleats the Contract. Bargain and Sale is celebrated in Writing, when it is agreed between the Parties in the Beginning, that a Deed or Writing ſhould be made thereupon, to the End that the Contract may be proved, and not otherwiſe: And in this Caſe, before ſuch a Deed is made and executed, neither of the Parties are under any Obligation. And this is often done among jealous and ſuſpicious Perſons, who are afraid of being impoſed upon by the Words of each other at large: And therefore, to avoid all manner of Fraud and Wrangling, they will have a Writing to be drawn on the Contents of ſuch Contract; which being read in the Preſence of the Parties, and agreed unto after a Treaty had, they execute on both Sides; and this ſhall give Faith to the Contract. This Deed, if it be a private Writing, is ſaid to be executed, when each of the Parties have acknowledged the ſame, and ſubſcribed themſelves thereunto. For he who ſubſcribes a Writing, is deemed to approve the Contents thereof; and therefore it ſhall affect him, as if he had written the Whole [z]. But if it be a Notarial Inſtrument, which is a publick Deed, it ought to be read by the Parties, or (at leaſt) read over to them by the Notary; and, if they approve the ſame, the Notary ſigns it; and then the Contract is perfected in ſuch a manner, that there is no room for drawing back. But before the Writing is executed, there is room for recoiling, when the Purchaſe is celebrated in Writing: So that the Buyer and Seller may forego the Contract with Impunity, unleſs ſomething be given by way of Earneſt. For then, whether it be in Writing, or without Writing, the Buyer cannot forego the ſame without loſing his Earneſt, nor the Seller without reſtoring it [a]. In *England*, no Contract for the Sale of any Goods of ten Pounds Value, or upwards, is valid, except the Buyer actually *receives* Part of the Goods, or gives ſomething in Earneſt for them, or unleſs there be ſome Note made in Writing of ſuch Sale and Contract [b], as I have elſewhere related.

[y] D. 18. 3. 4. 1.

[z] D. 20. 6. 8. 15.

[a] I. 3. 24. pr.

[b] 29 Car. II. cap. 3.

Touching

Touching Actions which ariſe from Bargain and Sale, there are ſome that are meerly founded on the *Civil* Law; and others that are introduced by the *Prætor*, called *Prætorian* Actions. Civil Actions are thoſe which we ſtile Action *ex Empto* and *Vendito*; which are often ſo called from the Perſon unto whom they are given, and ſometimes (though ſeldom) from him againſt whom they lie. As an Action *ex Empto* is often ſaid to be that
[c] D. 18.4.19. which is given to the Buyer [c]; and ſometimes ſaid to be that which lies
[d] D. 18. 3. 4. againſt the Buyer [d]. Thus, in the like Manner, an Action *ex Vendito* is
D. 21. 2. 26 & 66. frequently ſaid to be that which accrues to the Seller againſt the Buyer [e],
[e] D. 19. 1. 13. Rub. for Payment of the Price, as the other is for a Delivery of the Goods; and ſometimes it lies againſt the Seller. Both theſe are perſonal Actions *bonæ fidei*, and are direct and tranſitory Actions; for they deſcend to the Perſon
[f] D. 19. 1. 10. of the Heir [f], and alſo lie for him, and likewiſe for univerſal, but not for particular Succeſſors. An Action *ex Empto* lies againſt him who has ſold a
[g] Nov. 48. pr. Thing in his own Name, and againſt his univerſal [g], but not his particular Succeſſors, and likewiſe againſt the Proctor or Agent. Whatſoever is done between the Parties contracting, is comprehended under this Action. But if there be nothing ſpecially agreed upon, then whatſoever is naturally incident to this Contract, is ſubject to the Power of this Action. Now theſe Things are naturally incident to Bargain and Sale, *viz.* That the Seller ſhould preciſely deliver the Thing ſold to the Buyer, and the Price ſhall be paid unto the Seller; that Poſſeſſion ſhall be given to the Buyer, or the Seller ſhall be condemn'd in Damages from the Time of a Delay made, that is to ſay, from the Day when the Seller might have deliver'd the
[h] C. 4. 49. 16. D. 19. 1. 11. 17. Gloſ. Thing without any Difficulty [h]. For after a Delay, the Buyer may have an Action for Damages, and for all the Fruits and other Acceſſions, from
[i] D. 42. 1. 13. fin. the Time of ſuch Delay [i]. The Seller ought to deliver the Poſſeſſion of the Thing, free from the Poſſeſſion of another Perſon, and to transfer the Property thereof, together with a Warranty againſt any Eviction, unto
[k] Paul. Lib. 2. Tit. 27. which he is bound when the Purchaſe-Money is paid him [k]. If a Perſon ſhall ſell an Eſtate, and conceal the Service that is due from ſuch Eſtate, or conceal the Number of Acres, he ſhall be liable to an Action *ex Empto*, and be condemn'd in Damages. And 'tis the ſame Thing, if he ſhall ſell a Veſſel of Liquors for a whole Veſſel, out of which ſomething has been ſpilt or pour'd.

Among *Prætorian* Actions, we may reckon a *Redhibitory* Action, an Action *quantò Minoris*, Action on the Caſe given by the Edict of the *Ædiles*, an *Eſtimatory* Action, *&c.* If a faulty Thing be deliver'd, and the Buyer be not made acquainted with the Fault, he may have an Action *ad Redhibendum*, to compel the Seller to take the Goods again, and to make Amends
[l] D. 19. 1. 11. 3. for Damages by Reaſon of thoſe Faults [l]. But if a Thing be bought, and both Buyer and Seller were ignorant of the Fault at the Time of Sale, then an Action, *quantò Minoris* lies, to force the Seller to return ſo much of the
[m] D. 19. 1. 13 & 39. Price as the Thing ſold is leſs in Value on the Account of ſuch Faults [m]. But if the Seller has knaviſhly concealed the Fault; then, by an Action on the Caſe, he ſhall be obliged to make good all Damage which happens
[n] D. 19. 1. 13. pr. through ſuch Fraud [n]. If a Thing be ſold, by a falſe Commendation, for more than it is worth, an *Eſtimatory* Action lies; for the Thing ſhall be
[o] D. 19. 1. 13. 4 appraiſed, and an Abatement allow'd in the Price [o]. For that which is ſaid on the Score of commending, ſhall oblige the Seller, unleſs the Faults
[p] D. 18. 1. 43. are viſibly apparent [p]. Laſtly, Whatever is defective through the Fault or Fraud of the Seller, he ſhall be obliged to make good, whether it be
[q] D. 19. 1. 6. 2. D. 18. 1. 72. covenanted in the Contract of Bargain and Sale, or not [q]. But the Buyer ſhall not be admitted to his Action, unleſs he has fulfilled the Contract on
[r] D 19. 1. 13. 8. his Part, and has paid the Price, or (at leaſt) made a Tender thereof [r], whether the Action be *Civil* or *Prætorian:* For, if the Buyer has not fulfilled

fulfilled his Part, the Seller may retain the Thing ſold, as a Pledge or Pawn [s].

[s] D. ut ſupra.

An Action *ex vendito*, lies for the Seller [t] and his Heirs, and even for a Pupil ſelling without the Authority of his Guardian [u], againſt the Buyer and his Heirs, and his univerſal Succeſſors. But if the Seller brings an Action for the Price, without a Delivery of the Goods, an Exception of *the Goods not deliver'd* will bar his Action, till a full Delivery be made [x]. After a Delivery made of the Goods, the Seller may have this Action for the Price, and for the Fruits from the Time of a Delay made in Payment, and for Intereſt from the Time of the Goods deliver'd, together with all Charges he has been at after the Sale on the Goods ſold; and ſhall recover ſo much as he could have ſold them more for unto another Perſon, if he had not been deceived by the Buyer [y]. But when a Delivery has not been made, nor the Buyer in Delay of Payment, no Intereſt is due [z]: Yet the Buyer ſhall enjoy the Fruits from the Time of the Contract perfected, ſince he is to ſtand to the Loſs and Hazard of the Goods [a]. But the Seller ſhall not ſtand to the Loſs of the Price promis'd, becauſe this is an Obligation of a *Genus*, which does not periſh with the Loſs of the *Species* [b]. Therefore the Seller cannot demand *Uſe* or Intereſt from the Time of the Contract, but from the Time of Delay in Payment [c]. The Seller alſo ſhall have this Action, to oblige the Buyer either to take away the Things bought, or to pay him Damages for the Continuance of them in the Seller's Cuſtody [d], and for the Performance of whatever is expreſly covenanted in this Contract of Bargain and Sale [e]. If either Party be deceived above one Moiety in reſpect of the juſt Price, they may have a Perſonal Action, called a Condiction *ex Lege*, either to adjuſt the Price, or return the Goods, or to forego ſuch unjuſt Contract [f]. Finally, it is to be obſerv'd, that theſe Actions *ex empto* and *vendito*, on Bargain and Sale only, lie in *Simplum*, unleſs it be otherwiſe covenanted and agreed upon by the Parties [g].

[t] D 19. 1. 13.
[u] D. 19. 1. 13.
[x] D. 19. 1. 25.
[y] C. 4. 49. 13.
[z] D. 19. 1. 13. § 19 & 22.
[a] C. 4. 49. 13.
[b] I. 3. 24. 3.
[c] D. 12. 1.
[d] D. 22. 1. 32. 2.
[e] D. 18. 6. 1. 3.
[f] D. 19. 1. 13.
[g] C. 4. 49. 2.
[g] D. 21. 2. 56.

TIT. VI.

Of Eviction *or Security given by the Seller unto the Buyer, for the quiet Poſſeſſion of that which he bought,* (*with us called* Warranty,) *expreſſed and implied; and what Remedy the Buyer has againſt the Seller, for Goods evicted; and how the Buyer ought to behave himſelf in ſuing this Remedy*: *And,* laſtly, *Of an Exception of a Thing ſold and delivered.*

EVICTION, as here treated of, is a Judicial Recovery of a Man's Property, though the adverſe Party has acquir'd the ſame by a Legal Title [h]: The Thing evicted being not the Property of the Perſon who ſold or diſpoſed of the ſame. And a Thing is ſaid to be evicted, if it be ſo loſt, that it is not lawful for the Buyer to have the ſame, but when all Hopes of retaining it are cut off and taken away [i]: For we cannot reckon that which is evicted to be among our Goods [k]. For if another Man's Goods are ſold without the Owner's Conſent, they may be taken away from the Buyer by the Proprietor of them [l]; unleſs ſuch Owner or Proprietor

[h] D. 21. 2. 24. 56 & 57.
[i] D. 21. 2. 24.
[k] I & L. 35. D. 50. 17. 190.
[l] D. 18. 1. 28.

ſhall afterwards confirm and ratify ſuch Alienation or Sale; or unleſs the Goods of another, which are ſold, do legally become the Property of the Vender: In which Caſe the Sale is ratify'd and confirm'd. Nor can he then afterwards demand or ſue for the ſame Thing of the Buyer, as being ſold, when it was in another's Property: Becauſe every one knows, that if the Vender claims a Thing by Action which he himſelf has ſold, he may be ouſted of his Action by an Exception of *Deceit*, though he ſeeks the Property of it by another Right: For he knaviſhly endeavours to evict that which he himſelf has ſold. So that the Buyer has free Power to defeat his Intention by an Exception, unleſs he had rather (the Thing being taken from him) recover Twofold in a Cauſe of Stipulation [m]. Hence it is manifeſt, that the Vender cannot evict the Thing ſold, nor even his Heir *eo Nomine*, *viz.* on the Account of being his Heir [n]; becauſe he is bound to perform and make good the Act of his Teſtator deceas'd. Therefore, though the Buyer ſhall not object an Exception of *Deceit* unto the Vender aiming at an Eviction, but ſhall ſuffer the Thing to be evicted; yet (notwithſtanding this) an Action is ſaved to him, and accrues on the Stipulation or Warranty; or elſe he may have an Action *ex empto* againſt the Vender or his Heir [o]. For it is not a new Thing for a Perſon that is caſt in a Suit on an Exception, even afterwards to have Recourſe to an Action. The ſame Things may almoſt be affirm'd in the Perſon of the Vender's Surety or Voucher, who cannot evict the Thing that is ſold [p]; becauſe, by his Vouching or Suretiſhip, he has obliged himſelf not to evict the Thing: For he acts a fraudulent Part, who demands or ſues for a Thing which he muſt immediately reſtore. Nor is the laſt Law of this Title [q] any Objection thereunto, which treats not of a Surety or Voucher, but of the Heir himſelf, who is not hinder'd in his own Perſon, and on his own Account, from claiming a Thing for which the Perſon deceas'd had interven'd: Yet an Action of Eviction is even reſerv'd to be brought againſt the Heir, from what has been already ſaid. And to this End it is, that the Surety can only be compell'd in reſpect of the Conſent which he has given for the Sale of the Thing, by which Conſent he prejudices himſelf, and him who is willing to claim the Thing by his Hereditary Right thereunto, and cannot claim the Thing ſold or alienated in his own proper Right, as the Heir may do, though ſuch Surety may claim it in Virtue of his Hereditary Right [r].

[m] D. 21. 2. 17.
[n] D. 21. 2. 14.
[o] D. 21. 2. 18.
[p] D. 21. 2. 11.
[q] D. 21. 2. 76.
[r] Barboſ. in L. 38. D. 24. 3.

By an Edict or Order of the *Ædiles*, the Buyer is to take Care of himſelf, that the Seller gives him Caution or Security in this Manner, *viz.* That if the Thing ſold be evicted, the Seller ſhall make good the ſame, either in *Specie*, or in Value, unto the Buyer, whether the Whole or Part of the Thing be evicted: And this is done by Stipulation or Warranty; and this is either *real* or *perſonal*, according to *Bracton* [s] and *Glanvil* [t]. *Real*, when it is annexed to Lands or Tenements granted for Life, *&c.* *Perſonal*, whether it either reſpects the Property of the Thing ſold, or the Quality of it. It paſſes from the Seller to the Buyer, from the Feoffer to the Feoffee, from him that releaſes to him that is releaſed from an Action real, and ſuch like. But this is our Common Law Notion of it. If a Thing be evicted only in Part, we ought to conſider, whether it be held *pro Diviſo* or *pro Indiviſo*. If it be held *pro Indiviſo*, as an Eſtate in Jointenancy, then the whole Eſtate ought to be valid, and an Action upon the Eviction will lie, and muſt be brought for a Moiety of the Whole: For the Goodneſs of one Part ſhall not be more conſider'd than the Goodneſs of the other. But if ſuch Eſtate be held *pro Diviſo*, then the Action on Eviction ſhall be for the Part evicted, with a Regard had to the Goodneſs of it [u]. When a Thing of an aggregate Nature is ſold, as a Flock of Sheep, and the like, then the Caution or Warranty given is not of a particular individual Thing, but

[s] Lib. 5. Tract. 4.
[t] Lib. 3. per tot.
[u] D. 21. 2. 1.

but for the Whole [x]. I ſhall next enquire, more particularly, what Perſons are liable to Eviction.

[x] D. 21. 2. 5.

And here it is to be obſerved, That the Seller and his Heir are liable hereunto, in whatever Degree ſuch Heir is placed and conſtituted [y]. That the Seller is obliged, appears from hence, *viz.* becauſe he ought to have given quiet Poſſeſſion of the Thing ſold to the Buyer: But a Thing does not ſeem to be deliver'd, if another Perſon may call that Thing out of the Buyer's Hands by way of Eviction [z]. But what if a Perſon ſhall ſell a Thing in another's Name, as being an Agent or Proctor? To which I anſwer, That if ſuch Proctor ſhall contract the Sale, without naming the Principal, he ſhall become liable to an Eviction, becauſe the Buyer gives him Credit, and takes his Word in his own private Capacity, without conſidering him as a Proctor, and (perhaps) would not have contracted with him, if he had known or thought that he had to deal with the Principal: But if he ſhall contract the Sale in his Principal's Name, as a Proctor, ſuch Proctor is not liable; for he thereby only purſues the Direction of his Commiſſion, and the Buyer then had a Regard to the Credit and Honeſty of his Principal, and not of him as a Proctor or Agent: And therefore, the Suit ſhall be with the Principal, by an Action *in Equity* after the Manner of an Action called *Actio Inſtitoria* [a]. Moreover, a Surety given by a Vender, and every Perſon that is like unto a Vender, may be ſued on the Account of Eviction [b]. A Surety or Voucher, ſimply given by a Vender, is underſtood to be given to every Event of Eviction, unleſs it appears to be otherwiſe agreed on [c].

[y] C. 8. 45. 9. 18 & 23. pr.

[z] D. 19. 1. 4 & 11. 8.

[a] D. 19. 1. 13. 25.

[b] C. 8. 45. 7.

[c] D. 2. 14. 39

Eviction is due from the Seller to the Buyer, when the Buyer cannot maintain and juſtify his Title from ſuch a Sale, on the Account of another's Right thereunto: And, in ſuch a Caſe, the Seller is bound to make good the Damage and Intereſt of the Buyer, by reaſon of ſuch Eviction [d]. *Titius* granted unto *Seius* ſuch and ſuch Eſtates, and, by a Stipulation, promiſed to warrant or ſecure the Title thereof againſt any Eviction. Afterwards *Titius* died, appointing *Seius*, together with ſome other Perſons, to be his Heirs. In this Caſe, if any Eviction be made on any of theſe Eſtates, *Seius* may have an Action upon the Eviction of theſe Eſtates againſt his Coheirs, for that Part wherein they are made Heirs, *viz.* an Action *ex Stipulatu*. But if he had not by Stipulation promis'd to Warrant the ſame againſt an Eviction, *Seius* could not by any Means convene them. *Sempronius* ſold unto *Caius* an Eſtate, which was mortgag'd unto another Perſon: *Quære*, Whether *Caius* may have an Action *ex Stipulatu* againſt *Sempronius* on the Score of Eviction, before ſuch Eſtate is evicted? And it was reſolved, that he could not. For if I buy a Thing of you, which is ſaid to be impawn'd to another, or which is ſaid to be another Perſon's, though I am uneaſy with my ſelf about ſuch Thing purchas'd, yet I cannot have an Action, till ſuch Time as the Thing be evicted. If a more antient Creditor ſhall evict a Pawn from a latter Creditor, to whom it is given in Payment, the latter Creditor may have an Action againſt the Debtor, who gave it by way of Payment, to recover Damage thereupon [e]; becauſe a Contract of this Kind, that is to ſay, the giving it by way of Payment, is in the Place, and repreſents Buying: But yet there is a great Difference, whether it was given in Payment for Money in Tale which was due, or for any *Species*. For if it was given for Money in Tale, the Perſon ſhall have an Action *ex empto*, as if a Purchaſe was made [f]: But if it was given for a *Species*, it ſhall be deemed as Permutation, or the like Contract, and the Perſon ſhall not have an Action *in Equity* on the Purchaſe, if the Thing be evicted, but ſhall have an Action of Eviction [g].

[d] C. 8. 45. 1.

[e] C. 8. 45. 4.

[f] D. 13. 7. 4 & 24. pr.

[g] D. 46. 3. 46.

It has been ſaid, under the Title *Of Bargain and Sale*, That the Sale of another Man's Goods is valid [h]; not that the Buyer ſhall have a Title to them,

[h] D. 18. 1. 28.

them, but that he may ſue for Damages, if they are evicted: For the Seller muſt warrant the Title, and make Amends, if the Goods, [i] D. 21. 2. 1. (moveable or immoveable) are claimed by others, in Whole, or in Part [i]. And this of Courſe, though there be no particular Agreement made for it [k] D. 21. 2. 2. between the Buyer and the Seller [k]; becauſe the Law endeavours to promote Juſtice in every Inſtance. The Seller is not only to warrant the Title of the Thing ſold, but likewiſe to reſtore the Price of the ſaid Thing, in caſe of Eviction. And this he is compelled to do, either through the Nature of [l] C. 8. 45. 6. the Contract itſelf [l], or elſe by an expreſs Stipulation enter'd into between the Buyer and the Seller; whereby it is provided, that the Seller ſhall [m] D. 21. 2. 56. reſtore the Price and Damage, in caſe of Eviction [m]. And this laſt, as it is called an *expreſs* Warranty, ſo the other is ſtiled a Warranty *imply'd*. In an Eviction upon a Warranty *imply'd*, only the ſimple Value of the [n] D. 21. 2. 60 & 70. Thing ſhall be repaid to the Buyer, together with Damages [n]: But in an Eviction upon an *expreſs* Warranty ſtipulated between the Parties, the Seller may enlarge the Warranty, and oblige himſelf to refund twofold [o] D. 21. 2. 17. 48 & 53. in reſpect of the Value thereof, in caſe the Thing ſold be evicted [o]. But in this Caſe the Buyer cannot recover Damages or Intereſt for the Thing evicted, as he may do in the other Caſe; for, in the laſt Caſe, the Seller is bound no further than he has ſtipulated.

Heretofore ſimple Caution was given, to this End and Purpoſe, without [p] D. 21. 2. 56. Sureties or Vouchers [p]: But now, I think, the Seller may be obliged to give this Caution or Warranty by Vouchers, if his own ſingle Caution be ſuſpected. But what if he ſhall refuſe or delay to give Caution? In this Caſe the Buyer may implore the Office of the Judge; and if he ſhall then refuſe or be in Delay, it is the ſame thing as if he had done it, and he [q] D. 21. 2. 2. ſhall be condemned *in Duplum* [q]. Theſe Cautions or Stipulations are forfeited, either when the Thing ſold is, upon a Judicial Eviction, reſtor'd to the true Owner evicting it; or elſe, when the Buyer is compelled to refund the Value of it; or, laſtly, when the Poſſeſſor, being convened by [r] D. 21. 2. 16. 1. the Buyer, is acquitted of Malice and evil Deſign [r].

D. 21. 2. 21 & 34. 1. To the End that the Buyer may have Redreſs againſt the Seller, he ought in due Time to denounce the Matter unto the Seller; that is to ſay, he ought to give him notice that he is judicially impleaded for the Thing [s] D. 21. 2. 29. 2. which he has purchaſed of him [s]. For he ought, at the Time of the Com- D 21. 2. 37. 53. 55 & 63. mencement of the Suit, to give him Notice thereof, that he may defend himſelf, if he pleaſes, unleſs the Seller be notoriouſly unjuſt in his Dealing, [t] In L. 8. C. 8. 45. (as *Baldus* remarks [t]). For there are ſeveral Things neceſſary in reſpect of Eviction; and the Law aſſigns Three Caſes in Particular, wherein though the Thing be evicted, yet the Seller ſhall not be liable to the Buyer on an Eviction. As, *Firſt*, If he ſhall omit to give the Seller Notice, as aforeſaid, after Suit is commenced againſt him, that the Seller may defend the Right of the Thing ſold to him. *Secondly*, If the Buyer ſhall contumaciouſly abſent himſelf at the Time of Sentence pronounced. And, *Thirdly*, If ſuch Sentence ſhall be pronounced *per Injuriam*, or by the Knavery of the Buyer. And if there be a Failure in any of theſe Requiſites, the Eviction has no Effect, in order to give the Buyer an Action [u] C. 8. 45. 1. againſt the Seller [u].

I ſay, That Intimation ought to be given to the Seller, in order to give the Buyer an Action of Eviction againſt him, even though the Seller ſhould [x] Rom. Conſ. 211. n. 3. know it without Intimation [x]. And the Reaſon may be (perhaps) becauſe the Buyer, *eo ipſo*, in not denouncing to the Seller, is deemed to be guilty of Fraud. Another Reaſon is, becauſe the Seller is preſumed to be better acquainted with the Matter than the Buyer: And therefore, this [y] Bald. in L. 75. D. 3. 3. Intimation ought to be given to him, that he may defend his Right of Sale [y]. [z] Conſ. 117. vol. 7. And this Intimation ought, (according to *Alexander* [z]) to be made with a Requeſt,

a Requeſt, that he would defend that Title of the Goods ſold; though (others ſay) that ſuch Requeſt is not neceſſary: But this we muſt refer to Practice. But a Notification is not good, unleſs it contains the Name of the Perſon that commences the Suit againſt the Buyer. It ought to be made to the immediate Seller, and not to the firſt Author of the Sale: For the Buyer cannot have an Action of Eviction againſt the Perſon whom the Seller bought it of, without an Aſſignment of his Right of Action: For, by ſuch Aſſignment, the firſt Seller is liable to an Eviction, whether the Thing be evicted from the immediate Seller, or from a Perſon that has a Title from him, provided this Eviction be not cauſed by the Act of the Buyer [a]; yea, though it ſhould have paſſed through a thouſand Hands, and be evicted from the laſt, yet the firſt Seller is liable, provided ſuch Eviction be not occaſion'd by any of his Succeſſors [b]. But then Notice of the Suit ought to be given to the firſt Seller, when the others have aſſign'd over their Rights againſt ſuch firſt Seller. Eviction ought to be made by a Sentence; otherwiſe the Thing is not ſaid to be evicted in ſuch a manner as to relieve the Buyer [c]: And *Alexander* ſays, that a Sentence alone is not ſufficient to entitle the Buyer to an Action, but the ſame ought to be executed, otherwiſe Eviction does not proceed [d]. But when a Perſon has knaviſhly ſold that which belongs to another Man, Eviction has Place without a Sentence ſubſequent to the Sale [e]: And 'tis the ſame thing, when the Seller is ſworn to an Eviction, and he does not fulfil his Promiſe [f].

[a] D. 21. 2. 22. 1.

[b] Bald. in L. 23. C. 8. 45.

[c] C. 8 45. 3.

[d] Alex. Conſ. 4. lib. 3.

[e] D. 3. 5. 19. 3.

[f] Beroſ. Conſ. 158. lib. 1.

As *Eviction* is ſaid to be the Loſs and Taking away of a Thing, which has been bought on a juſt and valuable Conſideration, by the Judge's Sentence in a Court of Judicature, whereby the true Owner recovers his Right [g]; it hence follows, that he is ſaid to evict a Thing in Law, who thus recovers a Thing, which belongs to him, out of the Buyer's Hands, by proving, in a Court of Judicature, That the Thing purchaſed, does, by Right of Property, belong to him, and not to the Buyer, though he has bought the ſame. Wherefore, if I buy a Houſe of *Titius*, which *Caius*, in a Court of Law, proves to be his, and *Caius* recovers that Houſe by an Action at Law, *Caius* is ſaid to gain and recover that Houſe by *Eviction*, though *Titius* be at the ſame time liable to me on the ſcore of Eviction, or, in other Terms, though *Titius* be obliged to indemnify me, by a Reſtitution of the Money paid for that Houſe, according to the Intereſt which I have in the ſaid Houſe, in caſe the ſame had been evicted [h]. The Buyer and his Succeſſor, and alſo the ſecond and third Buyer, if an Eviction be commenced againſt them, may object an Exception *rei venditæ & traditæ* [i]; *viz.* That the Thing was ſold and deliver'd to them; and this Exception lies againſt the Vender and his Succeſſor. Eviction has not only Place in Bargain and Sale, but even in many other Objects of the Law [k]; as in Permutation, Legacies in general, and in the Diviſion of an Inheritance, and of Things which lie in Common, *&c.* But Eviction does not obtain in every Contract of Bargain and Sale.

[g] D. 21. 2. 16.

[h] D. 21. 2. 60. 70 & 74.

[i] D. 21. 3. 3.

[k] D. 21. 2. 34. 1.

When there are ſeveral Things or Chattels diſtinctly ſold, and each of theſe have a proper Price annexed to them; then, if only one Thing be evicted, the Price of that Thing is only conſider'd on the Eviction, and the Damage or Intereſt ſhall only reſpect the ſame, without any Regard had to the other Things [l]. As when a Man ſells a Horſe, Wine, and Corn, ſeparately, and the Horſe be evicted, the Price or Damage only of the Horſe ſhall be made good to the Buyer; becauſe here there are ſo many Evictions as there are Things, though ſold to the ſame Perſon [m]. But if a Man engages to ſell ſeveral Chattels jointly for one Price, the Sale ſhall be reſcinded in the Whole, if he cannot deliver them all; becauſe,

[l] D. 21. 2. 1.

[m] D. 21. 2.

to deliver a Thing, is an individual Obligation, according to the common Opinion of the Lawyers. See *Curtius junior* [n].

[n] Conf. 74. per tot.

It has been already hinted, That the Remedy which accrues to the Buyer upon an Eviction, is either an Action *ex Empto* [o], or elſe an Action *ex Stipulatu*, whereby he ſhall recover the whole Value of the Thing, and the particular Damage he has ſuſtained by ſuch Eviction; that is to ſay, the Intereſt which he might have gained, in caſe ſuch Eviction had not happen'd [p]; which admits of more or leſs, according to the Increaſe or Decreaſe of ſuch Intereſt. But an Action *ex Stipulatu*, brought upon an *expreſs* Warranty *in Duplum*, does not receive an Increaſe or Diminution, but is aſcertain'd to twofold of the Value of the Thing ſold [q], as before related. When I ſay, That the Buyer has his Remedy by an Action *ex Stipulatu*; I mean, if the Perſon has ſtipulated in a penal Sum, as in Twofold, Threefold, *&c.* *Note*; Theſe Actions ceaſe, if the Buyer knaviſhly purchaſes a Thing belonging to another [r]; or if the Buyer has not made a juſt, but only a feint Defence in the Suit [s]; or if the Thing be injuriouſly taken from him [t], or by his own Act, Fault, or Negligence [u]; or if he ſhall neglect to give Notice to the Seller, or his Heir, of the Suit commenced againſt him, before Condemnation had in the Cauſe [x], even though the Seller had otherwiſe Knowledge thereof, as already remember'd; or if he has voluntarily compounded or compromiſed the Matter with the Plaintiff [y]; or, laſtly, if the Buyer has ſuffer'd a Limitation or Preſcription of Time to run againſt him from the Time of the Sale made [z]. The Seller may be compelled to aſſign over the Actions which he has for the Thing ſold, againſt the Perſon he bought it of, unto the Buyer that ſuffers by Eviction. A Creditor ſold a Thing *Jure Creditoris*, *viz.* in Right of being a Creditor, but would not be liable to an Eviction. The Thing was evicted in the Buyer's Hands, becauſe he was not the Debtor. And thus the Creditor had a contrary *Pignoratitious* Action againſt the Debtor, becauſe he had impawned a Thing which was not his own. Wherefore, though the Creditor be not liable to an Action of Eviction; yet he ought to aſſign over ſuch contrary *Pignoratitious* Action, ſince it is no Injury to him [a]. Thus,

[o] D. 21. 2. 1.
[p] D. 21. 2. 60 & 70.
[q] D. 21. 2. 64. D. 19. 1. 44.
[r] C. 8. 45. 27.
[s] D. 21. 2 29. 1.
[t] D. 21. 2. 51.
[u] D. 21. 2. 55 & 56.
[x] D. 21. 2. 29. 2. D. 21. 2. 56. 4.
[y] D. 21. 2. 56. 1.
[z] D. 21. 2. 54.
[a] D. 21. 2. 38.

A Creditor ſelling a Thing *Jure Creditoris*, which he thought to be the Goods and Chattels of his Debtor, is not liable to an Eviction, unleſs he has expreſly promis'd to the Buyer to become ſo. As for Example: If the Exchequer ſells a Thing *Jure Creditoris* [b], *viz.* either by Pact, or according to Law, the Exchequer is not liable to the Purchaſer on the ſcore of any Eviction; nor is a private Perſon, unleſs he has bound himſelf thereunto. But what if the ſaid Pawn was gaged unto the Exchequer and to a private Perſon, and, after the Sale thereof, the Exchequer ſucceeds ſuch private Perſon as Heir; may the Exchequer, in this Caſe, evict ſuch Pawn, contrary to its own Act and Deed? And it is held, That it may not; either becauſe that he was a Creditor who had the Preference of Right, or had not, when he ſold it: For he who ſells a Pawn, ought to ſhew that he had the Preference to other Creditors. See the Title *Of Pawns* hereafter.

[b] C. 8. 46. 1.

Thus, if a Perſon ſells a Thing as the Proprietor thereof, he is then liable to Eviction: But if he ſells it as a Creditor, ſaying, That he ſells it, becauſe he is a Creditor; then he is not liable, if he has a Right of ſelling it either by ſome Law or Pact: But if he has no Right of ſelling it, then he is bound to the Buyer, by an Action, to aſſign him over a contrary *Pignoratitious* Action, if the Thing be evicted [c]. When the Buyer ſucceeds the Seller as Heir, or the Seller ſucceeds the Buyer, if the Thing be evicted, in both theſe Caſes an Action lies againſt the Sureties [d]. *Titius* ſold an Houſe or an Eſtate unto *Caius*, and thereupon promis'd to give him a Surety

[c] D. 21. 2.
[d] D. 21. 2. 41.

Surety on the Account of Eviction, whereunto (notwithſtanding) he was not obliged. Therefore, that he might fulfil his Promiſe, he gave him a Surety: In this Caſe the Surety is liable. But if *Caius* ſucceeds *Titius* as Heir, the Surety is diſcharged [e]. *Mævius* ſold me another Perſon's Bondman, and, by way of Warranty, gave Caution *de Duplo*, as the uſual Way then was. *Caius*, the Proprietor of the Bondman, died, and made me his Heir: *Quære*, Whether I may have an Action againſt *Mævius* in Twofold? And it was adjudged, that I could not: But yet I may have an Action *ex Empto*, to compel him to repay me the Purchaſe-money which I gave for the Bondman [f]. *Sempronius* had an Eſtate in Common with *Titius* and *Seius*, and *Sempronius*, as ſole Proprietor thereof, granted me the Service of a Foot-way through the ſaid Eſtate. Afterwards the other two Tenants in Common refuſed to conſent and aſſign me the ſaid Way. In this Caſe it was held, that *Sempronius* was liable to me in an Action of Eviction [g]. If a Perſon ſells me a Cow big with Calf, and gives Caution *de Duplo*, and the Calf falls in my Keeping, but yet is evicted, I cannot, in this Caſe, have an Action of Eviction, but may have an Action for Damage [h]; becauſe the Cow was the principal Thing ſold, and the Calf was only an Acceſſory. It is not to be doubted, but that the Seller may be repelled by an Exception of *Deceit*, if he claims the Thing which he has ſold by raiſing up another Title [i].

[e] D. 21. 2. 41.

[f] D. 21. 2. 9.

[g] D. 21. 2. 10.

[h] D. 21. 2. 16.

[i] D. 21. 2. 17.

It has been noted, That *Eviction* is Twofold; *viz.* what we have called *expreſs* and *tacit* Eviction. The *Firſt* is, When a Thing has been deliver'd, and evicted after Delivery: And in this Caſe a Sentence is required; and, according to *Baldus* [k], a Promiſe touching Eviction has not any Force without ſuch a Sentence. *Tacit* Eviction, is, When the Thing is not deliver'd, nor can it be deliver'd: And, for this Reaſon, it is not properly call'd Eviction; to the End that the Buyer may have an Action touching Eviction: but he ought to have his Action *ad Intereſſe*, or for *Damage* [l]. Wherefore, *Baldus* (as before cited) ſtiles this a *feigned* Eviction; becauſe, from the Nature of the Sale, there is an inherent or implicit Promiſe, on the Part of the Seller, to deliver the Thing.

[k] Conſ. 289. lib. 2. pr.

[l] D. 19. 1. 1.

Eviction is derived from the Verb *Evinco*, which ſignifies the getting the better by Conqueſt of Suit, or otherwiſe; and *Eviction* is, the obtaining or taking of a Thing from another by ſuch a Conqueſt: As when, in any Diſpute, a Perſon gets the better of his Adverſary by Dint of Argument. But it is often uſed as a Law-term, to point out ſuch Eviction as is made either by Law, or a Judicial Proceſs. When it is made by a Judicial Proceſs, it is a Recovery or Taking of a Thing bought, or received upon ſome Account or other, by the Decree of the Judge [m], as before deſcribed. For 'tis to be obſerved, That it was heretofore uſual, that if a Thing was alienated according to the Law of Nations, and not by the *Roman* Law, the Perſon that acquir'd it received Stipulation in twofold, for the ſecure Poſſeſſion of it; and this was called Caution *de Evictione*; and by our *Engliſh* Lawyers, *Warranty*.

[m] D. 21. 2. 24.

[By the Common Law of *England*, no Man is bound to warrant the Title of what he ſells or conveys, unleſs there be an *expreſs* Warranty, or Warranty by Law [n]. And by the ſaid Law the Buyer gains a Title, without Danger of Eviction, if the Sale be made in an open Fair or Market, and tolled for. See *The Doctor and Student* [o].]

[n] Inſt. 102. a.

[o] Lib. 1. c. 25.

TIT.

TIT. VII.

Of Hiring *and* Letting to Hire; *a Compariſon between this Contract and that of* Bargain *and* Sale: *Of the* Merces, *or Reward and Wages agreed upon, or referr'd to the Judgment of a third Perſon; and wherein this* Merces *or Reward conſiſts. Under this Title is comprized the Intereſt and Buſineſs of Landlord and Tenant.*

AMONG Contracts founded upon Conſent alone, we may alſo conſider Hiring and Letting to Hire, in *Latin* called *Locatio-conductio*, as a ſecond *Species* of theſe Contracts. The Ancients uſed the Words *Locatio* and *Conductio* in a promiſcuous Senſe, to ſignify one and the ſame Thing [p], as they alſo did theſe two Words *Emptio* and *Venditio*. But *Location* is nearer of Kin to *Emption*, in reſpect of its Riſe from the Law of Nations, as likewiſe in reſpect of that fair dealing which ought to attend it, and alſo in other Regards. *Varro* ſays [q], that theſe two Words *Locatio* and *Collocatio*, are both derived from the *Latin* Word *Locus*, becauſe the Cryer was wont to Let every Thing to Hire, which the Place conſiſted of, and for that every Thing may be Let to Hire which conſiſts in Place, as every Thing may be purchaſed which conſiſts in Price. Thus *Locare* is to give ſomething to be done or made uſe of, for which the *Conductor* or Hirer is to pay a certain Reward or Hire; and this alſo extends itſelf to ſome Work that is to be done. For Example, *Locare Domum*, is to Let a Houſe to a Perſon for a certain Rent or Penſion: And he is ſaid *Locare Opus*, who bargains with a Carpenter, or other Artificer, touching ſome Work to be done, on the Payment of ſuch Wages or Hire. And, in this Senſe, Hiring and Letting to Hire, is a Contract founded on Conſent, whereby a Perſon is either to do or make ſomething, on a certain Reward paid: And when it relates to Work done, the Reward is in *Latin* ſtiled *Merces*; but if it reſpects a Place, as a Stable, Houſe, *&c.* it is then called *Locarium*, or a Rent.

[p] D. 19. 2. 20. D. 43. 8. 1.

[q] Lib. 4. de Lin. Lat.

I have before hinted, that Hiring and Letting to Hire, is near of Kin to Bargain and Sale, being govern'd almoſt by the ſame Rules [r]: Wherefore, I ſhall next conſider, wherein Hiring and Letting to Hire do agree with Bargain and Sale, and wherein they differ. *Firſt*, Wherein they agree. For as a Contract of Bargain and Sale is formed, if a Price be agreed on; ſo alſo is a Contract of Hiring and Letting to Hire underſtood to be made, if a *Merces* or Rent be ſettled. And hereupon an Action *ex Locato* accrues to the Perſon who Lets a Thing to Hire; and an Action *ex Conducto* to the Perſon who hires [s]. *Secondly*, This Contract of Hiring and Letting to Hire, is founded on the Law of Nature, and introduced by the Uſage of all Nations, as Bargain and Sale is: So that in theſe Contracts there is no occaſion of any ſolemn Form of Words. *Thirdly*, As in Bargain and Sale three Things are requir'd, *viz.* The Thing, the Price, and Conſent, which are the Subſtantials of this Contract: So likewiſe in Letting to Hire, there ought to be the Thing hired, the *Merces* or Hire, and the Conſent of the Parties. *Fourthly*, As it is not lawful in Bargain and Sale, for one Party to

[r] l. 3. 25. pr.

[s] l. 3. 25. pr.

recede

recede from his Contract without the others Conſent: So neither is it in Hiring and Letting to Hire; for all Contracts are reciprocally binding. *Fifthly*, As in Bargain and Sale, when Eviction of the Thing ſold threatens or happens *in Limine Contractûs*, the Price is not paid: So it is the ſame Thing in Hiring and Letting to Hire. *Sixthly*, As the Seller is liable to the Buyer, in Caſe of Eviction: So likewiſe is the *Leſſor* or *Locator* liable to be condemned to the *Leſſee* in Damages and Coſts of Suit. Another Semblance in each Contract, is, that the Price and Hire ought to be ſettled *in Pecunis Numeratis*, according to the *Civil* Law [t]. And this Contract of Hiring and Letting to Hire, is like unto a Contract of Bargain and Sale in many Reſpects: And both theſe Contracts have ſo near a Relation to each other, that in many Caſes it has been a Queſtion, whether it be Bargain and Sale, or Hiring and Letting to Hire [u]. As when I agree with a Goldſmith to make me ſo many Rings, of a certain Weight and Form, out of his own Gold, and he has received for this Three Hundred Pounds in Money, it is deemed to be a Contract of Bargain and Sale [x]. But if I furniſh him with Gold, and pay him for his Workmanſhip, it is then ſaid to be a Contract of Hiring and Letting to Hire [y]. And as this Contract of Hiring and Letting to Hire, reſembles a Contract of Bargain and Sale; ſo it is govern'd almoſt by the ſame Rules of Law, as aforeſaid: And where there is no Difference found, an Argument from one to the other is valid. But theſe Contracts differ in ſome Reſpects; becauſe in a Contract of Bargain and Sale, a Price is principally requir'd: But in a Contract of Hiring and Letting to Hire, the Fact itſelf is only principally concern'd. *Secondly*, Bargain is perpetual, and cannot be retracted: But Hiring and Letting to Hire, is for a Time only. *Thirdly*, In Bargain and Sale, the contingent Hazard belongs to the Buyer: But in Hiring and Letting to Hire, the Danger falls on the *Locator* [z]; unleſs the contrary be agreed on, or unleſs the Perſon that hires be in Fault. *Fourthly*, In Bargain and Sale, the Property of the Thing ſold paſſes to the Buyer: But it is otherwiſe in Hiring and Letting to Hire; for herein only the Uſe of the Thing paſſes for a Time, and the Property thereof is not transfer'd to the Hirer [a]. *Laſtly*, In Bargain and Sale, Caution or Warranty, touching Eviction, obtains: But in Letting to Hire it does not. And theſe are the principal Differences between theſe two Contracts.

[t] D. 16. 3. 1. 9. I. 3. 25. 2.
[u] I. 3. 25. 3.
[x] D. 18. 1. 65.
[y] D. 19. 2. 1. 1. I. 3. 25. 4.
[z] D. 19. 2. 9. 3. D. 19. 2. 15. 2.
[a] D. 19. 2. 39.

There are three *Species* of *Location*, or Letting to Hire, and one differs from another. A *proper* Location is ſimple, and for a moderate Time only, according to *Aretinus* [b]. There is another Kind for a conſiderable Length of Time, but yet determinate, as for Twenty Years, and the like: And this differs from a ſimple and perpetual *Location*, or from a Leaſe for Length of Time not determinate. There is another Kind of Demiſe, or *Location*, for a Length of Time indeterminate, as for Thirty Years, and to be renew'd always from Thirty Years to Thirty Years: And this differs from the former, and is more properly an *Emphyteuſis* than a Demiſe. As a Leſſee cannot exceed the Time for which the Thing is Let [c]: So he is not bound to reſtore the Thing hired before the End of the Term; unleſs he has failed to pay the Rent or Hire for Two whole Years together: In which Caſe he is bound to reſtore it ſooner [d]. *Secondly*, He is bound to give it up ſooner, if the Landlord or Proprietor ſtands in great need of the Thing itſelf [e]. *Thirdly*, If the Tenant or Leſſee, has injur'd and impoveriſh'd the Eſtate [f]. And, *Fourthly*, If the Owner or Proprietor has a Mind to repair or rebuild the Houſe, *&c.* If a Leſſee continues in Poſſeſſion after the End of his Term or Leaſe, he is preſumed to have a ſecond Demiſe or Leaſe made him. Corporations or Bodies Politick, can only Demiſe or make Leaſes for a moderate Length of Time, as for Ten Years, and under, unleſs they uſe the Solemnities that are requir'd in an Alienation; becauſe

[b] Conſ. 46.
[c] C. 4. 65. 3.
[d] D. 19. 2. 56.
[e] C. 4. 65. 3.
[f] C. 4. 65. 3.

a Leaſe for any conſiderable Length of Time, is a kind of Alienation. But this is otherwiſe, when a Community has made a Leaſe only for a particular Perſon's Life, for then ſuch Leaſe is valid without thoſe Solemnities, and ſhall not be revers'd by way of Reſtitution *in Integrum*, unleſs ſome Damage be proved. By the *Canon* Law, a Leaſe of Eccleſiaſtical Eſtates, beyond the Time permitted by Law, which is Three Years, is prohibited, and not valid. By the Law of *England*, Colleges, Deans and Chapters, *&c.* may grant Leaſes for Three Lives, or One and Twenty Years, and no longer [g]; and no concurrent Leaſe ſhall be valid, unleſs granted to commence within Three Years from the Expiration of the old Leaſe [h]. By the *Civil* Law, a Leaſe may be made to laſt during the Will and Pleaſure of the Leſſor, or to determine on the Death of the Leſſor or Leſſee [i]. If no Time be expreſſed in the Demiſe, in Country Eſtates they ſeem to be Let for a Year, and no longer; but in City Eſtates, till one or either of the Parties ſhall renounce the Contract [k]. But this Renunciation ought to be made with ſome Grains of Allowance, that the Tenant or Leſſee may have the Uſe of the Thing, and not be obliged to quit the ſame on a ſudden [l].

[g] 13 Eliz. c. 10.
[h] 18 Eliz. c. 11.
[i] D. 19. 2. 4.
[k] D. 19. 2. 13. fin.
[l] D. 13. 6. 17.

Hiring and Letting to Hire are tranſitory Things, and therefore paſs to the Heirs of the Leſſor or Leſſee during the Time of the Leaſe [m]: And the Leſſee may Leaſe to an Under-Tenant, provided the Leaſe be made to a fit and proper Perſon, and to the Uſe of the firſt Leſſee [n]. And not only the firſt Demiſe, but alſo the Under-Demiſe or Leaſe paſſes to Heirs and Succeſſors. And therefore, as the firſt Leſſor cannot ouſt his Tenant during the Time of the Demiſe [o]: So, for the ſame Reaſon, the ſecond Leſſee cannot be moleſted by the firſt, unleſs there be ſufficient Cauſe. If a Leaſe be made, it ſtands good till it be revoked; yet Death is no Revocation thereof: But if it be made to continue during Pleaſure, it expires by the Death of the Leſſor or Leſſee. As long as the Leſſor remains Owner or Proprietor of the Eſtate, he may (notwithſtanding ſuch Demiſe or Leaſe made) transfer the Property of the Thing Let unto another [p]; and the Perſon to whom the Transfer is made, as he has not contracted with the Tenant or Leſſee, is not obliged to obſerve the Terms of the Demiſe. But yet ſuch Tenant or Leſſee may convene the Leſſor to make good his Intereſt in the ſaid Demiſe, or elſe to pay him Damages [q]. The Leſſee is liable to anſwer to the Leſſor for ſuch Perſons as dwell with him in the ſame Houſe, if it be through his Fault that evil Perſons are let into the Houſe demiſed [r]: And it is the ſame Thing, if ſuch Perſons are taken in through the Fault of his Servants. But the Leſſor muſt prove a Fault to be in the Leſſee. So that if a Houſe be burnt by Fire, and the Leſſor would have an Action of Damage againſt the Leſſee, he muſt prove that the Fire happen'd thro' the Fault of the Tenant or Leſſee [s].

[m] I. 3. 25. 6.
[n] Bald. in L. 6. C. 4. 65.
[o] D. 16. 3. 1. 6.
[p] C. 4. 35. 21.
[q] D. 19. 2. 25. 1.
[r] D. 19. 2. 11. pr.
[s] Arg. D. 18. 6. 11.

If a Perſon in one Leaſe, and in the ſame Contract, demiſes unto any one two Farms or two Houſes, and the Tenant behaves himſelf ill in one of them, he may be turned out of them both, as if one was only let to him [t]. But the Abuſe or Dilapidation ought to be remarkable, and not light, which is left to the Diſcretion of the Judge; and the Damage ought to reſpect the Property, and not Fruits; becauſe the Tenant is Lord of the Fruits. But it is otherwiſe in a Vineyard: For if Vineyards are not pruned and dreſſed as they ſhould be for a long Time, it is a great Damage to the Landlord. By a Leaſe or Demiſe made, the whole Right of receiving the Fruits by the Tenant, is transfer'd, and the Fruits thus received by him do, *Jure Dominii*, belong to the Leſſee, according to their proper Portion, and not to the Leſſor. But ſometimes an Eſtate is Let for the Landlord to receive one Part of the Fruits, and the Tenant the other: And ſuch a Tenant is ſtiled *Colonus Partiarius*, as being obliged to pay the Landlord's Part

[t] C. 4. 65. 28.

Part out of the Fruits which grow on the Eſtate held of him. And thus a Perſon may compel his Tenant, who is obliged every Year to render a certain Quantity of Corn, to render ſuch Quantity out of the Fruits and Grain, which he collects and gathers from the Eſtate, which his Tenant holds of him as a Husbandman. Where a Monthly or Yearly Price is by Contract ſettled and agreed upon for the Fruits of an Eſtate, ſuch Contract is (according to *Bartolus* [u]) called a Covenant of Letting to Hire: And this is true, whether the Parties contracting have made uſe of the Words *Letting to Hire* or not, or any other Term of Sale; for Letting to Hire is a kind of Sale. As when it is ſaid, That ſuch a one has ſold the Revenues or Profits of an Eſtate for ſuch a Price, to be Yearly or Monthly paid him: Such a Contract, I ſay, ſhall be deemed a Contract of Letting to Hire; for the Nature of the Contract is more to be conſider'd than the Words of it [x]. And in ſuch a Contract, the Rent or Hire ought to be remitted, if a Misfortune happens, as in a Contract of Letting to Hire.

[u] In L. 1. C. 4. 66.

[x] C. 4. 65. 21.

A Contract of Hiring and Letting to Hire, does, of its own Nature, carry an Obligation along with it on both Sides. For the Landlord or *Locator* is to ſee that his Tenant, or the Perſon who Rents a Thing, has the Uſe and Enjoyment of the Thing demiſed or granted to him, otherwiſe he ſhall be obliged to remit the Rent or Hire, and pay Damages: And eſpecially when ſuch a Tenant or Hirer has been hinder'd from uſing the Thing, by the Default of him who Demiſed or Let it. But when ſuch Hinderance is not occaſion'd by the Fault of the *Locator*, he ſhall only remit the Rent or Hire, without an Aſſeſment of Damages. But of this again by and by. The Payment of Rent ſhall alſo be remitted unto a Tenant or *Conductor*, on Score of unuſual Floods, and great Overflowings of Rivers, the Force of Enemies, and the like [y]; or if any Blight ſhall deſtroy or ſpoil the Fruits, or if the Fruits ſhall be ſcorched up by an unuſual Heat of the Sun, or the Land ſhall be ſwallow'd up by an Earthquake, or the Houſe ſhall periſh by Fire, without the Fault of the Tenant, or the Perſon that hires it [z]; and laſtly, on the Account of all Force which cannot be reſiſted. In all theſe Caſes, the Perſon who Hires or Rents a Thing, may have an Action *ex Conducto*, in order to have his Rent or Hire remitted to him. But this, I think, is otherwiſe according to the Common Law of *England*, unleſs the Court of *Chancery* thinks fit to relieve the Tenant: But the Landlord would do well to be merciful without Compulſion. On the Part of a Perſon who Rents or Hires a Thing, it is his Duty to preſerve, maintain, and uphold the ſame, and he ſhall have neceſſary Expences allow'd him; and he ought likewiſe to uſe the ſame Care in keeping it well, as a vigilant and circumſpect Man would do in preſerving his own Eſtate or Goods [a], but he is not bound to uſe the ſame Diligence as the moſt prudent and careful Man would do; unleſs he takes on himſelf the Riſque of a fortuitous Caſe [b]; or unleſs he receives a Reward or Salary for the ſafe keeping thereof; or unleſs the Thing in its own Nature requires the exacteſt Diligence [c].

[y] C. 4. 65. 35.

[z] D. 19. 2. 15.

[a] D. 19. 2. 25. 3.

[b] Not. in. L. 28. C. 4. 65.

[c] D. 19. 2. 25. 7.

An Action is granted to the *Locator*, or Perſon who Lets a Thing to Hire, whereby he may ſue for the Rent or Hire promis'd him; and if the Perſon who Rents or Hires a Houſe, does not pay the Rent, he may be ejected and turned out of the Houſe: But all the Goods and Chattels brought into the Houſe, are, by a tacit Implication of Law, engaged for the Payment of the Rent. If a Landlord Lets out a Houſe or any Thing unto a Tenant, who again Lets out the Houſe, *&c.* unto another Perſon, he may not only ſeize on the Goods of the firſt Tenant, but alſo on the Goods of the other, if the Landlord be not paid his Rent. But firſt of all, Execution ought to be levy'd on the Goods of the firſt Tenant, and if thoſe Goods are not ſufficient for the Payment of the Rent, he may then (according

ing to *Bartolus* [d]) proceed againſt the Goods of the ſecond Tenant: But this is to be underſtood for that Part only which the ſecond Tenant Rents [e]. Becauſe, though the ſecond Tenant be not perſonally engaged to the firſt Landlord, with whom he has made no Contract; yet the firſt Tenant is bound to him, and the Goods of the ſecond Tenant are tacitly engaged for the Debt of the firſt Tenant, ſince all the Goods of the firſt Tenant are bound to the Landlord, unleſs the Houſe had been Let to the ſecond Tenant *Habitandi Gratiâ*; for then his Goods are not deemed to be tacitly engaged to the firſt Landlord, ſince no Rent is due [f]. But it is otherwiſe in a *Colonus* or Husbandman, who Rents an Eſtate in the Country. For Goods brought on an Eſtate in the Country are not tacitly engaged *ipſo Jure*, unleſs the Owner of the Eſtate be privy to the bringing them thereon, and, by expreſs Covenant conſented thereunto [g]: But the Fruits which ariſe from ſuch an Eſtate unto the Husbandman, are tacitly engaged to the Owner of the Eſtate for Rent unpaid [h]. And this is the Difference between a *Colonus* and an *Inquilinus*, as the Law ſtiles them. For Goods brought into a Houſe hired by the latter, are bound as a Pledge for the Rent, though they are not brought in by the Conſent and Privity of the Landlord: But in reſpect of the former, only the Fruits growing on the Soil are liable.

[d] In L. 10. D. 39. 4. fin.

[e] D. 13. 7. 11. 5.

[f] D. 20. 2. 5.

[g] C. 4. 65. 5.

[h] D. 20. 2. 7.

Every Perſon who ſucceeds to an Eſtate by the Decree of the Judge, or by the Teſtator's Will, *&c.* is obliged to abide by a Demiſe or Grant made by him who was the Proprietor of that Eſtate, becauſe ſuch a Tranſfer or Conveyance of the Eſtate is made *ex Neceſſitate*, and in ſuch a Caſe a Succeſſor is always bound to retain his Tenant, unleſs ſuch Eſtate demiſed to the Exchequer by way of Confiſcation or Forfeiture: For the Exchequer is not obliged to retain a Tenant, or ſtand to a Demiſe that is made by him whoſe Eſtate or Goods are confiſcated [i]. It has been ſaid, that a Purchaſer is not bound to abide by the Demiſe made by the Seller in any Thing which he has bought [k]: But there is one Caſe wherein he is obliged to ſtand to ſuch Demiſe, *viz.* if in the Contract of the Demiſe there be a Covenant inſerted, That *the Thing hired may not be alienated to another, and if any Alienation be made contrary hereunto, it ſhall be null and void:* For then the Property cannot be transferred to another in Prejudice of a third Perſon.

[i] D. 19. 2. 33.

[k] D. 19. 2. 33. pr.

I have already obſerved, That a Landlord may turn his Tenant out of the Houſe which he Rents, if he has a Mind to inhabit the ſame himſelf, and has no other Houſe to dwell in: But then the Landlord muſt pay his Tenant all Damages which he ſuſtains by ſudden Removal or Ejectment [l]. But if the Landlord be ſo far preſſed with Neceſſity, that he is compelled to repoſſeſs himſelf of his own Houſe which he has demiſed to another, he ſhall not be obliged to pay the full Damage: For a Perſon that does an Act out of meer Neceſſity ſhall find Relief [m]. When a Tenant is turned out of his Houſe for the proper Uſe of his Landlord, as when either the Landlord or his Son ſhall marry a Wife, or his Parents want a Dwelling, he ought to remit the Rent *pro Ratâ Temporis*. Letting to Hire is properly ſaid to be, when the Rent or Penſion for the Thing hired or Let to Hire is paid in Money [n]: For if the Hire or *Merces* be paid in any *Species*, it becomes an *Innominate* Contract. But though, by the *Civil* Law, the *Merces* or Hire *chiefly* conſiſts *in Pecuniis Numeratis*, (for it may depend on another Thing,) yet with us here in *England* it may conſiſt in Corn and other Things of this Kind, and ſometimes even in Fealty alone [o]. But when we Let Lands for Lands, it is called *Exchange*.

[l] C. 4. 65. 3.

[m] D. 2. 8. 7. 1.

[n] D. 16. 3. 1. 9. I. 3. 25. 2.

[o] Littl. lib. 1. c. 7.

Not only Things Moveable, as Horſes, Oxen, Sheep, *&c.* are the Object of Hiring and Letting to Hire; but even Immoveables, as Lands and Houſes [p]: And Things incorporeal may alſo be Let to Hire, as an Uſufruct,

[p] D. 19. 2. 9. fin.

fruct, the Right of Paſture, and the like. But then theſe incorporeal Things, by our Law, cannot be Demiſed or Let without Writing [q]. If a Perſon hires a Houſe in the Time of a War, or Peſtilence raging in that Place, he cannot afterwards alledge a fortuitous Caſe of War or Peſtilence: For a Promiſe which a Perſon makes touching the Payment of a Rent or Penſion, ought to be underſtood according to the State of the Time, which was at the Time when the Perſon enter'd upon the Demiſe [r]; and a Remiſſion or Abatement of Rent ought not to be made upon the Account of a War, which was at the Time of the Contract made [s].

[q] 23 Hen. 6. c. 10.

[r] Bald. in L. 17. C. 4. 32.

[s] Dec. Conſ. 212.

As Hiring and Letting to Hire, is a Contract founded upon Conſent [t]; ſo this Conſent may either be expreſs'd by Words or Signs, and may alſo be by a tacit Implication of Law; as when a Perſon tarries in a Houſe after the Term of the Leaſe is expired [u]. But this Conſent ought to center in the Thing let and to be enjoy'd; and alſo to be touching a certain Rent or Hire, which is ſometimes call'd a Price [x]. But if there be no Price or Hire agreed on between the Parties contracting, the ſame may be rightly referr'd to the Diſcretion of a third Perſon, and not left to the Will of either of the Contractors: Wherefore, if a Perſon ſhall deliver Cloaths to a Taylor to be mended, or to a Scourer to be cleanſed, and ſhall not immediately agree on the Price for the Work done, it ſhall be left to the Arbitration of a third Perſon. But this is not properly ſtiled Hiring and Letting to Hire; but an Action *Præſcriptis Verbis* lies [y]. Too great an Inequality in reſpect of the Hire or Rent, and if either of the Parties are deceived in more than the juſt Price, do vitiate this Contract [z]. If a Perſon ſhall ſell the Revenues of an Eſtate for ſeveral Years *ſub uno Pretio*, it will not be a true Contract of Bargain and Sale, being executed under ſuch a Form; and conſequently, the Riſque of the Thing ſhall belong to the Buyer, nor ſhall a Remiſſion of the Price be made on the ſcore of Sterility; becauſe he purchaſes the Hope of receiving the Profits of the Eſtate; which Hope ſucceeds in the Place of the Thing, and is not diminiſh'd though all the Fruits periſh. But it ſhall be adjudged Letting to Hire, if a Perſon ſhall ſell the Revenues of an Eſtate *ſub uno Pretio*, to be paid at different Seaſons; becauſe ſuch Payments thus divided, do render it a Contract of Letting to Hire: And this is true, when thoſe Payments are uniform; but is otherwiſe if they are diſſimilar.

[t] D. 19. 2. 1.

[u] D. 19. 2. 13. fin. &. l. 14.

[x] D. 19. 2. 56. pr.

[y] I. 3. 25. pr.

[z] D. D. in L. 2. C. 4. 44.

There are two Sorts of Actions *Bonæ Fidei* [a], which attend this Contract of Hiring and Letting to Hire; and they each of them paſs to the Heir [b], but neither of them to a particular Succeſſor [c]. The firſt is an Action *ex Locato*, which is given to the Perſon who lets a Thing to Hire, by Virtue whereof he may ſue to have the Thing reſtored him after the Term of Letting to Hire is expired [d]: And if the Thing be deſtroy'd, and the like, he ſhall alſo recover the Value of it [e]; and thus if the Thing hired ſhall periſh by the Fault or Fraud of the Hirer, it ſhall be made good by this Action [f]. *Secondly*, This Action will compel the Hirer to pay the Hire or Rent due unto the proper Perſon, together with *Uſe* or Intereſt, after a Demiſe contracted [g]: But, I think, Intereſt is not due by Right of Action, but by Virtue of the Judge's Office. *Thirdly*, The Perſon who lets a Thing to Hire, may, by this Action, recover Damages, if the Perſon who hires or rents it quits the ſame before the Determination of the Term without juſt Cauſe [h]. The Oath *in Litem* may be given againſt a Perſon not reſtoring the Thing hired [i]. An Action *ex Conducto* is given to the Perſon, who hires any Thing, almoſt upon the ſame Account: *viz.* If the Perſon, who lets a Thing to Hire, will not ſuffer the Perſon who has hired it to make Uſe thereof, either becauſe the Poſſeſſion of the whole Field, or any Part of it, is not given to the Leſſee or Tenant, or the Houſe be not repair'd, *&c.* In this Caſe the Leſſee or Tenant ſhall have

[a] D. 19. 2. 54.

[b] D. 19. 2. 19. 8.

[c] D. 19. 2. 11.

[d] C. 4. 65. 25.

[e] C. 4. 65. 29.

[f] D. 19. 1. 15. 1. D. 19. 1. 9 & 10.

[g] C. 4. 65. 17.

[h] D. 19 2. 14.

[i] D. 19. 2. 55. 2. D. 19. 2. 48.

[k] D. 19. 2. 15 & 27. this Action for an Abatement or Remiſſion of Rent [k]. But herein we ought to conſider, whether the Tenant or *Conductor* has been hinder'd to uſe the Thing letten by any Impediment of the Leſſor, or of any other Perſon: Becauſe, in the firſt Caſe, the Leſſor or *Locator* ſhall be liable *ad Intereſſe*, *viz.* to make good the Damage which the Leſſee has ſuſtained, by not having the Uſe thereof. But, in the other Caſe, if any third Perſon hinders the Tenant or *Conductor*, we ought again to conſider whether the *Locator* might have prevented ſuch Oppoſition given to the *Conductor*; and then, again, he is liable, *quatenus Intereſt*, if he has not forbidden ſuch Oppoſition: But if he could not prohibit the ſame, then only a rateable Abatement of Rent ſhall enſue. The Tenant ought alſo to have an Abatement or Remitter of Rent made him, upon the Account of Sterility, or a very [l] D. 19. 2. 9. 1. D. 19. 2. 15. 2 & 7. bad Crop [l]. But he who alledges the Sterility, ought to prove the ſame. And Sterility, or a Badneſs of Crop, may be prov'd by common Fame and Opinion; and it is proved, when a Perſon receives no more from the Fruits of an Eſtate, than the Expences which he has been at will amount unto. Sterility is alſo ſaid to be, when the Tenant does not receive a Moiety of that which he was wont to receive, and alſo when he does not receive a Moiety of the Rent or Penſion to be paid. The *Conductor* may alſo have this Action againſt the *Locator*, if he has either knowingly or ignorantly let unto him a vicious Servant, and the like, or bad Veſſels to [m] D. 19. 2. 19. 1. put Goods in [m].

A Taylor, Fuller, and other Artificers, who let out their Work for the ſake of making a Gain thereby, are liable to make good all Damage for the Goods which they have received; and the Unskilfulneſs of an Artificer [n] D. 19. 2. 13. 5. D. 19. 2. 51. 1. is reckon'd a Fault in him [n]. And ſuch Perſons ſhall not only be anſwerable for all Fraud and the Safe-keeping of the Things deliver'd to them, but alſo, ſometimes, for the ſmalleſt Fault, according to the Circumſtances [o] D. 19. 2. 40 & 41. of the Affair and Pacts made with them [o], but not according to the Nature of the Contract.

TIT. VIII.

Of Partnerſhip, *how diſtinguiſhed into* univerſal *and* particular *Partnerſhip. Of the Parts of Profits and Loſs, equal and unequal*, &c. *how it expires either by Death, Renunciation, or when the Buſineſs for which it was enter'd into is determin'd*, &c.

THE *Third* Kind of Contract, which is perfected by Conſent alone, is, what we call *Society* or *Partnerſhip*: And this, in the general Senſe of it, is twofold; *viz. Publick* and *Private*. Nature itſelf has eſtabliſh'd the firſt among all Men; it being nothing elſe but that natural Alliance and Relation which all Men have with each other in publick Con- [p] D. 1. 1. 3. verſation [p]; and *Cicero* has given us a full Account of it in his *Offices* [q], [q] Lib. 1. c. 16. Lib. 3. c. 12. under the Name of *Publick Society*; for which Reaſon I ſhall not treat of it in this Place. Private Society, or what we more ſtrictly call *Partnerſhip*, is that which Civil Authority has introduced among Men, by a formal Kind of Contract, in Imitation of Publick Society or Partnerſhip introduced

introduced by the Law of Nature: And of this I ſhall here diſcourſe at large.

Now this Kind of Partnerſhip, in our Books [r] called *Societas*, is a *Nominal* Contract *bonæ fidei* invented by the Law of Nations, whereby (on the Conſent of two or more Perſons) Goods and Labour are put in Common, that each of the Parties contracting ſhould ſhare in the Gain and Loſſes thereof [s]: I ſay, *by the Conſent of two or more*; becauſe it is abſurd, and contrary to the Nature of this Contract, that one Perſon alone ſhould contract Partnerſhip. This Kind of Society ought to be built upon Honeſty and upright Dealing, and not upon Fraud and Iniquity [t]; for, among Knaves and Raſcals, there can be no ſuch Thing as true Partnerſhip [u]. Wherefore, if two Perſons ſhould agree to enter into Partnerſhip, upon a diſhoneſt or forbidden Account, as Theft, or ſuch-like Miſdemeanor, it is not call'd Partnerſhip [x], but a Confederacy or Combination of Wickedneſs. The Object of Partnerſhip, is Trade and Commerce among Men; under which I alſo include Labour, (as I ſhall obſerve hereafter): For Partnerſhip extends to all Things lawful and honeſt which may happen in Commerce [y]. In Partnerſhip, the Stocks or Labour ought to be in Common, in reſpect of each Perſon concern'd therein: For if you neither contribute Money nor Labour to the Partnerſhip, it will be rather deemed a *Donation* than a *Partnerſhip* [z]. Thus, either Goods on both Sides may be brought into Partnerſhip; or elſe Goods on one Side, and on the other Labour and Service [a]; or Labour and Service on both Sides: For, between two or more Artificers there may be a Partnerſhip, and their Gains may be in Common [b].

[r] I. 3. 26.
[s] D. 17. 2. 29. & 67.
[t] D. 17. 2. 57
[u] D 17. 2. 53 & 54.
[x] D. 46. 1. 70.
[y] D. 17. 2. 63. fin.
[z] D. 17. 2. 5. 2 & l. 37.
[a] D. 17. 2. 29.
[b] D. 17. 2. 71.

Partnerſhip, as here diſcourſed of, is twofold, *viz. univerſal*, and *particular*. The firſt, which the *Greeks*, by a particular Name, call Κοινωνία, extends itſelf to all the Partners Goods [c], (which is always underſtood to be contracted, unleſs particular Partnerſhip be agreed on [d]): And the other has only relation to ſome particular Goods in Trade and Commerce [e]; as, in buying and ſelling Slaves, Horſes, Sheep, and the like. There are (as juſt now hinted) two *Species* of this Contract diſtinguiſh'd according to the reſpective Shares which the Parties contract for. The firſt we may ſtile a *definite*, and the other an *indefinite* Partnerſhip. Again: If the Shares are *definite*, it may be either ſtiled a *general* or a *particular* Partnerſhip. The firſt is, of all the Goods a Man is poſſeſs'd of; and herein we include Lands, and ſuch-like Poſſeſſions: And the ſecond is, of the Commodity alone; as Wine, Oil, *&c.* There may be one Kind of Partnerſhip in reſpect to Things publick; as touching Cuſtoms, Taxes, and the like: and another, touching Things of a private Nature; as Corn, Wooll, Leather, *&c.* This Contract had its Original either, 1*ſt*, from the Smallneſs of the Stock of particular Perſons; or, 2*dly*, from Covetouſneſs, where there was a Deſign of engroſſing and monopolizing of Commodities; or, 3*dly*, from the Nature of the Undertaking itſelf, which requir'd the Aſſiſtance of many, for the more convenient carrying on of Commerce, and for enlarging the Gain of it, as it happens in Companies. In a general Partnerſhip, *Omnium Bonorum*, all Things belonging to the Parties contracting do immediately, upon entring thereinto, become in Common, as *tacitly* deliver'd; unleſs it be a Man's Debts and Credits [f]. For when this general Partnerſhip is entred into, all Legacies, Gifts, and Heirſhips are then in Common among ſuch Partners; and ſo likewiſe is that which is acquir'd by any other Title whatſoever [g].

[c] D. 17. 2. 1. 1.
[d] D. 17. 2. 7 & 8.
[e] D. 17. 2. 5.
[f] D. 17. 2. 2 & 3.
[g] D. 17. 2. 3.

The Law of *England* is chiefly concern'd in ſuch Partnerſhip, where Perſons hold Lands and other Eſtates jointly. And theſe Perſons, our Lawyers ſtile either Co-partners, Joint-partners, or Tenants in Common [h]. The firſt are ſuch either by Law or Cuſtom. By Law, two or more Women of the ſame Degree,

[h] Littl. lib. c. 2, 3 & 4.

Degree, do, through a Defect of Male Heirs, ſucceed equally to the Eſtate of their Anceſtors; or even the Children of two Women, to whom the Lands, not formerly divided by the Mothers, deſcend. And thoſe are Partners by Cuſtom, who, according to the Cuſtom of divers Provinces, which the old Lawyers call'd *Gavelkind*, do equally ſucceed unto the Eſtates of their Anceſtors, whether they are Brothers or (in Defect of ſuch) Siſters, Nieces, and the like Joint-tenants, are ſaid to be ſuch, either properly or improperly. Thoſe are properly ſaid to be ſo, who poſſeſs a Fee, a Freehold, or any Chattel, real or jointly, by Virtue of the ſame Title: And thoſe are improperly ſaid to be ſuch, who are thus in Poſſeſſion of any perſonal Chattel. Tenants in Common, are thoſe that jointly poſſeſs the ſame Thing, as Lands or Tenements, or even Chattels real or perſonal, but by different Titles [i]. For if one of the Partners ſhall give or ſell his Right unto a Stranger; he, and the reſt, how many ſoever there be, are call'd Tenants in Common, but the reſt retain the ancient Appellation among themſelves.

[i] Littl. lib. 3. c. 4.

Partnerſhip may either be perpetual, *viz.* for the Life-time of the Partners [k]; (for there is no entring into eternal Partnerſhip [l]); or elſe it may be for a Time only; or, *thirdly*, it may be under the Limitation of a Condition [m]. If no expreſs Covenant be made touching the reſpective Parts or Shares of Profit and Loſs, the Parties are adjudged to go Share and Share alike in all Profit and Loſs [n]: But if the reſpective Shares herein are expreſly agreed on, then ſuch Agreement ought to be obſerved [o]. Nor can it be doubted but that ſuch a Covenant (as this) is valid. Yet *Portius* on the *Inſtitutes* [p] thinks, that where the reſpective Shares are not expreſs'd, a *Geometrical* Proportion ought to be follow'd, according to the Principal and Labour which each Perſon contributes thereunto; otherwiſe (ſays he) there would be a real Inequality [q]. But the Law ſeems to be plain againſt him, ſaying, That where the Shares are not expreſſed, they ſhall be equal in reſpect of Profit and Loſs, though they contributed unequally [r]. If one Share be expreſſed in reſpect of the Gain, the ſame Proportion ſhall be obſerv'd in reſpect of the Loſs [s]. It cannot be diſputed but that ſuch a Convention or Agreement as this is valid; *viz.* That two Parts in three of the Profit and Loſs ſhall belong to one, and a third Part thereof to the other Party, when it is thus ſtipulated and agreed on between the two Perſons [t]. But ſuppoſe that *Titius* and *Seius* ſhall make ſuch Agreement as this between themſelves, *viz.* That two Parts of the Gain ſhall belong to *Titius*, and a third Part of the Loſs; and that two Parts of the Loſs ſhall accrue to *Seius*, and only a third Part of the Gain: *Quere*, Whether ſuch a Covenant would be valid? *Quint. Mutius* thought, that ſuch an Agreement was againſt the Nature of Partnerſhip; becauſe Partnerſhip has a Kind of Brotherhood, and therefore a Right of Equality [u]. But *Servius Sulpitius*, whoſe Opinion prevailed, thought otherwiſe; becauſe the Labour of ſome Perſons is often ſo valuable in Partnerſhip, that their Condition may be better in Partnerſhip, than if they had contributed Money. For a *Geometrical* and not an *Arithmetical* Proportion is obſerved in Partnerſhip [x]. For it is not to be denied but that it may be thus agreed on in Partnerſhip, *viz.* That one ſhould contribute Money, and the other not, (for he may contribute his Labour); and yet the Gain ſhall be Common between them [y]; becauſe oftentimes the Labour of one Man is of equal Value to the Money of another [z]. And therefore, it obtained againſt the Opinion of *Quint. Mutius*, that ſuch a Covenant may ſubſiſt, *viz.* That one ſhould have a Share of the Profit, and yet not be obliged to ſtand to any Loſs [a]. But this ought to be underſtood with ſome Limitation: As when there is Gain in one Thing, and Loſs in another, upon Compenſation made; that

[k] D. 17. 2. 1.
[l] D. 17. 2. 70.
[m] D. 17. 2. 1. pr.
[n] D. 17. 2. 5 & 29.
[o] D. ut ſupra.
[p] I. 3. 26. 1.
[q] D. 17. 2. 6.
[r] D. 17. 2. 29.
[s] I. 3. 26. 3.
[t] I. 3. 26. 1.
[u] D. 17. 2. 63.
[x] D. 1. 17. 6.
[y] C. 4. 37. 1.
[z] D. 17. 52. 2.
[a] I. 3. 26. 2.

is

is to ſay, upon a Reckoning had on both Sides. That is only ſaid to be Gain, which remains after the Labour and Money laid out is deducted [b].

[b] I. 3. 26. 2. fin.

Partnerſhip may be contracted ſeveral Ways: For here I adapt my Diſcourſe to the more general Diviſion of Partnerſhip, according to the *Civil* Law; and conſider it as it is either *expreſly* or *tacitly* contracted. Partnerſhip is ſaid to be *expreſly* contracted and enter'd into, when two or more Perſons do adviſedly, in expreſs Terms, covenant and agree about the Joint Stock or Community of their Goods [c]: And this is made four ſeveral Ways, *viz. Firſt*, By a Joint Stock of all their Goods, which *ipſo Jure* includes all Things Corporeal, in reſpect of the Property and Poſſeſſion thereof. *Secondly*, It includes Inheritances, as well as Legacies and Gifts made on the Proſpect of Death: But Debts and Rights are not *ipſo Jure* included therein, (as before noted;) but one Perſon muſt aſſign his Action over unto the other. Nor are thoſe Things herein comprized, which accrue to a Man upon forbidden Conſiderations, as on the Score of Theft, Male-feazance [d], *&c.* For Partnerſhip in Offences carries a flagitious Turpitude along with it. Again, *Expreſs* Partnerſhip may be contracted *ſimply*, without any Mention made at all of the Goods: And then only ſuch Things are comprehended as are acquir'd *ex Quæſtu, viz.* by a Man's own perſonal Work and Induſtry: As when any Gain or Lucre ariſes by Buying and Letting to Hire. But Inheritances, Legacies, and Gifts *Mortis Cauſâ*, are not contain'd under this Kind of *expreſs* Partnerſhip; becauſe theſe Things do not happen *ex Quæſtu*, but by Reaſon of ſome Merit, or on the Score of good Fortune. *Thirdly*, *Expreſs* Partnerſhip is contracted on the Account of ſome one particular Branch of Traffick. And, *Fourthly*, It is contracted in dealing for one Thing only; as in the buying of a Houſe, or any other individual Thing; and then Partnerſhip is not extended beyond that particular Thing. Partnerſhip is contracted *tacitly* by tacit Conſent, when the Parties bring their Stock and Subſtance into Common, without any expreſs Agreement: And ſuch Partnerſhip may be inferr'd from ſuch Acts as are ſuitable to the Nature of Partnerſhip itſelf: As when two Perſons dwell together, and do in Common ſhare in Profit and Loſs: But then ſuch Perſons muſt be ſuch as are qualify'd to contract; and then (according to *Roland à Valle* [e], they are ſaid to be Partners both *actively* and *paſſively*. Thus again, when two Brothers, of full Age, ſhall become Traders by a Joint Stock, they do, in that Affair wherein their Stock is in Common, ſeem to have contracted a *tacit* Partnerſhip: But it is otherwiſe, if they are called to their Father's Inheritance in Common. And thus *expreſs* and *tacit* Partnerſhip differ from each other; becauſe the firſt is made by Inſtruments in Writing, but the other may be effected by bare Acts of Partnerſhip.

[c] D. 17. 2. 4.

[d] D. 17. 2. 25 & 53.

[e] Conſ. 91. N. 27.

Two Merchants did each of them contract a mutual Partnerſhip, and hereupon they cauſed Letters or Inſtruments of Partnerſhip to be made; wherein it was declar'd, That whatever Profit ſhould happen, it ſhould be equally divided between them, and therein no mention is made of any Loſs. And upon a Doubt in this Caſe, it was reſolved, That the ſame Regard ſhould be had in point of Loſs, as is expreſs'd in point of Profit [f]: And ſo *vice verſâ*; becauſe *eadem eſt Ratio Contrariorum* [g]. And ſo theſe two Partners were to bear equal Parts as well in point of Loſs as in point of Profit. For, if nothing be ſpecify'd to the contrary, they are both to have equal Parts of Loſs and Gain, in Proportion to the Goods which they brought into the Stock: But, by a particular Covenant, one may have *two* Parts, and the other a *third*, as already related. If it be agreed, that one ſhall have all the Gain, and the other ſhall bear the Loſſes, it cannot be deemed Partnerſhip [h]. For that would be ſuch another Partnerſhip as was made

[f] I. 3. 26. 3.

[g] D. 32. 1. 103. 3. D. 10. 2. 20. 5.

[h] D. 17. 2. 29 2.

made by the Lion in the Fable, and to which the Ancients often alluded upon this Occaſion. If one is to ſuffer ſuch a Part of the Loſs, he is to have his Share of the Gain of Courſe, though not expreſs'd, according to the Nature of Partnerſhip; and if one is to have ſuch a Part of the Gain, he is, by a Parity of Reaſon, to undergo Loſſes proportionably [i]. If two Perſons purchaſe an Eſtate in Common, and both are let into Poſſeſſion of it, they hereby ſeem to have contracted Partnerſhip, not only in reſpect of the Eſtate itſelf, but alſo in regard of ſupporting the Incumbrances laid upon ſuch Eſtate; and all Payments and Penſions made by one of them may be recover'd from the other by an Action of Partnerſhip [k].

[i] I. 3. 26. 3.

[k] C. 4. 37. 2.

The Profits and Advantages ariſing from Partnerſhip paſs to the Heir, though it be ſuch a Partnerſhip as does not paſs to the Heir [l]. As when *Titius* and *Caius*, as Partners, buy Salt together, and before they come to make a Dividend of the Profits *Titius* dies: In this caſe his Heir ſhall come in for a Share of the Profits. In Partnerſhip, it matters not whether a Partner dies Teſtate or Inteſtate, becauſe his Heir is obliged to obſerve all Covenants and Agreements [m]: For a perſonal Obligation follows every Heir or Executor, as our *Engliſh* Lawyers call him. If a Partner acquires any Thing on the Score of Partnerſhip, by virtue of Money of the Common Stock, ſuch Purchaſe or Acquiſition is abſolutely made on the Account of Partnerſhip, and muſt come into the Joint Stock. And 'tis alſo the ſame Thing if he purchaſes it with his own Money on the Common or Joint Account; but then he ſhall only recover his Money of his Partner, if it be a great Sum; but if it be a ſmall one, it is preſumed to be a Gift between two Brothers that are Partners [n]. If a Partner, in a doubtful Caſe, makes a Purchaſe, he is preſum'd to have done it on his own Account, and not on the Score of Partnerſhip; and out of his own Money, and not of the Joint Stock: But this only holds good in reſpect of particular, and not univerſal Partnerſhip. Partnerſhip, enter'd into on the Account of any certain particular Buſineſs or Commerce, is of that Nature, that whatever a Partner acquires foreign to that Trade or Employment, is to his own Profit and Gain, and does not come into Partnerſhip [o]. And as Profit and Gain out of particular Partnerſhip does not come into Stock, but only belongs to the Perſon who makes it: So, in the like manner, do all Loſſes and Damages. Therefore, if ſuch Partner has a Daughter to endow, he ought, without doubt, to do it out of his own Subſtance.

[l] C. 4. 37. 3.

[m] C. 4. 37. 4.

[n] Bald. Conſ. lib. 5.

[o] Rom. Conſ. 168.

It has been ſaid, That *tacit* Partnerſhip is proved or preſum'd from Facts or Things themſelves: And therefore, if ſuch Facts do not appear, as do neceſſarily infer Partnerſhip, it is not preſum'd. And herein the Act of both the Partners is requir'd: For it is not ſufficient that one alone has acted, but both of them ought to have acted as Partners. Now the Communication of Profit and Gain is a neceſſary Inference of Partnerſhip; and likewiſe a Participation of Loſs and Damage, and other promiſcuous Acts of Commerce. Thus a Payment made by one Partner, in the Name and Behoof of Partnerſhip, is a tacit Proof of Partnerſhip. Again, Partnerſhip is inferr'd, if two Perſons live together, and trade thus, and have their real and perſonal Eſtates in Common. In Partnerſhip, one Perſon may find Money for the Common Cauſe or Stock, and another may do the Work or Buſineſs [p]; and if they do ſo, it is a ſufficient Proof of Partnerſhip.

[p] C. 4. 37. 1.

Partnerſhip is diſſolved either by the Natural [q] or Civil Death of one of the Partners. I ſay *by the Civil Death* of one of the Partners, becauſe this is diſſolved by the *Maxima* and *Media Capitis Diminutio* [r], but not by that which is ſtiled the *Minima* [s]. For Partnerſhip cannot be contracted or made to deſcend to a Man's Heirs, even though it ſhould be thus ſtipulated by the Articles of Agreement [t], leſt a Perſon ſhould be compelled to enter into Partnerſhip againſt his Will and Conſent [u]. But this, I think, admits

[q] D. 17. 2. 65. 9.

[r] D. 17. 2. 4.

[s] D. 17. 2. 58. 2.

[t] D. 17. 2. 59.

[u] D. 17. 2. 56. 9.

admits of a Limitation. For in Partnerſhip relating to Cuſtoms and Impoſts of Goods, the Partnerſhip remains with the Heirs even after the Death of the Partner: And the Importance of the Affair requires this, leſt the State, by Farming out the Cuſtoms, ſhould ſuffer hereby [x]. Again, Partnerſhip is ended not only by mutual Diſſent, which is common unto all other Contracts that are founded on Conſent [y], but may alſo be diſſolved by a Renunciation of one of the Partners [z], whether ſuch Renunciation be *tacit* or *expreſs* [a]; nay, though it was firſt agreed that ſuch Partnerſhip ſhould be perpetual. For, though in other Contracts one Perſon cannot recede from the Contract againſt the Will of the other [b], yet it is otherwiſe here, leſt Perſons ſhould be retain'd in Communion or Partnerſhip againſt their Will, which would create much Diſcord and Miſchief [c]. But a Perſon cannot renounce his Partnerſhip at an unſeaſonable Time [d], as when Danger threatens: Nor ought he to do it with a knaviſh or cunning Deſign, in order to obtain ſolely unto himſelf ſome Gain that offers or promiſes itſelf; for, in this Caſe, he does not diſengage himſelf from his Partners, but diſengages his Partners from himſelf. And therefore, he ſhall be obliged to communicate unto them the Profit received, and ſhall alſo ſhare of the Loſs, but ſhall not come in for his Share of the Profit which the others make [e]. An *expreſs* Renunciation muſt be made in direct Terms in the Preſence of the Parties: But a *tacit* Renunciation happens, when one of the Parties begins to trade apart by himſelf. If this Renunciation be fraudulently made, in order to buy a ſcarce Commodity alone, *&c.* on private Notice of ſome Advantage thereby, it ought not to be accepted, unleſs it be to the Prejudice of him that thus renounces [f]. So if a Renunciation be made by one when abſent, the Profit that is made ſhall be put in common, till the reſt of the Partners are made acquainted with it: But if he has ſuffer'd any Loſs, he ſhall bear it himſelf [g]. *Thirdly*, Partnerſhip ceaſes by an Accompliſhment of the Buſineſs for which ſuch Partnerſhip was undertaken and enter'd into [h]; as for buying and ſelling of Slaves, and the like; or by the Determination of that Time for which it was agreed to trade in [i]. *Fourthly*, Partnerſhip is diſſolved by a *Ceſſio Bonorum*, *viz.* when one of the Partners delivers up all his Eſtate unto his Creditors for the Payment of Debts [k], ſince then he has no Goods to put in Partnerſhip; And this is what we mean, when we ſay that Partnerſhip is diſſolved by Poverty. But in this Caſe of *Ceſſion*, if they ſtill continue their Agreement in Partnerſhip, a new Act of Partnerſhip ſeems to begin thereby [l]. And, *laſtly*, Partnerſhip is at an end, by excluding one that is ſeized with Madneſs, whoſe Curator has Power to renounce in his Behalf [m]. Upon a Diſſolution of Partnerſhip, *Security* ought to be given on both Sides, to bear a Part in future Loſſes, and to divide all future Profits [n]. I have before obſerved, that the Heir is not obliged to continue private Partnerſhip, though there was an expreſs Agreement for it by the Teſtator or Inteſtate: Yet the Heir is obliged to ſettle Accounts with the Partnerſhip; for he muſt ſhare in the Profits and Loſſes of this Affair unaccounted for [o]. And if the ſurviving Partners undertake any new Adventure, (not knowing of the Death of their Partner,) the Heir ſhall take the Profits and Loſſes, according to his Share: But if his Death was known, the Society is diſſolved.

From this Contract there ariſes an Action *pro Socio*, which accrues, for the moſt part, after the Partnerſhip is ended [p], unleſs it be in publick Partnerſhip of Impoſts and Cuſtoms: In which Caſe this Action has Place, even whilſt the Partnerſhip is exiſting. Therefore it is not expedient for either Party to recede from their Partnerſhip on the Account of a Diverſity of Contracts. This Action is alſo brought, and made uſe of in order to aſcertain a Proportion of the Gain and Loſs ſuſtain'd in Matters of Commerce,

[x] D. 17. 2. 65. 15.
[y] I. 3. 30. 4.
[z] D. 17. 2. 65.
[a] D. 17. 2. 64.
[b] C. 4. 10. 5.
[c] D. 31. 1. 77. 20.
[d] D. 17. 2. 14.
[e] D. 17. 2. 65. 3. I. 3. 26. 4.
[f] D. 17. 2. 65. 5 & 6.
[g] D. 17. 2. 17.
[h] D. 17. 2. 65. 10.
[i] D. 17. 2. 65. 5.
[k] I. 3. 26. 8.
[l] I. 3. 26. 8.
[m] C. 4. 37. 7.
[n] D. 17. 2. 38.
[o] D. 17. 2. 65. 2.
[p] D. 17. 2. 65. 15.

merce, according to the aforeſaid Diſtinction, *viz.* That if there be a Partnerſhip of all their Goods, then there ought to be a Contribution or Joint Stock of all their Effects: And the Impoſts on the ſame ought to be paid according to an Average in reſpect of their Shares: But it is otherwiſe if their whole Stock be not bound. This Action is alſo given to a Partner and his Heirs, againſt a Partner and his Heirs [q], and is a *direct* Action on both Sides [r], that is to ſay, ſuch an Action as is given both by Law and the *Prætor:* But this I ſhall explain more at large in another Place, under the Title *Of Actions*, in the Second Volume of this Work.

[q] D.17.2.63.8.
[r] D. 17. 2. 65. 9. D. 17. 2. 38.

Partnerſhip, in Matters of Commerce, is ſtiled a *Conventional* Society, becauſe it has its Exiſtence from the Convention and Agreement of the Parties, by Means of ſome Treaty had thereupon: And it differs from the *Communio Bonorum*; for that does not neceſſarily ſuppoſe the Contract of *Society* or Partnerſhip [s], becauſe it may happen in *Fact* only, without Conſent or Agreement; as when an Eſtate deſcends among *Coheirs*, in the *Engliſh* Law called *Co-Parceners.* But here it meerly relates to Trade, and the like. And therefore, if a Partner has converted any of the Common Stock of Money unto his Uſe [t], or has received a larger Dividend of the Profits than belongs to him [u], the aforeſaid Action will lie againſt him. Again, on the other hand, he may have this Action againſt his Partner, if he has ſuſtain'd any Damage, on the Account of Partnerſhip, from Highway-men, and the like, in going to Market [x], or has laid out any Money on the Common Stock, or has improved the ſame [y]. And this Action lies for each Partner againſt each or all of them, ſince the Cauſe and Condition of each and all is equal [z]. And by this Action they may recover againſt an Heir, if the Teſtator has been guilty of any Fraud or Negligence in his Adminiſtration [a]. For all Damage done unto Partnerſhip by the Fraud and Negligence of one of the Partners, ought to be made good by ſuch Perſon unto the Society, or elſe by his Heirs: But yet it is ſufficient for a Partner to apply the ſame Diligence in Partnerſhip as he would do in his own ſeparate Concerns [b].

[s] I. 3. 28. 3 & 4.
[t] D. 22. 1. 1. 1.
[u] D. 17. 2. 38. 1.
[x] D. 17. 2. 52. 4.
[y] D. 17. 2. 38. 1.
[z] D. 17. 2. 63. 8.
[a] D. 17. 2. 35 & 36.
[b] D. 17. 2. 72.

This Contract requires ſuch Perſons to be concerned therein as are qualify'd to oblige themſelves; otherwiſe Partnerſhip enter'd into with any one that is not thus capable, is not valid, though a Pupil may implead a Perſon in an Action *for Buſineſs done*, according to *Baldus* *. And a Pupil, without the Authority of his Guardian, cannot make a Contract of Partnerſhip, which ſhall bind him, as *Alexander* obſerves †. The Nature of Partnerſhip is, that it ſhould be free from all Deceit and Guile, and be void of every Offence, Treſpaſs, or Crime. Equality ought alſo to be ſo far obſerved therein, that if a Perſon has promis'd his Pains and Labour by way of Capital, or has been at any Expence; he ought to come in for an equal Share with him who has laid down the Capital, after Expences are deducted and ſatisfy'd, unleſs it be otherwiſe covenanted. For Example, *Titius* becomes a Partner with *Sempronius* in Trade, and in the Place of Capital promiſes his Labour and Pains. *Sempronius* lays down the whole Capital. *Titius* is at ſome Expence in the Management. In this Caſe *Titius* ſhall have his Charges firſt allowed, and then come in for a Share of the Profit, as agreed on. But of this before. A Diſparity of Partnerſhip may be valid *Jure Pacti*, which is not valid by Right of Partnerſhip, as in the Caſe of Unequal Gain and Loſs.

* Conſ. 235. lib. 4.

† Conſ. 49. lib. 1.

TIT.

TIT. IX.

Of an Emphyteuſis, *or a Contract whereby Lands and Houſes are given to be poſſeſſed for ever, on Condition that the Lands ſhall be improved, and a yearly Quit-rent be paid to the Proprietor: How diſtinguiſhed from* Hiring and Letting to Hire, *&c.*

AN *Emphyteuſis*, or what our *Engliſh* Lawyers call a *Fee-farm*, is a Contract *Bonæ Fidei* founded upon Conſent and the Law of Nations, whereby the Proprietor of a real or predial Eſtate grants the Uſe and Profits thereof unto another, either for Ever, or elſe for a conſiderable Length of Time, upon Condition that the Tenant or *Emphyteuta* pays a certain yearly Penſion or Quit-rent, by way of acknowledging the *direct* Property to be ſtill veſted in the Lord or Proprietor of the Soil [c]; which Quit-rent or Penſion is commonly in *Latin* termed a *Canon*, and ſometimes call'd *Vectigal* [d]. Hence it is, that he who delivers unto *Caius* a predial Eſtate, ſometimes call'd *Ager Vectigalis*, for twenty Years, for Example-ſake, with an *Onus* or Rent-charge of an hundred Pounds to be paid him, by way of Acknowledgment that he has the *direct* Property in it, may be ſaid to have contracted an *Emphyteuſis*. Theſe Eſtates were firſt of all ſuch as were barren Lands, and only granted unto the Tenant for manuring and improving the ſame, as it is now practiſed in the *Weſt-India* Plantations: But in Proceſs of Time rich and fertile Lands were granted *in Emphyteuſin*, and even Houſes themſelves, on the Bottom of this Tenure [e]. And it is obſervable, that not only ſecular but even eccleſiſtical Eſtates may be thus granted, by way of *Emphyteuſis* [f]: So that an *Emphyteuſis* may be divided into a ſecular or eccleſiaſtical *Emphyteuſis*. The old *Romans* doubted whether they ſhould reckon an *Emphyteuſis* under the Title of Bargain and Sale, or of Hiring and Letting to Hire: But the Emperor *Zeno* [g] afterwards diſtinguiſh'd this from thoſe other Contracts, and gave it a proper and ſeparated Place among thoſe Contracts which are enter'd into by Conſent alone [h]. And thus, Writing is not of the Subſtance of this Contract, but only made uſe of for the ſake of Proof [i].

[c] I. 3. 25. 3.
[d] D. 6. 3. 1. C. 4. 66. 1.
[e] D. 39. 2. 15. 26. Nov. 120. c. 1.
[f] Nov. 55. c. 2. Nov. 120. c. 1. §. 2.
[g] C. 4. 66. 1.
[h] I. 3. 25. 3.
[i] C. 4. 66. 1.

The Tenant or *Emphyteuta*, after a Delivery, (and not before [k]), acquires ſuch a Right in the Eſtate as is next unto a Freehold or Property; which Right the *Civilians* call *Utile Dominium*: And from hence he may have a real Action, whereby he may claim the Eſtate from any Poſſeſſor whatſoever, even from the Lord of the Fee himſelf [l]: So that he has not only the Right of receiving the entire Fruits and Profits, (which is alſo granted to a *Conductor* and an *Uſufructuary*), but has a Right of impoſing any Service thereon [m], of Mortgaging [n] and Exchanging the ſame [o], and likewiſe of making a Gift thereof, and of Transferring the ſame by any other Means unto another Perſon, even againſt the Will of the Lord; provided the new *Emphyteuta* pays the *Laudimium*, or Part of the Purchaſe-money, unto the Lord, as an Alienation Fine [p]. If a Perſon would ſell an Eſtate of this Holding by *Emphyteuſis*, he ought to ſignify

[k] Arg. C. 2. 3. 20.
[l] D. 6. 3. 1.
[m] D. 43. 8. 2.
[n] D. 13. 7. 31.
[o] C. 11. 61.
[p] C. 4. 66. 3.

this unto the Lord, and alſo the Price that others bid him: And hereupon the Lord, if he has a mind to purchaſe it, ſhall have the *Jus Protomeſios*, or the Right of being the firſt Purchaſer; provided he declares his Mind
[q] C. 4. 66. 3. within two Months [q]. For the *Jus Protomeſios* was a Right and Prerogative of being preferr'd unto any other Purchaſer. An *Emphyteuta*, who has ſold the Eſtate without asking the Lord's Leave for ſo doing, and has deliver'd the ſame, ſhall be deprived thereof: But it is otherwiſe, if he has not deliver'd it. Nor, conſequently, ſhall an *Emphyteuta* be deprived thereof, who has only expoſed the Eſtate to Sale. An *Emphyteuta* cannot quit or renounce the Eſtate contrary to the Will of the Proprietor, in order to diſcharge himſelf from the Incumbrance: But ſuch a Perſon has the Liberty to ſurrender or alienate the Eſtate unto the Proprietor himſelf, without the Aſſent of any other.

As the *Emphyteuta* receives the entire Profits of the Eſtate, it is but Equity that he ſhould alſo ſuſtain all Incumbrances incident or inherent thereunto. Hence alſo it is, that he is obliged to pay the yearly Taxes
[r] C. 4. 66. 2. due to the Exchequer, and ſuch-like Preſtations [r]. Hence alſo it is, that though the Loſs of the whole Eſtate belongs to the Lord; yet a particular Damage appertains and falls to the Tenant to bear, even though ſome
[s] C. 4. 66. 1. Calamity ſhould ſwallow up the greater Part of the Eſtate [s]. For the ſame Reaſon it is, that he cannot ſue for an Abatement or Remiſſion of Quit-rent, on the Account of any Sterility, or Incurſion of Enemies; though it
[t] D. 19. 2. 25. 6. be otherwiſe, where a Perſon is only a *Conductor* [t]. For the *Canon* or Quit-rent is not paid according to the Meaſure of the Fruits which are wont to be received from the Eſtate, as in Hiring and Letting to Hire, but
[u] C. 4. 66. 1. 3. only by way of Acknowledgment [u]. But if an *Emphyteuta*, by reaſon of a War, has not been able to receive any Profits from the Eſtate which he holds by this Tenure of an *Emphyteuſis* under a yearly Quit-rent, he ſhall not be liable to any ſuch Quit-rent, provided the ſame be of any conſiderable Value in Money, *&c.* But it is otherwiſe, if it conſiſts only of a ſmall
[x] In L. 2. c. 4. 66. Sum, and the like, which (according to *Baldus* [x]) is not to be remitted on the Account of a War. If there be no Fruits on the Eſtate one Year, and they abound another Year; the Penſion or Quit-rent for the Year there were none, ſhall be ſupply'd and made good out of the abundant Fruits.
[y] In c. 3. Nov. 7. *Guido Paſa* ſays [y], That fortuitous Caſes belong to the *Emphyteuta* to bear; and that ſuch Remiſſion of the Quit-rent does not obtain, though the Eſtate held by *Emphyteuſis* has been in the Enemy's Hands: For the Tenant (as aforeſaid) pays his Quit-rent as an Acknowledgment of the Property, and not properly for the Fruits of the Eſtate; and an *Emphyteuſis*, generally ſpeaking, is granted *in Perpetuum*; the Loſs of a few Years Profits, is compenſated with the great Increaſe of the following Fruits. And this ſeems to me to be the beſt Opinion, among the various and ſeveral Opinions of the Doctors.

I have ſaid, That an *Emphyteuta* has the *Utile Dominium* of the Eſtate, and may impoſe a Service thereon without the Conſent of the *direct*
[z] Gloſſ. in L. 2. D. 8. 1. Owner [z]; and ſuch Service ſhall continue as long as the Eſtate itſelf
[a] D. 8. 6. 11. fin. remains in the Hands of the *Emphyteuta*, but not afterwards [a]: For if the Eſtate reverts to the Lord, the Impoſition of ſuch Service ſhall ceaſe, which cannot prejudice the *direct* Owner. If a Perſon that accepts of an *Emphyteuſis*, or any Eſtate for himſelf and his Male Iſſue, for the Term of forty Years, and the like, ſhall die within ten Years without Children, ſuch Eſtate ſhall not fall to the Lord of the Fee, but ſhall deſcend to the Heirs of
[b] Jaſ. in L. 29. D. 28. 2. ſuch Tenant for the Reſidue of the ſaid Term of forty Years [b]. By the Law of *England* it paſſes to the Executors as a Chattel. A Perſon is preſumed to be a Tenant by *Emphyteuſis*, if he has paid a Penſion or Quit-rent unto any one for ten Years together, in ſuch a manner that the

Lord

Lord now receiving, and he who has received ſuch Penſion, could not reject the ſame: For it is ſufficient Proof, that he is ſuch a Tenant from ſuch Payment [c]. For the Payment of a Year's Quit-rent is an expreſs Acknowledgment of the *direct* Property or Fee being in the Receiver; ſince a Quit-rent is wont to be paid for no other Reaſon than on the Account of ſuch Acknowledgment. As ſoon as the Term of Years, for which there is an *Emphyteuſis*, expires, (if it be granted for a Term of Years) the Eſtate returns to the Proprietor, unleſs a new Grant be made thereof. Where an Eſtate is granted to ſeveral Perſons by way of *Emphyteuſis*, they cannot alienate the Eſtate among each other.

[c] Jaſ. in L. 28. C. 1. 3.

From this Contract an Obligation ariſes, which produces an Action, ſtiled *Actio Emphyteuticaria*: And this is a *direct* Action on both Sides, and it lies for the Tenant againſt the Lord to make good his Grant, according to the *Pacta Conventa*, or the Articles agreed on between them. And it lies for the Lord againſt the Tenant, to compel him to pay his *Canon* or Quit-rent [d], and to do all other Things either according to Covenant, or according to the Nature thereof. But the Lord may often times make uſe of another more commodious Action. For if the Tenant does not pay his Quit-rent within two Years in an eccleſiaſtical *Emphyteuſis*, or within three Years in a ſecular *Emphyteuſis*, or alienates or commits any Waſte on the Eſtate, he forfeits his Right, and the Lord may claim the Eſtate by a real Action [e]. But though the Tenant forfeits his whole Right, generally ſpeaking, by ſuch a Non-payment of the Quit-rent, either in Part, or in the Whole; yet if he be poor, and not able to do it, he ſhall not forfeit; nor ſhall he do it, if he be a Creditor unto the Proprietor, and has a mind to quit Scores with him, by way of Compenſation. For in theſe Caſes he does not forego his Right by a Failure of Payment. Nor ſhall an *Emphyteuta* be ouſted or turn'd out of the Eſtate on Account of any light Damage or Waſte done thereon. An *Emphyteuta* may at the Beginning of the Grant pay all his Quit-rent for fifteen Years, and the like all at one Payment, if he pleaſes. In an *Emphyteuſis* a Tenant cannot preſcribe againſt his Lord for the Quit-rent; becauſe it is paid as a Token of Subjection, or as an Acknowledgment of Superiority: For though the Tenant has not paid his Quit-rent for an hundred Years together, nor any Demand made thereof by the Lord; yet he ſhall not preſcribe againſt the Lord for the Time to come, but only for the Time above twenty-nine Years laſt paſt. But if the Eſtate has reverted to the Lord, and the Tenant has interverted him in the Poſſeſſion of it, by not admitting of the Lord, then a forty Years Preſcription ſhall avail, unleſs a Law-ſuit has been commenced thereon for the Poſſeſſion of it. If a Tenant by *Emphyteuſis* grants ſuch Eſtate unto another, he cannot make the Rent greater than it is; becauſe, if the Quit-rent ſhould be increaſed, and afterwards the Eſtate ſhould happen to be alienated, the Lord wou'd be injur'd in his *Laudimium* or Alienation [f]. This Contract of *Emphyteuſis* can only be proved by Deeds or by Recognitions of Quit-rents paid for ſo many Years: For if Witneſſes were admitted, the Tenants or their Heirs might eaſily, by their Perfidy, interveſt the Poſſeſſion, and deprive the Lord of his Property.

[d] Arg. C. 4. 66. 1.

[e] Nov. 7. c. 3. Nov. 120. c. 8.

[f] Guid. Pap. Conſ. 72.

TIT.

TIT. X.

Of a Mandatum, *in* Engliſh *ſtiled a* Commiſſion *or Authority given: Of the Execution of it; and by what Methods it is diſſolved and revoked,* viz. *by the Death of either of the Parties, or by the Renunciation of the* Mandatary, *&c.*

A Fifth *Species* of Contract, founded on Conſent alone, is what we call an *Authority* or *Commiſſion* given: And this is ſaid to be perfected by Conſent; becauſe herein a Delivery of the Thing contracted for, is not neceſſary; nor are Words or Writing requir'd hereunto, in order to eſtabliſh an Obligation from them, though they may ſometimes be made uſe of. Now this Contract is in our Books ſtiled *Mandatum*, from the Verb *Mando*, which is derived *à Manu dandâ*, from giving the Hand; becauſe, in giving and receiving of Commiſſions, it was anciently uſual for the Perſons to give each other their Hands, as we now commonly ſee it obſerved in mutual Promiſes. Thus the Word *Mandare*, in a general Senſe of it, ſignifies the committing of ſomething to a Perſon, to be done and executed by him; which is ſometimes in a publick, and ſometimes in a private manner. *Publick* Mandates, are properly ſaid to be the Precepts of Magiſtrates, and the Inſtructions of Princes, which are of Neceſſity to be obey'd, (as I ſhall ſhew hereafter): And in this Senſe *Juſtinian* ſometimes underſtands them [g]. But *private* Mandates are vulgarly ſtiled Commiſſions; which as they are of a large Extent, ſo they comprehend ſeveral Things. Nor is it of any Import, of what Words ſuch private Commiſſion ſubſiſts; for it may be made by the Word *Rogo*, *Supplico*, *Mando*, *Volo*, *Peto*, and by any other the like proper Words [h].

[g] C. 1. 15.

[h] D. 17. 1. 1. ib. Gloſſ.

This Contract, in the *Code* and *Digeſt*, is put firſt among ſuch Contracts as are perfected by Conſent alone; becauſe it is of a more excellent Nature than other Contracts, as being derived (according to *Baldus* [i]) from Friendſhip, *&c.* And theſe two Titles, *de Mandato* and *de Procuratoribus*, do well enough agree together, as placed in the *Code* and *Digeſt*, for that a Proctor cannot be without a Mandate or Proxy; yet they differ in this, *viz.* becauſe the Title *de Procuratoribus* ſpeaks only of Proctors *ad Lites*; and the Title *de Mandato* ſpeaks only of Proctors *ad Negotia*. Again: The Title of *Proctors* ſpeaks of the Proctors Office; but the Title *de Mandato* principally treats of an Action *de Mandato*. We are ſaid to give a Commiſſion of Authority to him unto whom we do either judicially or extrajudicially, in a friendly manner, recommend ſomething to be done in our Name *bonâ Fide*. For the Word *Commendare* is derived from the Verb *Mando*; and ſo it is here taken in our Books. Hence a *Mandatary* is ſaid to be a Proctor or Procurator, from the Words *Pro* and *Curo*; for this Word *Pro* is not an idle Term, but uſed to denote a kind of Diligence, and the prudent Office of a Friend.

[i] In Rubr. D. 17. 1. D. 17. 1. 1.

Wherefore, a *Mandatum* here treated of, may rightly be defined or deſcribed to be a *Nominate* Contract *bonæ Fidei*, founded on the Law of Nations [k], and ſubſiſting by Conſent alone [l], whereby the principal Perſon commits ſome Buſineſs or other to be done *bonâ Fide* [m] unto the Perſon that

[k] D. 2. 14. 7.
[l] D. 17. 1. 1.
[m] D. 17. 1. 1. pr. D. 44. 7. 2.

that undertakes the ſame; and this is to be managed without any Fee or Gratuity [n]: Or elſe, in other Words, it may be ſaid to be a Contract, whereby a Perſon does either expreſly or tacitly take on himſelf an honeſt Office or Employment, which is permitted by Law, to be executed by him for another in a gratuitous Manner [o]. I here, *firſt*, call it an *Office*, becauſe this Contract is an Act of Benevolence, which one Friend renders to another: For it had its Riſe from Friendſhip, and the good Offices which one Man owes another [p]. *Secondly*, I ſay *honeſt*, becauſe a Mandate or Commiſſion is not obligatory in Things diſhoneſt or unreaſonable, and which favour of Turpitude [q]: And hereunto I have ſubjoin'd the Words, *which is permitted by Law:* Becauſe, how honeſt and reaſonable ſoever a Commiſſion may be; yet, if it be contrary to the Laws, it is not valid. As when a Perſon orders or commiſſions Money to be lent to *Filius-fam*, the Commiſſion or Order is deemed ineffectual, as being repugnant to the *Senatuſconſultum Macedonianum* [r], which forbids it. And I have added the Words *in a gratuitous Manner*; becauſe if a Stipend or *Merces* intervenes, it is not a *Mandatum*, but a Letting out of a Man's Work or Buſineſs unto Hire, called *Locatio Operæ*. And the Reaſon why it ought to be gratuitous, is, becauſe this Contract has eſpecial Place among Friends, as already hinted: For he violates the Laws of Friendſhip, who takes a Reward or Wages for an Office done. And I have uſed the Words *expreſly or tacitly*, becauſe this Contract is not only made by expreſs Words; but if I ſuffer any one to do my Buſineſs in my Preſence, I do hereby ſeem to commiſſion him. If a Perſon does in another's Abſence, of his own Accord, and without an Order, manage his Buſineſs, it will not be reckon'd a *Mandatum*, but a *Quaſi* or improper Contract, for which an Action *for Buſineſs done* lies.

There is one Kind of *Mandatum* which is *voluntary*, and of which I am here diſcourſing; and another which is ſtiled *neceſſary*, *viz.* when we are enjoined to obey the Magiſtrate commanding ſomething to be done [s]; of which hereafter. Again, There is one Kind which is term'd *gratuitous*, and this is properly a *Mandatum* [t] or Commiſſion; and another which is term'd *mercenary*, as when ſome Honour intervenes by way of Remuneration or Recompence [u], or if a Salary in general be promiſed *extra ordinem* [x]. There is one Kind of Commiſſion which is *general*, and another which is *ſpecial*. A general Commiſſion is that which extends itſelf to all Matters; and is either *ſimply* general, or with a full Power of Adminiſtration, like unto that which the principal Perſon himſelf has: But this laſt Diſtinction is rather approved of by the *Canon* Law and Modern Practice, than by the *Civil* Law [y]. A *ſpecial* Commiſſion, is, when any particular Matter is committed to the Care and Management of another [z]. There is one Kind of Commiſſion which is made for the Sake of him that grants it, and likewiſe on the Account of the Perſon to whom it is granted; another Kind which is granted on the Account of a Stranger, and another Kind which is granted on the Score of a Stranger and of the Perſon to whom it is granted; and laſtly, there is another Kind, which is made on the Account of a Stranger and on the Score of the Perſon that grants it, and likewiſe on the Account of the Perſon to whom it is granted, called the *Mandatory*. A Commiſſion is not rightly contracted on the Account of the Mandatory alone; becauſe this is rather Advice and Counſel, than a Commiſſion. In order to know for whoſe Sake a Commiſſion or Authority is given, we ought to conſider to whoſe Advantage that Thing accrues, which is order'd by ſuch Commiſſion or Authority. For if a Commiſſion be granted for the Sake of the Perſon only unto whom it is made, it does not oblige the Perſon of him who makes it, in caſe of Damage. And the Reaſon is, becauſe it is then rather Counſel and Advice than a Commiſſion. And no

[n] D. 17. 1. 1.
[o] D. 17. 1. 1.
[p] D. 17. 1. 1.
[q] I. 3. 27. 7.
[r] D. 14. 6. 1.
[s] D. 50. 17. 167. 1.
[t] D. 17. 1. 36.
[u] D. 17. 1. 6.
[x] D. 17. 1. 7.
[y] C. 2. 13. 16. D. 17. 1. 39.
[z] D. 3. 3. 1. 1.

one is anſwerable for Counſel or Advice, unleſs it be fraudulently or malici-
[a] D. 50. 17. 47. ouſly given [a], becauſe Counſel and Advice does not compel a Perſon to follow the ſame. For every Perſon may and ought to conſider, whether
[b] D. 17. 1. 2. fin. ſuch Advice be expedient or not [b].

A *Mandatum* is not introduced by Words *Commendatory*. As when a Perſon recommends *Titius* to me, and I, upon his Commendation, afterwards lend him Money, an Action *de Mandato* does not, in this Caſe, accrue
[c] D. 17. 1. 12. 12. to me againſt the Perſon recommending him [c]: For a *Commendatory* Epiſtle does not oblige the Perſon of the Writer, though an *Exhortatory* Letter induces his Conſent. A *Mandatum* or Commiſſion, conſiſts in the Conſent alone of the Parties contracting; and therefore, among abſent Perſons, it may be undertaken by the Direction of a Letter, or the Notice of a Meſ-
[d] D. 17. 1. 1. ſenger [d]. For, ſince Men cannot be always preſent and waiting on their own Affairs, or (at leaſt) will not attend the ſame, it has been, therefore, thought good to introduce the Uſe of Commiſſions, that abſent Perſons may be aſſiſted thereby, and their Rooms ſupply'd by the Office of other Men, whom we ſtile Proctors *ad Lites*, and Proctors *ad Negotia*, Actors, Syndicks, and the like; whoſe Buſineſs it is to execute their Commiſſions with Care, Diligence, Readineſs, and Fidelity; and not to exceed the Bounds thereof. After a Perſon has undertaken a Commiſſion, he ought to perfect the ſame, according to the Form preſcribed; for the Form of a Commiſſion ought to
[e] D. 17. 1. 3. 4 & 5. be diligently obſerved [e]. And it ought not only to be obſerved in point of Subſtance, but alſo in reſpect of Quality: For a Commiſſion is not ſaid to be executed, if the Qualities of it be not obſerved. The Perſon who gives a Commiſſion to another to act for him, is not only liable to reimburſe the *Mandatory* in Point of the Expences which he is at in executing the Commiſſion, but is likewiſe anſwerable for all Damage that he ſhall ſuſtain
[f] DD. in L. 12. D. 17. 1. 9. thereby [f]. For a *Mandatory* ought to be indemnify'd from all Damage that may happen on the Account of a Commiſſion, if it be not occaſioned
[g] D. 17. 1. 26. through his Fault or Neglect [g], ſince no one ought to ſuffer by any Office he undertakes. But it is not neceſſary that a Commiſſion ſhould be obſerved
[h] D. 17. 1. 62. 1. *ad unguem*, it being ſufficient if it be obſerved by an Equivalent [h]: For a Man may purſue the probable Mind and Intention of the Perſon who grants ſuch Commiſſion.

It is a Matter of known Law, that a Commiſſion may be granted to ſell
[i] D. 17. 1. 60. the Goods of the Perſon who grants it [i]; which is a common Practice among Merchants: And he who receives ſuch a Special Commiſſion, is obliged either to perfect the ſame, or elſe to renounce it *re integrâ*, *viz.* before he has done any Thing therein. A Perſon who receives a Commiſſion to ſell Mercantile Goods, does not fulfil the ſame by a Barter and Exchange of them for other Merchandizes, becauſe there is not the ſame Reaſon for Permutation as for the Sale of Goods, the Merchant (perhaps) wanting Money: And therefore, he is liable to an Action of Damage, to make good what the Merchant ſhall ſuffer by his Neglect, to the utmoſt
[k] D. 17. 1. 17. 1. D. 17. 1. 27. 2. Farthing [k]. In a Commiſſion ſometimes the exacteſt Diligence is required, as in a Proctor *ad Lites*; and then he ſhall be liable for the ſmalleſt Neglect or Fault, becauſe he aſſerts himſelf to be skilful in his Buſineſs relating
[l] C. 2. 13. 13. DD. ib. to judicial Matters [l]. Sometimes only an exact Diligence is requir'd, as in the Payment of Money; and then the Perſon executing ſuch Commiſſion
[m] C. 4. 35. 21. ſhall be anſwerable *de latâ & levi Culpâ* [m]. And ſometimes a Commiſſion is granted, which requires little or no Diligence, becauſe every Perſon may ſpeed ſuch an Act, as to carry a Letter or Book from one Perſon to another; and then the Perſon is only liable for Fraud and groſs Negligence, unleſs he has received a Reward for ſo doing, and then he ſhall be liable *de culpâ levi*, and alſo for a fortuitous Caſe, if he has undertaken the Ha-

zard

zard [n]: Otherwiſe, regularly ſpeaking, a *Mandatory* is not liable to a fortuitous Caſe [o].

[n] D. 47. 2. 14. fin.
[o] C. 2. 13. 13.

All future Matters to be tranſacted, are the Subject of a Commiſſion, provided they are lawful and honeſt, and not contrary to good Manners [p]: For if a Man gives a Commiſſion or Authority unto another to do ſomething that carries Diſhoneſty or Turpitude along with it, or what is contrary to good Manners, ſuch Commiſſion or Authority is not Obligatory [q]. For thoſe Things which are *contra bonos Mores*, are, in Law, deemed as Things impoſſible to be done [r]; and from Things impoſſible there ariſes no Obligation [s]. According to the *Canon* Law, thoſe Things are ſaid to be *contra bonos Mores*, when any Sin flows from the Practice and Obſervance of an Act: But the *Civil* Law reputes thoſe Things to be contrary to good Manners, which are done contrary to a Prohibition of Law, though it may be done without Sin. A Commiſſion granted, is proved by the Letters of ſuch Commiſſion, if there be any doubt thereof: And the Act of the Perſon to whom any Commiſſion is granted, is ſaid to be the Act of him who grants ſuch Commiſſion. A Ratification is equivalent unto a Commiſſion or an Authority given. A Commiſſion or an Authority may be revoked *re integrâ remanente*, that is to ſay, when nothing is done in the Matter: But it cannot be revoked, if any Thing be done therein. Which leads me next to ſpeak of the Revocation of a Commiſſion.

[p] D. 17. 1. 12.
[q] D. 17. 1. 22. 6.
[r] D. 28. 7. 15.
[s] D. 50. 17. 185.

Now a Commiſſion is, *firſt*, diſſolved or revoked by the Will alone of the Perſon who granted it [t], if the Matter remains entire and nothing be done therein [u]; and it is likewiſe diſſolved by his Death upon the ſame Terms [x]. *Secondly*, The *Mandatory*, or Perſon to whom it is granted, may wave and renounce his Commiſſion; provided nothing be done therein, and the Perſon who granted it does not ſuffer in his Right thereby: But if it be the Intereſt of the Perſon who granted it, that the *Mandatory* ſhould not quit his Office, he ſhall be obliged to perfect the ſame, after he has once accepted of it [y], unleſs he can ſhew juſt Cauſe for quitting the ſame [z]. But a Commiſſion is diſſolved by the Death of the *Mandatory*, if he ſhall die, and nothing is done in the Execution of the Commiſſion; for the Perſon is deemed to be choſen upon the Account of his Care, Induſtry, and Knowledge. Hence, if his Heir fulfils the Commiſſion, he cannot have an Action *de Mandato*, but muſt have an Action *for Buſineſs done*. A juſt Cauſe for deſerting a Commiſſion, is an Indiſpoſition of Health, capital Enmity, and the like. But a Commiſſion is not diſſolved by the Death of the Granter, if a Thing be order'd which ought to be perform'd after the Granter's Death, as the erecting of a Monument [a], *&c.*

[t] D. 17. 1. 40. 1.
[u] I. 3. 27. 9.
[x] D. 17. 1. 26.
[y] D. 17. 1. 27. 2.
[z] D. 17. 1. 22.
[a] D. 17. 1. 12.

Though a Perſon ſhould ſay, that he has the Prince's Commiſſion to do ſuch an Act; yet, if he does not ſhew the publick Inſtrument, Credit ſhall not be given to him: For a Commiſſion ought to be proved, either by Letters, or elſe by an Inſtrument, or elſe by Witneſſes. A general Mandate or Commiſſion given by Law, is not ſufficient, where a ſpecial Authority or Commiſſion is requir'd [b]: But a general Commiſſion to do a Thing, *whenever need ſhall require it*, is ſufficient; but then (I think) the Reaſon of doing ſuch Act ought to be expreſs'd and ſet forth by the Agent, that a Judgment may be formed touching the Neceſſity of ſuch Act. If a Perſon ſimply grants a Commiſſion unto another to pay Debts, ſuch a Commiſſion has only a Reſpect unto ſuch Debts as may be at preſent demanded, and not unto future Debts. But if I order you to pay *Titius* a Sum of Money, and afterwards I in your Preſence forbid *Titius* to accept of it, it is a Revocation of ſuch Commiſſion. If I grant a ſimple Commiſſion unto a Factor, and this Commiſſion cannot take Effect till after my Death; it ſeems to be extinguiſhed by the Death of me the Granter. And, generally ſpeaking, a Commiſſion is in every Caſe extinguiſhed by the Death

[b] Bart. in L. 27. D. 4. 4.

of him that grants it, *re integrâ remanente*, that is to ſay, if nothing be done therein. And therefore, a Commiſſion does not paſs to an Heir; becauſe, in a doubtful Caſe, the Granter ſeems to have an eſpecial Regard to the Honeſty and Induſtry of the Perſon to whom he grants it *: But the Mandate of a Judge granted to an Apparitor or Servant of the Court, to do a Judicial Act, is not extinguiſh'd by the Death of the Judge, becauſe that might be (perhaps) a Hinderance unto publick Juſtice. Yet a Commiſſion granted unto a Judge, expires with the Death of the Granter, and all Things tranſacted by ſuch Judge remain in *ſtatu quo.*

* Bart. in L. 2. D. 17. 1.

If a Perſon in a publick Office ſhall grant an unlawful Commiſſion, the Perſon unto whom it is granted is obliged unto Obedience, and the Perſon that grants it ſhall be puniſh'd for the Act committed: But if the Perſon unto whom it is granted knows it to be an unlawful Commiſſion, as a Commiſſion of Piracy is, and yet acts therein, he ſhall be puniſh'd for acting againſt his Knowledge of the publick Laws. But it is otherwiſe, if a private Man grants an unlawful Commiſſion, and the Perſon acts under it; for then they ſhall be both puniſh'd alike: For a Perſon that acts in a private Commiſſion is to take Care what he undertakes, and ſhall be anſwerable if he does amiſs; and here the Offence of the Perſon acting, and of the Perſon that orders it, is deemed one and the ſame Offence. No Prince whatſoever may grant a Commiſſion of Piracy, for ſuch Commiſſion is evidently known to be againſt the Law of Nations; but he may grant a Commiſſion of Reprizals againſt the Subjects of this or that State, for Damage done to his own Subjects. If a Prince grants a Commiſſion of Reprizals, and afterwards abdicates or quits his Kingdom, ſuch Commiſſion is thereby extinguiſh'd: And if the Perſons having ſuch Commiſſion, ſhall (notwithſtanding) act under it, it is Piracy in them, becauſe they act without a lawful Authority. But if ſuch a Prince ſhall be driven out of his Kingdom by Conqueſt or Force, it has been then a Queſtion whether the ſame be Piracy. Herein we are to diſtinguiſh, whether ſuch Force was the Act of his own Subjects, or of a foreign Enemy. If it was the Act of his own Subjects, he is no longer their Sovereign Prince; and, conſequently, ſuch Commiſſion is Piratical: But if it was by the Force of a foreign Enemy waging an unjuſt War, ſuch Commiſſion does not ceaſe by his Expulſion, but he may recover his Dominions again, if he can, by Arms.

Though a Commiſſion be compared unto a Ratification in many Reſpects, eſpecially if it be full, and no Ratification promis'd; yet, if a Ratification be therein promis'd, an Act done in Virtue of ſuch previous Commiſſion, has not its full Force and Vigour, until it be ratify'd; for ſuch Commiſſion is only preſum'd to be granted to treat and prepare Matters for a good Event. A Commiſſion granted unto one Perſon, may be fulfilled and executed by another, if ſuch a Power be granted in ſuch Commiſſion. A Commiſſion which may have a Reſpect to Things lawful and unlawful, is always reſtrained and interpreted in reſpect of Things lawful: For a Commiſſion, how general ſoever it be, is never extended to any Matters of Turpitude. Thus a Commiſſion to take Poſſeſſion of an Eſtate, is not preſumed to be granted to diſſeize a Man thereof by Violence; becauſe this is not agreeable to Reaſon. A Commiſſion granted, does not prove that the Thing was done which was commiſſion'd, but only ſhews the Purpoſe of the Granter's Mind.

TIT. XI.

Of Things credited *on a Loan, in* Latin *termed a* Mutuum; *and therein of Debtor and Creditor; of Things lent in a certain Sum or Quantity; what is the Object of a* Mutuum, *and what is neceſſary thereunto, and the like; and of an Action ariſing thereupon, what*, &c.

UNDER this Title of *Things credited*, commonly called a *Mutuum* or Loan, I ſhall chiefly treat of a Debtor and Creditor, as the two Perſons therein concerned; and firſt ſhall ſhow what I mean by a *Mutuum* or Loan, and what is the proper Object thereof. Now a *Mutuum* is a *nominate* and *real* Contract, *ſtricti Juris*, founded upon the Law of Nations, which is perfected by ſomething done; that is to ſay, by lending ſomething upon condition, that he who borrows it ſhould return the ſame again in the ſame Kind, though not in *Specie* [a]: For the *Civilians* make a diſtinction between a *Mutuum* and a *Commodatum*, though with us they denote the ſame Thing. The Thing thus lent is called a *Mutuum*, as the Criticks obſerve, becauſe *de meo fit tuum:* For in a *Mutuum*, the Thing lent or given becomes the Property of him who receives or borrows the ſame, which is otherwiſe in a *Commodatum*. The Lender is ſtiled the *Mutuant* or Creditor; and the Borrower is termed the *Mutuary* or Debtor: the words *Debtor* and *Creditor* are taken in a larger Senſe, as I ſhall hereafter note. A *Mutuum* depends on ſuch Things as depend on Weight, Number, and Meaſure [b], as Wine, Oil, Corn, and the like; that is to ſay, in ſuch as conſiſt in Quantity, and are ſtiled fungible Things, and not in *Species*. Such Things as conſiſt in Number, have a reſpect to Money paid, or in Tale; ſuch as conſiſt in Meaſure, have a reſpect to Wine, Oil, Corn, *&c.* and ſuch as conſiſt in Weight, have a reſpect unto Gold, Silver, Braſs, and the like. And it is the Nature of a *Mutuum*, as aforeſaid, that the very ſame Thing or Body ſhould not be returned, but ſomething *in eodem genere*; as Money for Money, Oil for Oil, Wine for Wine, and the like. For it transfers the Property of the Thing to the Perſon that receives the ſame [c], though he be obliged to return an Equivalent *in eodem genere*, which diſtinguiſhes it from a *Commodatum* that is returned in the ſame *Species*.

[a] D. 12. 1. 3.

[b] D. 12. 1. 2. 1.

[c] D. 12. 1. 1. 2.

A *Mutuum* is threefold, *viz. firſt*, ſuch as is *only natural*, as when a Payment of Money is made without a Stipulation *de ſolvendo*. The *ſecond* is *civil only*, as when a Stipulation intervenes without any Money paid down or lent. And the third *Species* is *civil* and *natural* both, as when Numeration and Stipulation do both intervene [d]; that is to ſay, when a Man actually lends his Money, and ſtipulates with the Borrower for the Payment of it again. A *Mutuum* is ſaid to be a Matter *ſtricti Juris*, becauſe of its own nature it contains a ſtrict Rule, whereby all Things are by an arithmetical Proportion demanded, according to the Equality of thoſe Things which are lent [e]: For a *Mutuum* is not contracted beyond what

[d] D. 12. 1. 2.

[e] D. 13. 4. 6.

what is lent or given by way of a Loan, though more be promiſed [f]. And though by the *Civil* Law [g] ſomething more than the Thing lent may be ſtipulated by way of lawful Intereſt; yet it is otherwiſe by the *Canon* Law [h], which forbids Uſury. A Perſon who lends Money, cannot immediately demand or recover the ſame again [i], becauſe the very Act of Lending ſuppoſes, that it was lent for ſome time to do the Borrower a Service. A Perſon that borrows Money is preſumed to do it for himſelf, and not for a Stranger: And, therefore, when a Perſon alledges, that he borrowed it for a Stranger, he ought to prove his Authority, and that he ſhewed his Orders unto the Lender. A Perſon that lends Money for the Repair of a Building, has this Privilege, according to the *Civil* Law, that he ſhall be preferred unto all other Creditors, even though they are before him in point of Time [k], if the Perſon borrows it expreſſly for this purpoſe, and the Houſe be repaired out of the ſaid Money; becauſe the Building is tacitly impawned to him for the ſaid Money: But it is otherwiſe, if the Money was ſimply borrowed, though the Debtor did repair the Houſe out of that Money; for then the Creditor ſhall not have this Privilege. But this Privilege, I think, does not obtain according to the Law of *England*. Again, if a Debtor ſhall borrow Money for the Building or Purchaſing of a new Houſe or Eſtate, the Creditor ſhall have this Privilege, but then the Houſe or Eſtate muſt be expreſſly mortgaged to him, and not otherwiſe. And thus the Repair of an old Houſe gives a greater Privilege than the Building of a new one. A Perſon who lends Money to one Man, by the Order of another, has both the Perſons bound to him [l]. I ſay, that a Perſon who lends Money ſimply and indefinitely to buy or repair a Houſe, or any Thing elſe, has not an Hypotheque or Mortgage therein, ſo as to be preferred before other Creditors, but has only a perſonal Action, unleſs it be otherwiſe expreſſly agreed upon between the Parties [m]: And it is not enough for him to aver, that he lent the Money *eo nomine*, but he ought to prove it, and likewiſe to prove that the Money was laid out to that End and Purpoſe. If a Father in time of Scarcity borrows Money, it is preſumed that he laid it out for the Maintenance of his Family.

[f] D. 12.1.11.
[g] C.4.30.9.
[h] X.5.19.10.
[i] D.5.45.1.
[k] D.12.1.28.
[l] C.4.35.7.
[m] Bald. in l.17. C.8.14.

Regularly ſpeaking, he who lends a Thing ought to be the Proprietor thereof: And, therefore, by delivering the Thing, he transfers the Property of it, if it be his own; but if not, then he only transfers the Condition of *Uſucapion* in reſpect thereof. Hence the Doctors have made lending to be twofold, *viz.* That which is *truly* and *properly* ſuch; and this is perfected by a Delivery of the Thing, and by an Acceptance thereof: And the other they ſtile a *quaſi*, or an *improper* Lending, which is induced *ex poſt facto* [n], as I ſhall note hereafter. If Corn be given or lent to a Perſon, that Wine ſhould be returned in the Place of it, it cannot properly be called a *Mutuum*, but an *innominate* Contract; and ſometimes it is ſtiled a Sale: For a Perſon who borrows Corn, cannot make a Reſtitution in Money, unleſs it be in caſe where there is no Corn exiſting, ſince it would then be termed a Sale. Nor is it a *Mutuum*, if a Number of Sheep be given to have ſo many Sheep returned again. A fortuitous Caſe, whereby the Thing lent is loſt, does not diſcharge the Borrower or Debtor from an Action on a Loan. For that which the *Romans* called a *Mutuum*, we properly call a Loan, without Intereſt or Uſury going along with it: But that which they ſtiled *Fœnus* (as *Beroaldus* [o] obſerves on *Apuleius* his golden Aſs) is ſuch a Loan as carries Intereſt and Uſury along with it. And *Cicero* alſo in his Treatiſe of Friendſhip ſeems to make this diſtinction, ſaying, that to the end we may be deemed liberal and beneficent, we ought to give ſo as not to demand thanks, *neque beneficium fœneramur, ſed naturâ propenſi ſumus*. But ſometimes the word *Fœnerare* denotes the ſame as *mutuò dare* [p]; as the Sun lends his Light to the Stars.

[n] D.12.1.13.
[o] Lib.1.
[p] Plin. lib.2. c.6.

I ſay, that by the *Civil* Law, a *Mutuum* is a Contract without Reward, and admits of no recompence in its Nature, and if *Uſe* and Intereſt is agreed, it is foreign to the Contract; for that ariſes from a diſtinct particular Covenant [q], or by the Cuſtom of a Country. For this Contract was contrived to promote Trade and Charity to ſuch as wanted, and if any one would make an advantage of the Property of any thing which he poſſeſſes, the way was to do it by buying and ſelling, or elſe by Exchange; and if he would make an advantage of *uſing* the Goods of which he was Maſter, he might do it by letting them to hire: For it is the Nature of theſe Contracts, and not of a *Mutuum*, to be founded on Price or Reward. And if one would alienate his Property without Price or Recompence, *Donation* is a proper way. But if for a *Mutuum*, a Reward or Intereſt be originally agreed to be paid, together with the Principal, by a particular Covenant, it ſeems contrary to natural Juſtice: For he that borrows Money, *&c.* muſt pay Intereſt for it, though he gains nothing by it, which is to give certain Profit to the Lender, whereas the Borrower himſelf may have nothing but certain Loſs. And this is ſo far true in right reaſoning, that it is contrary to Juſtice, that the Lender ſhould have Intereſt, though the Borrower made Profit of the Money lent; for that was *accidental*, and the Borrower ran a Riſque of loſing all, when the Lender was in no danger of loſing the leaſt Part. All this is to be underſtood, if the Borrower pays within the Time appointed: For if he fails in his Promiſe, then it is fit the Creditor ſhould be allowed his Damages after a Demand [r]. But upon no account is Intereſt upon Intereſt to be endured [s], as I ſhall afterwards obſerve under the Title of *Uſury*. Letting to hire, and hiring for a Price, has Juſtice to ſupport it; for if he that hires it is hindred from making uſe of the Thing by ſome inevitable Accident, or if the Thing hired is loſt or periſhes by chance, he that hires will be relieved from Payment, for the Price was intended as a Recompence for ſome real Advantage; whereas in lending of Money (if Intereſt be paid of neceſſity) the ſame Sum and Intereſt muſt be returned, though the Principal be loſt at the ſame time without any Fraud or Neglect of the Borrower. Conſider, therefore, that though you are not forced to lend Money any more than to give; yet if you once lend or give, (according to the Nature of ſeveral Acts) it muſt be without recompence, otherwiſe it is not lending or giving, but ſome other Contract which yet has not a certain Name.

[q] D. 50. 16. 121.

[r] D. 22. 1. 32.

[s] C. 4. 32. 28.

Touching an Action *ex mutuo*, or upon the account of a Loan, it lies for a Perſon who has lent ſuch Things as may be lent; and if there are ſeveral Perſons concerned in the Loan, each of them may have his Action for his own Part, unleſs it be otherwiſe agreed upon [t]. And it lies not only againſt him, who has borrowed in his own Name [u], but likewiſe his Sureties: And if there are ſeveral Perſons that have ſimply borrowed, it lies againſt each of them, according to his Proportion, though the Payment be only made in the Name of all, unleſs they have all of them promiſed a Repayment *in ſolidum* [u]. The Perſon convened by this Action is oblig'd to pay or reſtore the whole Thing credited, in the ſame Kind, good Quantity and Quality, though this be not expreſſly covenanted or provided for [v]; and hence Animals cannot be reſtored for Animals, as Sheep for Sheep, *&c.* becauſe the ſame Goodneſs and Quality cannot be well aſcertain'd and known in them. But a Debtor is not bound to reſtore Money lent in the ſame Form or Matter, (for we rather conſider the Value of Money, than the Body itſelf credited [w],) unleſs the Creditor ſhall receive ſome Damage from not having the ſame *Species* of Money [x]. But the Debtor is bound to pay it at the ſame Value and Price it was lent at, though the Value thereof ſhould afterwards be increaſed or diminiſhed. See *Molina* touching Uſury [y]. But this is otherwiſe in reſpect of Bullion: For Bullion of

[t] C. 4. 2. 9.

[u] C. 4. 2. 13.

[u] C. 4. 2. 5.

[v] D. 12. 1. 1. 2. & 3.

[w] Arg. D. 46. 3. 94. 1.

[x] D. 46. 3. 99.

[y] Quæſt. 92.

of the ſame Quantity, Quality, and Goodneſs may be paid for Bullion lent. If the Thing due cannot be had or made good in its Kind, by reaſon of the Scarcity of it, the Borrower may pay the Value thereof in Money,
[a] Nov. 4. c. 3. and it ſhall be held good [a]. This Action is perpetual, and not barr'd by any Limitation of a Year, *&c.* And may be commenced immediately if the Obligation be *pure* and unconditional; but if it be conditional, or *in diem*, we muſt wait for the Event of the Condition, and the Coming of the
[a] D. 12. 1. 8. Day [a]. And thus far of borrowing or lending by way of *Mutuum* in general. I ſhall next treat of *Debtor* and *Creditor* in the full Extent and Signification of the Terms, and ſhew the Law relating thereunto: And firſt of *Creditors.*

Now under the Name of a *Creditor* we not only mean ſuch a Perſon as has given Credit by lending of Money, but even all ſuch Perſons to
[b] D. 50. 16. 11. whom any thing is due upon any account whatſoever [b]. For the words *Creditor* and *Creditum* are ſo called from the Verb *Credo*, to give Credit unto, or to have Faith and Confidence in the Honeſty of another: And, therefore, theſe words *Creditor* and *Creditum* extend themſelves to all Contracts whatſoever, as being generical Terms which comprehend the ſeveral *Species* of Contracts, as a *Mutuum*, *Commodatum*, *Depoſitum*, and the like. For in all Contracts, wherein any Thing is due to us, we are ſaid to give Credit, and to have a Confidence in the Honeſty of another Perſon; and this Confidence is ſtiled a *Credit*; and as a *Genus* is verify'd in each of its *Species.* Thus in the general Senſe of the Term he is ſaid to give Credit unto whom any Thing is due on any account whatſoever, even on the ſcore of an Offence or Treſpaſs, as well as on the account of a Contract; though the word *Credit*, in a ſtrict Senſe, is underſtood, when we aſſent unto any thing by following the Report and Faith of another Perſon. But this laſt is not the Senſe of it as uſed among Lawyers: And, therefore, we ought rather to regard the Uſe of it as taken among them, than the Etymology of the Word. A *Credit* differs from a *Mutuum*, as a *Genus* differs from a *Species.* For that may be called a *Credit*, which does not conſiſt in Weight, Number, and Meaſure: But a *Mutuum* conſiſts only in Weight, Number, and Meaſure. A natural *Mutuum* cannot be without ſuch a Thing lent, which conſiſts in one of theſe three: But a *Credit* may ſometimes be, though nothing at all goes out; as when a Man promiſes a Dowry on the ſcore of Marriage, *&c.*

He is ſaid to be a *Creditor* in Law, who has a proper Action to ſue for
[c] D. 50. 16. 55. a Thing, and cannot be barr'd of his Demand by any perpetual Exception [c]: For it is the ſame thing to have no Action at all, as to have an Action
[d] D. 50. 17. 112. which may be ſet aſide by an Exception [d]. *Accurſius* thinks, that he ought not properly to be ſtiled a *Creditor*, who convenes another in a *real* Action: But I adhere to the Opinion of *Alciatus* [e], becauſe no one can deny,
[e] In l. 10. D. 50. 16. but that he who is in poſſeſſion of my Eſtate, ought to reſtore it to me. Again, it has been a Query, whether a Creditor *ſub conditione* may be properly ſtiled a Creditor? To which, I anſwer, That if it be certain that ſuch Condition will have its Event, he may properly be ſo ſtiled: But 'tis otherwiſe if ſuch Condition be uncertain in its Event, unleſs it be in a large Signification of the Word; and then whenever the Condition ſhall have its
[f] D. 44. 7. 42. Event, he is ſtrictly a Creditor [f]. As when a Perſon that is a Debtor *in diem*, is not a Debtor, properly ſpeaking, becauſe he only is truly ſuch
[g] D. 50. 16. 108. from whom a Demand may be made againſt his Will [g]: So conſequently he
[h] D. 31. 1. 46. cannot be truly called a Creditor, unto whom Money is only due *in diem* [h]; becauſe he cannot bring his Action till the Day comes. Creditors have a twofold Remedy againſt their Debtors. The firſt is a *real* Action lying againſt their Debtors Eſtates, if the Debt be upon a Mortgage; and this is ſtiled *Remedium Hypothecarium*, or an Action upon a Mortgage: And the

other is a *perſonal* Remedy, which only lies againſt the Perſon of the Debtor. A Creditor remitting a Debt ſeems to make a Donation thereof: For the very Remitting itſelf is a Donation; and, therefore, it is not valid between a Husband and a Wife.

A Creditor that has nothing to ſhew for the Acknowledgment of a Debt, but a Bill or Note under the Hand-writing of his Debtor for the Money, which he lent him, is in *Latin* ſtiled *Creditor Chirographarius*[i]: And he who gives ſuch a Note or Bill, is termed *Debitor Chirographarius*. And thus the Money thus lent without a Pawn or Mortgage, is ſtiled *Pecunia Chirographaria*, or Money due upon Bond or Bill of Hand-writing. Our common Lawyers call it Money due upon *Specialty*. For *Chirographum* is a private Writing ſubſcribed by the Hand of any Perſon, which we ſometimes call a Sign-Manual, Bill, Note, or Obligation, *&c.* And it differs from *Syngraphum*, becauſe this laſt is ſubſcribed by more Perſons than one, and contains Pacts and Covenants, as a Leaſe does. *Syngraphus* is an indented Writing between Debtor and Creditor: In the Indentation of which was antiently wrote this Word in capital Letters, *viz. Syngraphus*. But a *Chirographus* is that which is only a Writing written or ſubſcribed by the Hand of one Perſon, as the Debtor; and is lodged with the Creditor.

[i] D. 42. 5. 22.

There are ſome Creditors that are ſuch upon a real, and others that are ſo upon a perſonal Right. The firſt are called Creditors upon a Mortgage, or *Creditores Hypothecarii*; and the others are ſtiled ſimple Creditors, or Creditors upon a Note of Hand-writing, *&c.* And as theſe laſt have only the Perſons of their Debtors bound to them for the Payment of the Debt, according to *Weſembeck*[k], they may be ſtiled *perſonal* Creditors, or Creditors upon Specialty. Under the Name of *hypothecarious* Creditors we may reckon ſuch as are Creditors *ſub pignore*, whether ſuch Pawn be an expreſs or tacit Pawn. There is alſo another diſtinction of Creditors, whom we call *privileged* Creditors, and ſuch as are not ſo. For whenever the Goods and Eſtate of a Debtor come to be ſold for the Payment of his Debts, all the Creditors have an equal Concurrence or Right of coming in for their Debts, unleſs there be ſome that are *privileged* Creditors, who are preferred unto all others. For in the caſe of Debts, the *Civil* Law gives a Precedency unto ſome Creditors, rather in reſpect of the Cauſe or Conſideration of their Debts, than in reſpect of the Time when they were contracted: For he whoſe Cauſe is a *privileged* Cauſe, is preferred unto all other Creditors[l]. Of theſe *privileged* Perſons there are ſome that have a Privilege with an Hypotheque, and ſome that are privileged without an Hypotheque. In reſpect of the firſt we may reckon the Exchequer[m], a Pupil[n], and a Woman in reſpect of a Dower given: And in reſpect of the latter we may reckon the State or Commonwealth[o].

[k] In Pand. lib. 40. Tit. 5.

[l] D. 42. 5. 1.

[m] D. 49. 14. 46. 3.

[n] D. 42. 5. 4. 5. 6. & 7.

[o] C. 11. 29. 2.

Among *privileged* Creditors, we may, *firſt*, reckon ſuch as lay out Money on the Funeral of him whoſe Heir they ſue, or on the Funeral of him whoſe Goods the Perſon ſued has poſſeſſed himſelf of as Heir[p]. *Secondly*, we may reckon a Woman in this number, who in the Recovery of her Dower has a Privilege of being preferred unto all other Creditors: And this Privilege is alſo extended to a Woman betrothed by Words *de futuro*, who has brought a Dower[q], though it be improperly ſo called; becauſe it is not a Dower, unleſs Matrimony enſues thereupon. And the ſame Privilege is likewiſe extended to her, who could not be a Wife, though ſhe was *de facto* marry'd; becauſe ſhe was under Age at that time: For if the Marriage be diſſolved in the mean time, ſhe ſhall recover her Dower, and be preferred unto all other Creditors, that ſhe may by this means marry another Husband[r]. And the ſame Privilege which a Pupil has againſt his Guardian, he has likewiſe againſt him who manages his Eſtate as a Curator, when he is no longer a Tutor[s]: But though a Pupil has this Privilege,

[p] D. 42. 5. 1.

[q] D. 42. 5. 2. 2.

[r] D. 42. 5. 3.

[s] D. 42. 5. 4. 1.

yet his Heir has it not. The like Privilege is granted to a Prodigal, and
[s] D. 42. 5. 5. to a Perſon deaf and dumb againſt his Curator [s]: But it is not granted againſt a Curator deſigned to manage the Eſtate of an abſent Perſon, or one taken Priſoner by the Enemy on the Return of ſuch abſent or captive Per-
[t] D. 42. 5. 6. ſon [t]. Nor has a Pupil this Privilege againſt his Agent, or *negotiorum*
[u] D. 42. 5. 7. *Geſtor*, who manages his Eſtate on the ſcore of Friendſhip [u]. In all theſe Caſes of Debt, thoſe Perſons are firſt paid and ſatisfy'd their Debts out of the Money ariſing from the Sale of the Debtor's Goods, who have the better Right, according to the Cauſe of their Debts.

If ſeveral *privileged* Creditors interfere or claſh with each other in a Suit, they have all an equal Right to the Debtor's Eſtate, and may equally divide the ſame betwixt them, unleſs one be before the other in point of Time,
[v] D. 49. 14. 28. or be preferred by ſome ſpecial Law, as a Woman and the [v] Exchequer is. But in a doubtful Caſe a Woman is preferred unto the Exchequer, and the Exchequer unto a private Man. In other Caſes, regularly ſpeaking, a *privileged* Creditor ought not to urge and plead his Privilege againſt a
[w] C. 8. 18. 12. *privileged* Creditor [w], except thoſe Perſons above-mentioned, whoſe Privilege paſſes not to an extraneous Succeſſor; all other Creditors coming in equally, without any regard had to the time of the Contract, according to the rated
[x] C. 7. 72. 6. Sum of their Debt [x]. But if any Perſon has been ſo vigilant and careful of himſelf as to make his Debtor's Goods his own before they are poſſeſſed by other of the Creditors, they ſhall be taken out of his Hands and re-
[y] D. 43. 8. 24. cover'd againſt him [y]. But if all the Creditors come in or poſſeſs the Goods at the ſame time, all have an equal Right, and there is no room
[z] C. 7. 72. 6. 1. for Gratification [z]. He who knowingly contracts with a Debtor, after he has purpoſed to defraud his Creditors, is exempted from the number of
[a] D. 42. 5. 6. *privileged* Creditors [a]. Though Creditors upon a Pawn or Mortgage are preferred before ſimple Creditors, or Creditors upon a Note of Hand-writing,
[b] C. 8. 18. 3. 7. & 11. and the like, whether theſe laſt are *privileged* Creditors or not [b]; yet there is one Caſe alone, wherein a ſimple Creditor, or a Creditor upon a Note of Hand-writing, *&c.* is preferred unto a Creditor upon a Pawn or Mortgage,
[c] D. 11. 7. 45. and that is, when any one expends Money upon a Funeral [c]. If there be a Concurrency of ſeveral *hypothecarious* Creditors, or Creditors upon a Pawn or Mortgage, we ought to diſtinguiſh in this manner, *viz.* They are either hypothecarious and *privileged* Creditors together, or elſe only *hypothecarious* Creditors. If they are only the laſt, then he that is firſt in point of Time,
[d] D. 8. 18. 7. is preferred in Law [d]: But if they are the firſt, then he that has the ſtronger
D. 20. 4. 2. 11. & 12. 2. or better Privilege is preferred unto all the reſt in reſpect of Payment [e]:
[e] D. 42. 5. 32. As the *Fiſcus* or Exchequer has always an Hypotheque and a Privilege
[f] C. 12. 63. 3. together annexed to it [f]. And ſo likewiſe has a Woman, who brings an
[g] C. 8. 18. 12. Action *ex ſtipulatu* for the Recovery of her Dower [g]; and alſo a Man who
[h] D. 11. 7. 45. lays out Money on another's Funeral [h]. And among all theſe he ſhall be preferred, who lays out Money on another's Funeral. A Creditor who has lent Money for the Repair of a Houſe, and the like, has a Privilege of demanding ſuch Sum of Money, which he has thus lent, before any other
[i] D. 12. 6. 25. Creditor [i].

Regularly ſpeaking, (and herein the Doctors are agreed) a Creditor cannot be compelled againſt his Will and Inclination, to receive a particular Sum in part of Payment; becauſe a Payment made after this manner by
[k] D. 10. 2. 3. Parcels would oftentimes be very inconvenient to the Creditor [k]. And it is the ſame thing, if the Debtor would make Satisfaction unto his Creditor by a Payment partly made in Money, and partly in Goods, as Corn, Oil, and the like: provided the Obligation unto Payment be founded on one Conſideration alone, as a Loan of Money, a Sale, and the like. For if Obligations of Payment have their Riſe from ſundry Cauſes or Conſiderations, it would be otherwiſe; becauſe as one Conſideration has no reſpect unto

unto another, it would not ſeem juſt and reaſonable, that all thoſe Obligations ſhould be diſcharged and taken away by the ſame Payment or Kind of diſcharge [1]. But if the Creditor be willing that this ſhould be done, doubtleſs he may receive a particular Sum in part of Payment. But tho' a Creditor cannot be compelled to receive part of a Sum in Payment, where the whole Debt is liquid; yet where only a part of it is confeſſed or liquid, he ſhall be obliged to receive the ſame, and he may litigate about the diſputed Part, if he pleaſes. And the ſame thing *vice versâ* may alſo be ſaid of a Debtor, who ſhall be obliged to pay the whole Debt, if it be liquid, under pain of being in delay: But if only part of a Debt be liquid or confeſſed, he may pay that part, and litigate for the other. As for inſtance, a Creditor who has a hundred Pounds owed him upon one and the ſame account, as upon Bond, and the like, is obliged to ſue for the whole Debt together, and not ten Pounds at one time, and twenty Pounds at another, and ſo of the reſt, *nè cauſæ continentia dividatur* [m]. In an Action of Debt againſt *Cole*, upon an Obligation for ſixteen Pounds, for the Payment of eight Pounds ten Shillings on the 11th of *November* 1600, the Defendant pleaded, that at the Plaintiff's Inſtance, before the ſaid Day, he paid him five Pounds ten Shillings in ſatisfaction of the whole. And it was reſolved by all the Court, That the Payment of a leſſer Sum in ſatisfaction of a greater, cannot poſſibly ſatisfy a greater, or the whole. But the Gift of a Horſe, Cow, Robe, *&c.* in ſatisfaction, is good [n]. But in this caſe of *Cole* it was reſolved, that the Payment of a Parcel, and the Acceptance thereof before the Day of Payment, in ſatisfaction of the whole, is a good Satisfaction in reſpect of the Circumſtance of Time: For, peradventure, parcel of that Sum before the Day of Payment may be more beneficial to the Creditor, than the whole of the Money at the Day limited; and the Value of the Satisfaction is not material. For if I am bound to pay ten Pounds at *Weſtminſter*, and you requeſt me to pay you five Pounds at *York*, and you will accept of it in full Satisfaction of the ten Pounds, this is a good Satisfaction in reſpect of the Place. But in this caſe the Plaintiff had Judgment for the inſufficient Pleading of the Defendant. For he did not plead the Payment of the ten Pounds in full Satisfaction (as the Law requires) but pleaded the Payment of Part *generally*; and always the Manner, Payment, and Tender ſhall be directed by him that tenders, and not by him that accepts.

[1] D. 20.6.15.

[m] C. 3. 1. 10.

[n] Cok. Rep. 5. Fol. 117.

Creditors may upon ſeveral accounts be let into poſſeſſion of all the Goods of a Debtor for the ſake of ſecuring the Debt or Money due to them. As *firſt*, when a Perſon that is ſummoned into a Court of Law, refuſes to appear or plead, or does in a fraudulent manner abſcond and hide himſelf [o]: For it is not enough for a Man to abſcond and hide himſelf, but it muſt be done with an Intent of defrauding his Creditors [p]. *Secondly*, A Perſon that is ordered to put in Bail or Caution (*de Juri ſiſtendo*) by Sureties, if he does not comply with the Order of the Court, but abſconds, ſhall have his Creditors put into the Poſſeſſion of his Goods [q]: But a Perſon does not ſeem to hide himſelf, who does not exhibit his Preſence through fear of Enemies, domeſtick Seditions, a Tyrant, *&c* [r]. For a Perſon may abſcond and conceal himſelf upon a reaſonable account. Wherefore the Judge ought to conſider, with what Intent the Perſon abſconds. If any Perſon ſhall prohibit or hinder a Creditor, that is by the Judge's Order admitted into the Poſſeſſion of his Debtor's Goods or Eſtate, from making an Entry thereon, an Action of Damage lies againſt him, and the Plaintiff ſhall recover a *quantum valet*, according to an Eſtimation made of the Debt and Damage thereupon [s]. A Creditor *ſub conditione*, regularly ſpeaking, is not admitted into the Poſſeſſion of the Goods and Eſtate of his Debtor; becauſe he is only thus admitted, who can ſell the Goods [t]: But this

[o] D. 42.5.7.1.

[p] D. 42.5.7.2.

[q] D. 42.5.15

[r] D. 42.5.7.4.

[s] D. 42.4.14.

pr.

[t] D. 42.4.14.2.

this muſt be underſtood by virtue of a ſecond degree; for a conditional Debtor may be put into poſſeſſion of his Debtor's Goods by way of Sequeſtration, for the ſake of ſecuring his Debt, if ſuch Debtor abſconds or abſents himſelf through Contumacy, *&c.* though the ſaid Creditor cannot ſell
[t] D. 42. 4. 6. pr. the ſaid Goods [t]. It is to be noted, that he who does any Act, whereby his Adverſary ſhould not come at him, does not ſeem to exhibit his Preſence or Appearance. Moreover, it is to be obſerved, that a Perſon may be in the ſame City or Town, and yet abſcond and hide himſelf, and be in another City or Town and yet not abſcond: For he who is in another City, and ſhews himſelf in publick there, does not ſeem to abſcond, unleſs he flies thither for the ſake of avoiding to meet his Creditors in his own
[u] D. 42. 4. 7. 13. City [u]; and whenever a Debtor is latitant, his Creditor may be put into poſſeſſion of his Goods. But of this more hereafter in the ſecond Volume of this Work, touching a firſt and ſecond Decree.

Having thus far declared and ſhewn for what reaſon Creditors may be let into the Poſſeſſion of another Perſon's Goods and Eſtate, I ſhall next proceed to ſhew how the Goods of a Perſon deceaſed may be ſeparated from the Goods of the Heir, for the Benefit of Creditors. Now it muſt be obſerved, that the Deceaſed ſometimes leaves many Creditors behind him, and his Heir himſelf is alſo ſo harraſſed and incumbred with Creditors of his own, that not only the Goods of the Deceaſed are ſold for the Payment of the Heir's Debts, but even the Goods of the Heir himſelf are ſold for the Payment of the Debts of the Deceaſed. Wherefore, for taking care of Creditors as well as of the Heir, the Remedy of Separation of Goods was invented and granted by the *Prætor*, to the end that the Creditors of the Deceaſed might ſeparate his Goods from the Goods of the Heir: And this was chiefly done, that the Creditors of the Deceaſed ſhould be upon one bottom, and the Creditors of the Heir upon another. And thus the Creditors of a Perſon deceaſed may pray the Benefit of a Separation of Goods againſt the Creditors of the Heir, to the end that after ſuch a Separation is made, they may in reſpect of the Goods of the Deceaſed be preferred unto the Creditors of the Heir, unleſs deſpiſing this Proviſion
[v] D. 42. 6. 1. 1. of Law, they have a mind to truſt to the Heir's Honeſty [v]. Thus if I have contracted with *Titius*, and he becoming my Debtor in the Sum of ten Pounds, or the like, dies, leaving *Seius* his appointed Heir, I may in this caſe convene *Seius:* And if he has any Creditors in his own Perſon, I may pray to have a Separation of the Goods of *Seius* made from the Goods of *Titius* deceaſed. But if I have ſtipulated with the Heir *animo novandi*, touching the Debt which *Titius* owed me, I cannot pray to have this Se-
[w] D. 42. 6. 1. 10. & 11. paration made [w]. But though the Creditors of a Debtor deceaſed may by Suit obtain a Separation of his Goods from the Goods of the Heir; yet the Heir cannot do the ſame. The power of praying a Separation of Goods is therefore granted unto the Creditors of a Perſon deceaſed, when they apprehend the Heir to be inſolvent, or will embezzle or confound the Goods of the Deceaſed with his own: But on the contrary, it is not granted unto the Creditors of the Heir. The hereditary Creditors, that is to ſay, the Creditors of the Deceaſed, after they have obtained this Separation, which is granted them by the Decree of the Judge, are preferred to all the Creditors of the Heir, though the Heir has mortgaged his hereditary Eſtate unto ſome Perſon: nay, they are preferred even unto the Exchequer, tho' the Exchequer was a Creditor unto the Heir. If the Heir ſhall take the Heirſhip on himſelf, which is incumbred with Debts, with a fraudulent Purpoſe of cheating his own Creditors, the Creditors of the Heir may in this caſe pray to have the Goods of the Heir ſeparated from the hereditary Goods of the Perſon deceaſed. The Heir may likewiſe pray to have a Separation of his own Goods made from the hereditary Goods of the Perſon

deceaſed, if he be ſuſpected, to the end that he may avoid the Suſpicion of diſhoneſty, and may only ſatisfy the hereditary Creditors out of the Goods of the Perſon deceaſed, and not out of his own Stock. This Separation of Goods may be obtained in eight Caſes mentioned in the Law here quoted [x]. The hereditary Creditors may pray this Separation, whether the Deceaſed be only a Debtor *ſub conditione*, or a Debtor *in diem* [y]: And after them Legataries may within five Years from the time that the Heir accepts of the Heirſhip [z], pray to have the Goods of the Deceaſed ſeparated from the proper Goods of the Heir; and this is done by the Judge's Decree. But if there are ſome Creditors, that deſire a Separation, and others that do not, thoſe who do not ſhall be reckoned with the Creditors of the Heir [a]. And it belongs to the Cognizance of the Judge, to conſider whether a Separation ſhall be admitted or not [b]. It has been ſaid, that the Creditors of a Perſon deceaſed may pray and obtain a Separation of the Goods of the Deceaſed, from the Goods of the Heir, unleſs they have given the Heir credit, or taken his Word: Becauſe he who has given the Heir credit, or taken his Word, contracts with the Heir; and, therefore, is a Creditor unto the Heir [c].

[x] D. 42. 6. 1.
[y] D. 42. 6. 4.
[z] D. 42. 6. 1. 13.
[a] D. 42. 6. 1. 86.
[b] D. 42. 6. 1. 14.
[c] C. 7. 72. 2.

If a Perſon dies, and has no one that will be his Heir, his Creditors are let into the Poſſeſſion of his Goods, and the Goods ſhall be ſold for the Payment of Creditors, according to the proportion of their Debts [d]: And Creditors upon a Pawn or Mortgage ſhall be preferred herein before Creditors upon Bills or Notes of Hand-writing [e], as aforeſaid. A Creditor let into the Poſſeſſion of an Eſtate by a Sequeſtration, after Payment of the Debt, ought to reſtore and account for the Fruits of ſuch Eſtate unto the Debtor himſelf demanding the ſame [f]; for the Poſſeſſion of the Eſtate is only a Security for the Payment of the Debt. A Creditor let into the Poſſeſſion of an Eſtate, is obliged to abide by a Leaſe or Demiſe made by the Debtor. Creditors may convene him unto whom the Inheritance is given, namely, the Heir appointed to declare whether he will accept of the Heirſhip, or not: And this is good and daily Practice ſo to do.

[d] C. 7. 72. 6.
[e] C. 7. 72. 6.
[f] D. 42. 5. 9. 3.

As a Preſcription or Limitation of Time does not run againſt Creditors, if an Imparlance or Delay in Law be depending [g]: ſo neither ſhall a Creditor plead Preſcription to a Pawn or Pledge by length of Time; nor ſhall he demand or retain the ſame as a Pledge, unleſs he proves the Obligation whereby the ſame was engaged to him, and the Default whereby the ſame was forfeited: And the former of theſe, *viz.* the Obligation, ought to be well proved, when the Debtor denies the Debt. A Creditor who accepts of an inſufficient Pawn or Mortgage, may demand the Surpluſage of what is due to him beyond the Value of the Pawn or Mortgage accepted of by him [h]. *Titius* mortgaged an Eſtate of a hundred Pounds *per annum* Rent, unto *Seius*, and thereupon borrowed three thouſand Pounds. This Eſtate, when it came to be ſold would not yield above two thouſand Pounds. Whereupon it was adjudged, that *Seius* ſhould pay the Surpluſage of a thouſand Pounds by an Action of Debt. See hereafter Title touching *Mortgages*. A Creditor by way of Pawn or Mortgage is liable to anſwer not only for any Fraud committed, but even for a *lata culpa*: But a Curator let into the Poſſeſſion of Goods, is only liable on the account of Fraud and Cozenage [i]. And the reaſon of this diſtinction between a Creditor and a Curator is, becauſe a Creditor in poſſeſſion of a Pawn is deemed to poſſeſs the ſame for the advantage of his Debtor. If a Creditor has reſtored a Pawn, hoping ſuddenly to receive his Debt, for which ſuch Pawn was given or laid down, and yet does not receive the ſame: In this caſe ſuch Creditor is not deemed and reputed to have remitted his Right to ſuch Pawn.

[g] D. 42. 4. 14. pr.
[h] D. 12. 1. 28.
[i] D. 42. 5. 9. 3.

Though a Creditor may transfer his Right unto another by the way of *Ceſſion* or Aſſignment, contrary to the Will of the Debtor; yet the Debtor cannot transfer the Right of Obligation, whereby he ſtands bound to another Perſon againſt the Will of the Creditor. If a Perſon avers himſelf to be a Creditor, when really he is not ſuch, and does this with a Deſign of defrauding other Creditors: or ſays, that he is a prior Creditor, when he is not, he may be puniſhed *pœnâ falſi.* A Creditor cannot be compelled to receive Payment in any other Place than the Place appointed for Payment, unleſs Intereſt be alſo tendred unto him: And this is mutual in reſpect of a Debtor. Nor is a Creditor bound to give a general Diſcharge or Acquittance unto his Debtor, becauſe this is captious. If a Creditor gives unto his Debtor the Specialty or Inſtrument of a Credit, called a Bond, or the like, he is hereby underſtood to have remitted the Debt. And a Creditor, after his Debt is paid or ſatisfy'd, is bound to deliver unto the Debtor his Bond or Note of Hand-writing: For after Payment of the Debt, the Specialty may be recovered by a Condiction *ſine causâ* [k]. If a Creditor ſucceeds to the Eſtate or Inheritance of his Debtor, the Creditor's Action is thereby extinguiſhed; for he may pay himſelf, and cannot have an Action againſt himſelf. Though, generally ſpeaking, a Creditor ought not to ſue for a Debt by Parcels, as before related; yet by demanding or ſuing for a leſſer Sum out of a greater, he is not prejudiced thereby: For in ſome Caſes, by ſuch Demand or Suit, he ſhall not be barred from ſuing for the Reſidue, though the Debtor has paid off the leſſer Sum demanded of him or ſued for. For, as I have obſerved, the Creditor does not prejudice himſelf by demanding leſs, when more is due, unleſs in the demand of ſuch leſſer Sum he ſhall make uſe of the taxative word *Tantum*, or ſhall demand ſuch Sum as the Reſidue of a greater Sum: For, mention being made of the *Reſidue*, or any ſuch taxative Term, it induces a Diſcharge or Releaſe of the whole Debt.

[k] C. 4. 9. 2.

It has been ſaid, that a *Creditor*, taken in a large Senſe of the Word, is ſaid to be that Perſon who has the Property of a Thing, or a Claim thereunto; and he that has the Poſſeſſion is called the *Debtor:* But, ſtrictly, Creditors are thoſe Perſons to whom any Thing is due or owing on the account of any *real* or *perſonal* Action whatſoever, whether it be a Debt abſolute, or at a Day certain, or under ſome Condition; but then there ought not to be any bar by a perpetual Exception: For if the Action or Proſecution may be abated by ſuch Exception, or if it be an *Honorary*, either ordinary or extraordinary, the Perſon to whom ſuch Payment ought to be made, cannot be called a *Creditor.* Nor is he properly ſtiled a *Creditor*, to whom a Thing is only *naturally* due, though if the Thing be paid, it cannot be retrieved or recovered again from the Receiver. And as a Perſon to whom a thing is only *naturally* due, cannot properly be ſtiled a *Creditor:* So he is improperly called a *Debtor*, who owes a thing only *naturally*; and that which is thus due is as improperly termed a *Debt.* But Perſons may be called *Creditors*, though no Money be lent by them: For every Contract that intervenes between them and others, makes them Creditors, as already remembred. For not only thoſe who have lent and credited Money, are comprized under the Name of *Creditors*, but even all Perſons to whom any thing is due on any account whatſoever, whether on the ſcore of a Thing hired, bought, lent, or any other Contract; nay, even on the ſcore of a Treſpaſs or Offence. Thoſe are ſaid to be *conditional* Creditors, to whom an Action does not yet accrue, but will ariſe hereafter as it is expected; for a *conditional* Creditor is truly a Creditor, though not properly ſo. Nor is he, to whom a Legacy is left under a Condition (pending ſuch Condition) properly a Creditor *cum effectu*; but yet he is truly ſuch, if the Condition may be fulfilled.

If

If a Creditor proves his Debt, the Judge ought to compel the Debtor to pay the ſame, though the Bond or other Specialty of the Debt be loſt: For the Loſs of ſuch Specialty does not affect the Creditor, if the Debt may be proved by Witneſſes, or by any other legal means [l]. A Creditor who has by Covenant a Power given him of entring into the Poſſeſſion of his Debtor's Goods or Eſtate, if he afterwards deſires leave of the Judge of entring thereinto, and it be denied him, cannot after by his own Authority enter thereinto. Whenever a Day is ſaid to be added in favour of a Creditor, it is neceſſary, that expreſs mention ſhould be made thereof, or elſe that it ſhould appear by evident Arguments: And all Perſons agree, that a Debtor may be repelled, if he pays before the Day appointed; becauſe it is (perhaps) the Creditor's Intereſt to expect the Day of Payment. Hence, if Money be lent upon Intereſt, and a certain Day be appointed for the Payment of the Principal, the Day is deemed to be added in favour of the Creditor, for the advantage of Intereſt: And, therefore, a Debtor paying before the Day muſt pay Intereſt for the meſne Time. But in a doubtful Caſe, a Day added for Payment is deemed to be added in favour of a Debtor. If a Creditor dies, and leaves ſeveral Heirs, a perſonal Action is divided among them by a Law of the twelve Tables [m]: But a Pawn or Pledge is gaged to each of them *in ſolidum*. And, on the other hand, if the Debtor dies, leaving behind him ſeveral Heirs, the perſonal Action which bound him is divided among them. But in an *hypothecarious* Action each of the Heirs is convened, not according to the Meaſure of each Perſon's Intereſt in the Eſtate, but *in ſolidum* to compel them to pay the whole, or to give up that which they detain in their Cuſtody [n]. But he who has acquired or purchaſed an Eſtate that was mortgaged from the Creditor, has no Action at all againſt the Eſtate, if he be not inducted into the Poſſeſſion of it upon a Vacancy [o].

[l] C. 4. 21. 1.

[m] C. 3. 36. 6. C. 2. 3. 26.

[n] C. 4. 16. 2. D. 10. 2. 25. 6.

[o] C. 8. 28. 13.

By a Law of the twelve Tables, it was lawful for Creditors to divide and cut their Debtors into pieces, if they were inſolvent, and to diſtribute their Members among them, according to the proportion of each Creditor's reſpective Debt: yet it was not lawful for one Creditor alone to do that, which was lawful for many to do jointly; becauſe one Creditor alone could not take away the Liberty and Life of his Debtor. I ſay, he could not take away his Life, becauſe Debtors were firſt to be made Priſoners to their ſeveral Creditors, and to work for them: Nor could he take away his Liberty, becauſe Debtors were to be made Priſoners only at the Suit of ſeveral Creditors. Now if we would reaſon cloſely on the ſcore of Liberty, ſince a Debtor muſt be impriſoned and loſe his Liberty, before he could loſe his Life to his Creditors, (for that he muſt do, if he be cut to pieces) we ſhall find as little reaſon for a Debtor to loſe his Liberty to many, as to one Creditor alone. For as to the Debtor, the loſs of Liberty is the ſame thing, whether it be by the means of one or more Creditors: And, therefore, on this Principle alone this Law is as irrational, as it is cruel. But in the Infant-State of *Rome* it was ordained to occaſion Thrift and Parſimony. And thus having diſcourſed of a Creditor in a more particular manner, I ſhall next proceed to ſpeak of a Debtor in the ſame way.

Now the word *Debtor*, as before rehearſed, imports a Perſon from whom we may demand ſomething againſt his Will. And a Perſon may be ſaid to be a Debtor three ſeveral ways: For a Debt is threefold in a large Acceptation of it. The firſt is ſtiled a *natural* Debt; the ſecond is termed a *natural* and *civil* Debt; and the third is called a *civil* Debt *only*; and ſome have added a fourth *Species*, *viz.* a *Prætorian* Debt. A *natural* Debt is that which is *naturally* due by reaſon of ſome Conſent, but is not aſſiſted by the Law; for the Law leaves it to the good Conſcience of the Party to diſcharge it. Thus an Obligation between Father and Son is a *natural* Debt: For by the *Roman* Law theſe Perſons are not *civilly*, but only

only *naturally* bound by their Contracts. And a Debt between Brothers, under the power of a Family, is the ſame: For by borrowing and contracting, they are only *naturally*, and not *civilly* bound unto each other [p]. And Legacies are ſaid to be *naturally* due on the ſcore of the Teſtator's Will, even though ſuch be not a ſolemn Teſtament [q]. A *natural* and *civil* Debt conſiſts in every juſt and perfect Obligation, as it is eſtabliſhed by Law and Conſent: And touching ſuch a Debt, no one can make any Diſpute or Queſtion in a Court of Law. A Debt *only civil*, is, when a Man gives a Bond or Note of Hand-writing for Money borrowed at any time, and acknowledged before the Money is lent to the Borrower; provided ſuch Bill or Bond does not extend beyond two Years, before ſuch Payment to the Borrower was made: And they who bind themſelves for Money received, which they have not actually received, but only acknowledge to have been received, and give Notes of Hand-writing for the ſame, are ſaid to be *civilly* bound. But though the *Civil* Law obliges them to the Payment thereof, yet they are not *naturally* bound, becauſe they have received nothing. Thus in the like manner, if you are *naturally* and *civilly* bound to me in the Sum of ten Pounds by a juſt and lawful Obligation, and I covenant with you *de non petendo*, *viz.* not to demand or ſue for the ſame: In this caſe, though you are *naturally* diſcharged by my Conſent, yet you are *civilly* bound, becauſe the civil Obligation is not hereby taken away.

[p] D.12.6.38.

[q] Gloſſ. in l. 1. D.12.6.

The *Civil* Law alſo makes another diſtinction of Debtors, *viz.* Debtors in reſpect of *Quantity*; Debtors in reſpect of a *Genus* or Body depoſited; and Debtors in reſpect of a *Species*. The firſt Kind of Debtors are not diſcharged by the Loſs of the Thing due, whether they are in Delay, or not. Wherefore, if I lend you ten Pounds, and that ten Pounds be loſt before you pay me, you are (notwithſtanding) liable to me, though you have contracted no delay in Payment, becauſe the Money cannot periſh, as a *Species* may: yea, though the State or City ſhould be ſtript of all its Money (which is almoſt impoſſible,) yet you ſhall be liable in the pecuniary Debt. For Fire, though it be a fortuitous Caſe, diſcharges not a Debtor from his Debt. Again, he who is bound to me in ten Marks of Silver, ſhall not be diſcharged, though all the Silver of the whole Province ſhould be loſt; becauſe Silver and Money ſymbolize, and Gold or Braſs Money may be paid for Silver. But if any one be bound to me in Money, as a Lump or Body, as when I deliver you a Bag or Cheſt with Money therein incloſed, this is not called a Sum or Quantity, but a Body or *Genus*, and if the ſame be loſt in the Cheſt or Bag, the Debtor is diſcharged; provided it be not through his Fraud or Negligence. A Debtor in reſpect of a *Species*, is, when a Perſon owes any thing in ſpecial, as his Bondman *Stichus*, or his Horſe *Bucephalus*, and the like, which are the *Species* of Things; and ſuch a Debtor is diſcharged *ipſo jure*, if ſuch Bondman or Horſe dies, provided he be not in delay of Payment [r].

[r] C.4.49.6.

But notwithſtanding what has been ſaid before, it is not equitable, that a Debtor ſhould be liable on the ſcore of Money loſt, who would not be obliged if the Creditor would have accepted of the Money [s], or in other Terms, if a Thing be loſt after a Tender made: As when a Debtor tenders ready Money, and lays it down on the Table, ſaying, *Take what I owe you*, and the Creditor by not accepting thereof, the Money is loſt, the Debtor is diſcharged (at leaſt) by the help of an Exception, becauſe if the Creditor ſhould afterwards demand the Money, an Exception will lie againſt him, *viz.* That he acts deceitfully who does not accept of ready Money tendred him. For example ſake, I will put a Caſe, *Titius* owed unto *Caius* ten Pounds upon ſome account or other, and once he came and tendred this Money unto *Caius*: But *Caius* being a moroſe and ſurly Fellow, did not

[s] D.46.3.72. pr.

regard

regard him, in ſuch a manner as to receive the ſame. *Titius* went away with his Money, and after ſome time loſt the ſame. *Caius* ſued *Titius* for his Debt, who by way of Anſwer ſaid to him, *Quid petis? nodum in ſcyrpo quæris.* I have loſt the Money which I tendred you the other day. If you had accepted of it, I had been now diſcharged: And, therefore, impute it to yourſelf, that the Money is loſt. I will not pay you any other Money, therefore, riſe and be gone. And this was adjudged to be a good Exception.

A Perſon that is a Debtor to a Creditor in divers Sums, and upon ſundry Conſiderations, may, when he pays one Sum, chuſe which Conſideration he pleaſes to diſcharge: And if he does do this, and the Creditor be ſilent, he ſhall be deemed to diſcharge that Debt, which he has a mind to diſcharge. But if his Creditor would chuſe which Debt he would have to be diſcharged, he ſhall have his choice, provided he makes his Election immediately. But if no mention be made of which Debt is paid, ſuch Payment ſhall then be underſtood of that Debt whoſe Day of Payment or Condition is not at hand [s]. *Titius* owed a hundred Pounds on the account of an Eſtate ſold him. He likewiſe owed me another hundred Pounds on the ſcore of Money lent him upon Intereſt. *Titius* paying a hundred Pounds ſays, that he would have deducted a hundred Pounds, or this Debt, which he paid from that, which he owes on the Eſtate ſold him. But I being to receive Intereſt for my Money, refuſe to do it, and make the Money paid for the Eſtate which I ſold him, and which carries no Intereſt. If I neglect to declare which Debt I would have diſcharged, *Titius* ſhall have his choice: But if I immediately declare which of theſe two Debts I would have diſcharged, the Choice ſhall then be mine.

[s] D. 46. 3. 1. & 3.

If the Goods and Eſtate of a Debtor are to be ſold for the Payment of Debts, the Statues that are erected in honour of ſuch Debtor, or as an Ornament to the State and Commonwealth, ſhall not be ſold. As for example, a certain Citizen or Subject of *Florence* did an eminent piece of Service to the Commonwealth, for which certain Statues were erected to him in Memory thereof; as heretofore the *Athenians* did for King *Demetrius*. This Citizen or Subject afterwards broke, and became a Bankrupt: Whereupon his Creditors would ſell his Goods. *Quære*, Whether his Statues of this kind may be ſold? And it was reſolved, that they might not, becauſe his Honour would hereby be attempted and ſuffer. And ſuch Statues are an Ornament to the State, to the end that it may be publickly ſeen that ſuch worthy Citizens or Subjects once lived and flouriſhed in the Commonwealth. When the Goods of a Debtor are to be ſold for the Payment of his Debts, and there is a Parity of bidding for them between an extraneous Perſon who is a Creditor, and a Creditor who is of kin to the Debtor, the Debtor's Kinſman ſhall be preferred to ſuch extraneous Creditor: And among other Creditors, he ſhall be preferred, who has the greater Sum of Money due to him. Touching the Goods of a Debtor, which are to be ſold by Creditors, ſome of them were willing to ſell them, and others were not, and theſe Creditors were equal in Number, Dignity, and in Bulk of their Debts: Now in this caſe, a regard ſhall be had to the Voice of thoſe Creditors that are of kin to the Debtor, rather than to the Voice of extraneous Perſons, or Perſons not related to him. By the Law of *England*, theſe Diſtinctions are not obſerved or followed.

A Sentence of Debt pronounced againſt the principal Debtor himſelf, makes full Proof of the Debt againſt his Surety, and every other Perſon engaged for ſuch Debt; and after ſuch Sentence, there may be an Execution demanded for that Debt on or againſt the Goods of the Debtor, if any ſuch Goods or Eſtate can be found: When the Debtor has nothing in Goods or Eſtate, and only alledges Poverty, or is in a total Contumacy for non-

appearing, then no Sentence is neceſſary, but it may be proceeded ſimply to an Enquiry touching his Goods and Eſtate, *viz.* touching what Goods and Eſtate he has. And the ſame Method ſhall be obſerved touching his Goods and Eſtate, if he be convened and ſummoned to appear. In which Caſes, the Judge may compel the Debtor as well as his Surety, by their proper Oaths, manifeſtly to declare their Goods and Eſtate; and if they ſhall be contumacious herein, he may mulct and fine them: yea, he may compel the Wife, and Children, and their Domeſticks, who have a probable Knowledge of their Goods and Eſtate, to diſcover the ſame. And the Judge may, moreover, inform himſelf touching their Effects, by the means of the Neighbours and near Kinsfolk, not only as to the Truth, but likewiſe as to the Fame and common Opinion of their Riches or Poverty: And if they ſhall depoſe, that there is a Fame and common Opinion of their Riches or Poverty, or of their Poverty alone, it is ſufficient. A Creditor may demand part of a Debt of the principal Party, and the other part of the ſaid Debt of the Surety, and may ſue for the ſame.

If a Debtor, who borrows and takes up Money upon Intereſt for a Year, be willing to pay the ſaid Money before the Year is expired, the Creditor is obliged to receive it with Uſe or Intereſt only for the Time paſt, unleſs the Debtor will pay it with Uſe and Intereſt for the whole Year. Uſury or Intereſt does not run againſt a Debtor, if the Creditor be in delay of receiving the Principal: nor is a Debtor liable to an Action, if the Creditor be unwilling to receive the Debt, though the Debt be entirely loſt. If a Debtor has at ſundry times given ſeveral Cautions or Securities to a Creditor for the Payment of one and the ſame Debt, ſuch Creditor cannot ſue and implead that Debtor upon all thoſe Securities; becauſe ſuch Debtor is preſumed to have given thoſe ſeveral Securities, which are ſubſequent to the firſt, with an Intent only of renewing the Security already given by him. By the *Canon* Law, if a Man be a Debtor to an Heretick, he is diſcharged by Law: nor is a Perſon by that Law bound to pay a Debt to an excommunicated Perſon, though the Day of Payment be at hand, becauſe he cannot ſue for the ſame. A fugitive or ſuſpected Debtor may be arreſted without the previous Solemnity of a Citation, which otherwiſe would be neceſſarily required: And ſuch fugitive or ſuſpected Debtor may be arreſted on a Sunday, or any Holiday whatſoever; but the Proof of ſuch Flight, or Suſpicion of Flight, ought to be made to the Judge upon Oath, before he decrees an Arreſt; for a Debtor in a doubtful Caſe is not preſumed to be a Fugitive. A vagabond Debtor, that is, a Debtor who has no fixt and certain Habitation, may be convened and arreſted in any Place where he is found.

In a doubtful Caſe, the Law favours a Debtor more than it does a Creditor. Thus when a Time is added and appointed in a Laſt Will and Teſtament for the Payment of a Legacy, (for a Legacy is a kind of a Debt) it is ſuppoſed to be added in favour of the Heir or Executor; becauſe in the Payment of Legacies, and the Execution of Truſts, the Heir repreſents the Perſon of a Debtor. Hence a great Advantage belongs to the Heir, ſince he hereby gains the meſne Profits received before the Day of Payment comes: And it is in the Power and Diſcretion of the Heir, whether he will pay the Legacy before the Day appointed, or not. And as the Right of a Creditor ought not to be changed by the Act and Deed of the Debtor; ſo neither can a Creditor take from his Debtor the advantage of Place, when the ſame is aſſigned for the Payment of a Debt. I ſay, the Right of a Creditor ought not to be changed by the Act of the Debtor: For though a Debtor has delegated or remitted a Debt, which is due to himſelf, unto his Creditor; yet if this Money or Debt be loſt by any Accident or fortuitous Caſe, ſuch Debtor is not thereby diſcharged. As when

when *Titius* is a Debtor unto *Sempronius*, and *Sempronius* a Debtor unto *Caius*, *Sempronius* is not releaſed by remitting the Debt of *Titius* unto *Caius*, if the Money be loſt.

A Debt *ſub conditione* paid through Error and Miſtake, pending the Condition, may be recovered againſt the Receiver; becauſe there is nothing due whilſt ſuch Condition is depending. *Titius*, being indebted unto *Sempronius* in the Sum of a hundred Pounds, under a Condition, paid the Money before the Event of ſuch Condition. And, upon a Queſtion, whether *Titius* could recover the ſame again, it was reſolved that he might: But if the Condition had had its Event, and was no longer exiſting, he could not recover it. But if Money be due at an uncertain Day, as when Marriage ſhall enſue or happen, and the like, and the Money be paid *adveniente die*, he ſhall not recover it, though the Debtor could not be ſued for it before the Day happened: But it is otherwiſe in a Legacy left *ſub incerto die*, ſince an uncertain Day, in reſpect of a Legacy, is looked upon as a Condition [t]. Though a Debtor cannot be ſaid to be in delay (pending the Day or the Condition of the Debt) by any demand whatſoever made; yet he may be in delay by his own Act and Deed: as when he promiſes to pay before the Day comes, or if the Condition has its Event.

[t] D. 35. 1. 75.

A Perſon remitting a Debt, ſeems to make a Donation thereof: For the very Remitter itſelf is a Donation; and, therefore, it is not valid between Husband and Wife. And though a Debt does not ſeem to be remitted or waved by a Surrender or Delivery made of the Specialty to the Debtor, if nothing elſe happens; yet if the Will and Mind of a Perſon, who renounced the Debt, appears by any Conjectures or Signs, doubtleſs the Debt is thereby remitted, and it is ſo preſumed to be according to the Opinion of all the Doctors. A Compoſition made with a living Debtor by the greater part of his Creditors, does not prejudice other Creditors who have not compounded or conſented to remit any Part of their reſpective Debts. A Debtor may demand of the Creditor the Specialty or Inſtrument, which he gave or cauſed to be given for proof of the Debt, after Payment of the Money due; and if the Creditor refuſes to ſurrender and give up the ſame, he may be compelled thereunto.

In all Actions of Debt, the Cauſe of the Debt ought to be aſſigned and expreſſed in the Libel or Declaration, elſe ſuch Libel or Declaration is vicious and good for nought: For it is not enough for the Plaintiff to ſay generally, *&c.* That the Defendant was indebted to him in a Sum of Money. If an Action of Debt be brought upon a Specialty for part of the Sum mentioned in ſuch Specialty, the Plaintiff muſt ſhew in his Libel how the other part was diſcharged. And as a Creditor, who demands Money to be paid him, is bound to prove his Debt, whether the Debtor denies the ſame to be due, or only doubts thereof: So, on the other hand, is the Debtor, who avers Payment of the Debt, obliged to prove the ſame, whether his Creditor denies the Payment of it, or only demurs touching the [u] ſame. And the reaſon is, becauſe he who affirms, ought to prove the ſame [v]. A Debtor bringing an Action for the Relaxation of Goods pawned, ought to prove the Payment of the Debt, and the Nature and Quality of the Principal, if the principal Debt be ſatisfy'd ariſing from ſuch a Pawn; and he ought alſo to prove the Nature and Quality of the Profits ariſing from ſuch Pawn. A Creditor accepting of a Pawn in lieu of Payment, in a doubtful caſe, ſeems to accept of it for the whole Debt. The Inſolvency of a Debtor, who is not able to pay a Debt, does not hinder but that the Judge may condemn him; but this Inſolvency prevents the Execution of ſuch a Condemnation, unleſs the Debtor has Goods and Lands. For he is ſaid to be an inſolvent Perſon, *quoad hoc*, or not to have the Power of paying his Debts, who has not Money at hand, though he has many Eſtates and Poſſeſſions

[u] C. 4. 18. 1.

[v] D. 22. 3. 2.

Poſſeſſions in Land, *&c.* And no one is reckoned ſolvent, unleſs he can pay his whole Debt; for if a Perſon be ſolvent for part, and not for the whole, he is eſteemed as a Perſon inſolvent in many Caſes. Tho' an inſolvent Debtor cannot alienate any Thing to the Prejudice of his Creditors; yet he may wave an Heirſhip, or renounce a Legacy conferred on him by a Teſtator.

A perſonal Action ſtill lies againſt a Debtor, though his Creditor has made choice of a Pawn or Mortgage for his Security: For if the Value of the Pawn or Mortgage be not enough to ſatisfy the Debt, the Creditor may convene his Debtor in a perſonal Action for the Reſidue of the Debt
[w] C. 4. 10. 10. that is due [w]. The Perſon that borrows Money is bound to the Perſon that lends the ſame, and not the Perſon to whoſe hands the Money comes
[x] C. 4. 10. 13. on the account of Traffick [x]: As for inſtance, if you lend me ten Pounds, and I buy Clothes with this Money, the Action lies againſt me, and not againſt the Seller of the Clothes. There muſt be a perſonal Contract, or a Contract implied in Law, in order to ſupport and maintain an Action of Debt. And though it be moſt natural for the Debtor to perform and pay for himſelf; yet the Creditor ought to acquieſce, if any other Man diſcharges the Debt for him. A Pact, that a Creditor may arreſt and detain his Debtor for a Debt, is not valid: nor at this day is it lawful for a private Creditor, without the Authority of the Judge, to arreſt his Debtor running away from him, unleſs he does upon the very Act of Flight immediately bring him before the Judge: See *Groenvegen de ll. Abrogatis* [y]; though antiently he might have done it. If a Debtor *in diem* or *ſub conditione* be ſuſpected of Flight, *&c.* Execution may be awarded and had againſt him in the *Interim.* If a Debtor tenders Money which was demanded, and the Creditor without ſufficient Cauſe refuſes to accept the
[z] D. 46. 3. 30. ſame, he ſhall not afterwards have an Action [z]. If a Debtor pays part of a Debt, and his Creditor makes a general Pact *de non petendo*, ſuch Pact only extends to that part of the Debt which is paid, and the Creditor may demand the Reſidue. If the principal Debtor be obliged to pay or give a Thing *in Specie*, his Surety is not diſcharged by paying the Value or Price of that Thing.

[y] In l. 10. D. 42. 8.

A Debt ought not to be demanded *armatâ manu*, but by a civil Action
[a] C. 4. 10. 9. in a judicial manner [a]: For we ought rather to make uſe of the Law, than open Force and Violence. Thus if *Titius* has lent any Sum of Money unto *Seius*, and *Seius* denies that he owes him any thing, *Titius* ought not to compel *Seius* to the Payment of it *armatâ manu*, but ought to ſue for the ſame before ſome Judge. If a *neceſſary* Debtor leaves any Thing by his Will unto his Creditor, he is deemed to leave it as a Compenſation of his Debt, unleſs it be otherwiſe expreſſed in the Will; but a *voluntary* Debtor (for ſuch diſtinction the *Civil* Law makes) does not ſeem to bequeath it *animo compenſandi*, but with a Deſign of exerciſing Liberality. A *neceſſary* Debtor is ſaid to be him, who contracts a Debt by a neceſſary Cauſe, as by a proper or an improper Contract, or by the Law, and not by the Act and Will of the Debtor; but if it be by the Debtor alone, as in the Caſe of a Promiſe, he is ſaid to be a *voluntary* Debtor.

TIT.

TIT. XII.

Of a Demand, *judicial and extrajudicial, and the Force and Conſequences thereof; how a Day appointed for Payment is a Demand in Law,* &c. *Of a* Delay *in Payment, and what attends the ſame.*

SINCE no Delay of Payment can rightly be alledged, before ſome legal Demand has been made [b], it will be proper in this Title firſt to treat of a Demand. Now a Demand is the calling upon a Debtor, and putting of him in mind of that which is due unto his Creditor, by requeſting him to pay or diſcharge the ſame: For it is proper for a Creditor, who expects his Dues to be paid him, to admoniſh and put his Debtors in mind thereof, eſpecially if they are in delay of Payment. For there are ſome Debts which need not be paid before the Debtor is actually requeſted thereunto: And again there are others, wherein the Day of Payment itſelf is a ſufficient Demand in Law; and in ſuch a caſe where the Day of Payment is elapſed, the Law ſays, *dies interpellat pro homine,* the Day makes a Demand in the Place of a Man. So that a Perſon ſeems to be in delay in ſuch a caſe, if he ſhall not then of his own accord tender the Debt on the Day of Payment.

[b] D.50.17.88.

A Demand, according to *Bartolus* [c], may be either judicial or extrajudicial. The firſt is, when a Demand is made in Court by ſome Suit or Action commenced: And the ſecond is made out of Court, either by the Creditor himſelf, or ſome Agent in his behalf. If a legal Demand be made on a Debtor, though it be extrajudicially, yet he ſhall (nevertheleſs) be ſaid to be in delay of paying the Debt, if he does not immediately ſatisfy the ſame upon a Demand made; and the Thing lent or borrowed does in the *Interim* become of leſs Value by the Loſs or Diſappointment he ſuſtains: Wherefore, the Creditor or Lender may pray to have the Debtor or Borrower to be condemned both in Principal and Intereſt to him, from the time of ſuch delay made; a due regard being had to the Value of the Thing lent, by rating the ſame. But if no Demand has been previouſly made to a judicial Proceſs or Action, and it is probable that the Price or Value of the Thing lent will vary, pending ſuch Proceſs, the Plaintiff may in ſuch a caſe pray to have the Principal and Intereſt taxed by the Office of the Judge, to ſee how much it will come to during the whole time of the Suit [d]; and if the Defendant be caſt in the Cauſe, he ſhall be condemned in the whole [e]. Thus a Demand is an Act in Law, having a legal Effect; and, it being made on a Debtor, it makes ſuch Debtor to be in delay of Payment, if the Debt be not ſatisfy'd [f]; and it likewiſe perpetuates the Obligation, if it be made from time to time, in ſuch a manner that no Preſcription can be pleaded againſt the Payment of a Debt. And it matters not, whether I make this Demand in my own Perſon, or in the Perſon of a Friend. *Bologninus* ſays, that though a Demand be made on a Debtor; yet it does not immediately cauſe him to be in delay, but ſome ſmall Interval of

[c] In l. 8. D. 39. 1. 6.

[d] D. 21. 1. 25. 8.

[e] D. 12. 1. 22.

[f] Bart. & dd. in l. 5. D. 12. 1.

Time ought to be allowed him to provide Money for Payment of the Debt [g]; and this is the received Opinion of moſt of the Doctors.

[g] Bald. in l. 38. D. 4. 4.

A Perſon is ſometimes deemed to make a Demand by a Proteſtation alone: For a Proteſtation *de non poſſe interpellari*, that he cannot make a perſonal Demand, is looked upon as a good Demand [h]. He who makes a Demand in order to put his Debtor in delay, ought to appear at the Time and Place, otherwiſe his Demand vaniſhes, and he himſelf, according to *Alexander* [i], ſuffers. Wherever an extrajudicial Demand is ſufficient, a judicial Demand is ſufficient, tho' it be made before an incompetent Judge; becauſe it has the Force of an extrajudicial Demand at leaſt [k]. And ſuch a Demand makes a Man to be in delay, whenever an extrajudicial Demand ſuffices, though ſuch Demand be founded on an illegal Citation, or a Proceſs which is null and void: And it is the ſame thing, when a judicial Demand is required; becauſe it has ſtill an Operation in Law, though the Proceſs or Citation be null and void. See [l] *Aretine* here cited. If Letters ſent to a Debtor do only contain, that the Creditor wants his Money, ſuch is a lawful Demand if proved; becauſe ſuch Demand alone is a Demand in Law: and this is the common Opinion, according to *Jaſon* [m]. If a Thing cannot be performed or paid before ſuch a Day or Time, according to the Nature of the Thing, it cannot be demanded to be paid or performed before that Time: And when a Time of Payment is added to an Obligation, a Demand cannot be made till ſuch Time is paſt and gone [n]. If a Demand be made by a Man, it is convenient it ſhould be made in the Preſence of Witneſſes, leſt the Debtor ſhould deny the ſame, and the Creditor not be able to prove it [o].

[h] D. 22. 2. 2.

[i] Conſ. 33. vol. 6.

[k] Aretin. Con. 60.

[l] In l. 23. D. 45. 1.

[m] In l. 22. D. 12. 1.

[n] D. 50. 17. 146.

[o] D. 5. 1. 23.

A Perſon may be ſaid to demand more than his due four ſeveral ways. *Firſt*, in reſpect of the Thing itſelf, which is demanded or ſued for: As when a Perſon demands or ſues for a hundred Pounds, when in truth only fifty Pounds are due to him [p]. *Secondly*, in reſpect of the Time of ſuch Suit or Demand: As when a Man demands or ſues for a Debt before the Day or Condition of Payment is expired; becauſe he then robs the Debtor of the advantage of Time which is due to him. *Thirdly*, in reſpect of the Place where the Debt is to be paid: As when a Man has promiſed to pay Money in a certain Place, and the Creditor demands it elſewhere. And *fourthly*, in reſpect of the Cauſe itſelf of ſuch Debt; and this happens in an alternative Cauſe, which gives the Perſon impleaded, his Election or Choice: As when I promiſe unto *Titius* a hundred Pounds, or to give him ſuch a Houſe, and *Titius* only ſues for the Houſe; or elſe in a general Promiſe, and *Titius* only demands one *Species* [q]. But when I ſay, that a Man demands or ſues for more than his due in reſpect of the Thing itſelf, it is to be underſtood of the principal Debt, when that is increaſed by his Demand: But it is otherwiſe in reſpect of Acceſſories, as when a Man demands the Thing itſelf, with the Fruit and Intereſt thereof.

[p] I. 4. 6. 33.

[q] X. 2. 11. 1. & dd. ib.

I have before ſaid, *before the Day*, whether the Day be fixt by the Agreement of the Parties, as *I promiſe to pay you on the Calends of* January; or whether a Delay be inherent thereunto from the Nature of the Thing itſelf, it matters not: For a Perſon ſuing for the Fruits of an Eſtate, before they are ripe, or for the Young of Cattle before they are fallen or produced, may be ſaid to demand the Thing *before* the Day of Payment comes, and ſhall not avoid the Cenſure of the Law [r], which puniſhes raſh and haſty Litigants. Thus the Heirs of the Deceaſed have the Term of a Year, within which Time they ought to reſtore the Dower of a moveable Chattle: Wherefore, a Perſon that ſues for ſuch a Dower before that Time, incurs the Penalty of the Law, which is the Loſs of his Action [s]. In a conditional Debt, a Perſon ought not to make his Demand before the Event of the Condition, under which the Thing is premiſed: For if he does, and thereupon commences a Suit, he may be ſaid to demand more than

[r] D. 45. 1. 73.

[s] I. 4. 6. 33.

than his due [s]: for pending the Condition there is nothing due, and conſequently no Obligation of Payment [t]; and if there be no Obligation of Payment till the Condition is compleated, a Demand is vain and fruitleſs. But if a Debtor runs away, or be ſuſpected of Flight, he may be arreſted *ante diem*, or before the Event of the Condition [u], as a Creditor may ſell a Pledge even before the Time, if his Debtor runs away.

[s] I. 4. 6. 33.
[t] D. 50. 16. 213.
[u] D. 20. 1. 14.

A Creditor ought to make a Demand either on the Perſon of his Debtor himſelf, or elſe at his Houſe [v], and it may be made by any Words which denote the ſame. When a Demand is made on a Guardian, it ought to be made in the Name of the Guardian, and not in the Name of the Pupil, according to *Bartolus* [w]. If a Perſon be a Debtor by his own Act, a ſimple Demand, without any other Proof of the Debt, is then ſufficient to render him guilty of a delay: But if he be a Debtor by the Act of another, a ſimple Demand is not enough. A Perſon cannot be ſaid to be guilty of Delay, in a caſe wherein a Demand was never made [x]: For a Demand is neceſſary to introduce a Delay, whenever a Day certain is not annexed to the Obligation. But neither a judicial, nor an extrajudicial Demand is ſufficient, when the Debtor is ſaid to be ignorant of the Debt, as becauſe it is antient, intricate, and the like; but the Creditor ought in the firſt place to exhibit ſome Proof of the Debt [y].

[v] Bart. in l. D. 13. 5.
[w] In l. 5. D. 12. 1. n. 12.
[x] D. 50. 17. 88.
[y] Jaſ. in l. 5. D. 12. 1.

A Delay is that Neglect or Contempt which the Debtor ſhews to the Notice or Admonition given him by his Creditor, *&c.* in neglecting Payment [z], whether the Demand be made by Man, or by the Law itſelf. And, to render a Debtor guilty of Delay, theſe three Things ought to concur, *viz. Firſt*, a Demand, as aforeſaid. *Secondly*, he ought to have an Ability of paying the Thing which is due. And *Thirdly*, he ought to know himſelf to be a Debtor [a]. A Debtor is ſaid to have an Ability of paying, when the Thing due is *in rerum naturâ*: So that the real Ability or Difficulty of the Perſon is not conſidered, but the Power of Nature. For a Difficulty which proceeds from the Act of the Party, does not prevent a Delay, but it muſt be ſuch a Difficulty as proceeds from Nature. We ought (I think) to conſider, whether this Difficulty appeared at the time when the Obligation was contracted: if ſo, the Perſon muſt then impute the Conſequence of it to himſelf, and it is no excuſe for a Delay in Payment; but if it happened through ſome ſupervening Accident *ex poſt facto* without his Fault, it tolls the Guilt of a Delay.

[z] D. 5. 1. 23.
[a] C. 8. 38. 12.

A Debtor is ſaid to be in delay in paying a Debt, when he knows, or may know, that ſuch Debt is due or payable: And this Knowledge he may acquire ſeveral ways. As *firſt*, when a Demand is made in a fit Place, and at a proper Time: And ſuch a Demand may be made by Man either by Word of Mouth, or by any other means (as already hinted) whereby the Debtor may be admoniſh'd and know, that he ought to pay the Debt. And this may be done either by a Bill or Petition exhibited in Court [b], or elſe in an extrajudicial manner [c], or by a Meſſenger or Letters (as already related) for the Will of the Writer is known by them, provided it be proved that the Debtor received ſuch Letters, and not otherwiſe [d]. But the Perſon on whom ſuch Demand is made, ought to be capable of ſuch Intimation; for otherwiſe ſuch Demand would be vain and fruitleſs: As when a Demand is made on a Pupil or Minor [e]; for ſuch a Perſon is not capable of making Payment [f].

[b] D. 12. 1. 5.
[c] D. 45. 1. D. 45. 1. 82. 1.
[d] D. 38. 31. 47.
[e] D. 50. 17. 88.
[f] D. 46. 3. 14. fin.

The Plaintiff may be ſaid to be in Delay two ſeveral ways. *Firſt*, when it is incumbent on him to do or perform ſomething, in order to preſerve his own Right. And *Secondly*, when it is incumbent on him to give or do ſomething in order to acquire a Right and an Action *de novo*, and not to preſerve an Action already acquired. In the firſt Caſe, he who is bound to give or do ſomething in order to preſerve an Action already acquired, may purge his Delay within a moderate time, if the Debtor has not an

Intereſt to the contrary. A Creditor may alſo be ſaid to be in delay, when he neglects or refuſes to receive a Debt lawfully tendred to him [e]; and in this ſenſe a Delay may be predicated of a Creditor as well as of a Debtor. But then in both theſe Caſes, the Fault of the Party ought to intervene: For a Delay cannot be without the Fault of the Party that makes ſuch Delay. The Law ſometimes admoniſhes and urges a Debtor without the Act of Man: And, therefore, if a Thing be not done or performed as the Law requires, the Perſon neglecting incurs a Delay, and ſhall make good the Damage, if a Time of Payment, or doing the Thing, has been ſettled [h].

[e] D. 15. 1. 51. C. 3. 8. 16.

[h] D. 5. 12. 31.

2. An Heir is not ſaid to be in delay of paying a Legacy, when he tenders and offers to pay Legacies on this Condition, *viz.* that the *Falcidian* Portion be deducted: And if he be not in delay, he ſhall not be obliged to reſtore the Fruits which he has or might have received within the time of his Adminiſtration, or Judgment had againſt him. For if no Delay was previous to the Judgment, the Defendant ſhall not be liable to refund the Fruits received, or to be received by him, within the Time which is given to Perſons adjudged, *viz.* four Months: But it is otherwiſe, if a Delay was previous to the Judgment. A Perſon, who delays to pay that which he owes at a Day certain, is not only liable to pay the Principal, but alſo Intereſt, which conſiſts in Damage [i]. A Delay is contracted, when a Perſon can pay, and does not, (as before hinted,) or if it happens by his Fault or Fraud that he is not ſolvent; or laſtly, if a juſt Cauſe intervenes, whereby the Perſon underſtands himſelf to be bound. And a juſt Cauſe is ſaid to be, when a Debtor is dunn'd or requeſted in a proper Place, and at a convenient Time, and ſuch a Debtor has no Plea whereby he may excuſe himſelf.

[i] D. 46. 3. 101.

A Delay is the Procraſtination or deferring of the Time that is appointed either by Law or Man, for the Payment of a Debt, or the Receiving thereof [k], and this Procraſtination ought to be founded on ſome Fault, otherwiſe it cannot be called a Delay, as here intended [l]. Theſe Words in the Definition, *viz.* for *the Payment of a Debt, or the Receiving thereof*, point out the Diviſions of Delay; *namely*, that there is one kind of Delay which reſpects the Debtor, and another which relates to the Creditor [m]. The Matter or Object of a Delay is the Debt itſelf: But herein we ought to conſider by whom a Delay is committed, the Demand made, the Cauſe of ſuch Delay, and the Methods of making a Demand in order to puniſh a Delay. Now a Debtor is ſaid to commit a Delay in not paying a juſt Debt [n]; and a Creditor commits a Delay in not receiving a Debt, when lawfully tendred [o]. A Debtor commits a Delay, if he does not pay a Debt, or perform an Act immediately, as ſoon as he knows himſelf, or may know himſelf to be a Debtor, and to owe a Thing which has an Exiſtence [p]. I ſay, *which has an Exiſtence*; becauſe if the Thing which a Man has promiſed, periſhes before any Delay, he is not liable to make it good, for the Obligation ceaſes, as being impoſſible to be performed [q]: And, therefore, as a Performance or Payment cannot be made, ſo no Delay can be ſaid to happen. The Buſineſs of Delay is very near of kin unto Damage, Deceit, and a Fault, and frequently comes upon the Carpet to be diſcuſſed in the Payment of Debts, and other Performances.

[k] D. 15. 1. 51.
[l] D. 5. 2. 16.
[m] D. 18 7. 17.
[n] D. 12. 1. 5.
[o] D. 45. 1. 23. D. 22. 1. 7.
[p] D. 12. 1. 5. D. 45. 1. 23.
[q] D. 45. 1. 69.

I ſhall in the laſt place conſider when a Delay may be purged and done away, as well on the part of the Plaintiff, as Defendant, and when not. A Delay is admitted or allowed of on the Plaintiff's Part, within a moderate time, in order to conſerve an Action, when a Day and Penalty is added [r]. A Delay is purged and done away in all arbitrary Actions; and ſometimes it is admitted in a fortuitous Caſe. It is alſo purged and removed in a Legacy, and an Annuity, when there is a ſufficient Reaſon for it; and likewiſe

[r] Bart. in l. 120. D. 45. 1.

likewiſe in all legal Penalties which are incurred on the account of ſome Offence or Treſpaſs done, even after a Sentence, according to *Bartolus* [f]: And a Delay is purged even after a Sentence, when the whole is paid which is due. A Purgation of Delay is admitted within a few Days after it is incurred, if the Plaintiff's Right be not prejudiced thereby. But it is not admitted, when there is a Day certain, and a Penalty annexed, nor after the Event of a Day, when a Day is put for the ſake of deferring Payment, nor after an Execution made by Man, or the Law, on a Debtor, nor when Intereſt with Principal may be demanded.

[f] In l. 84. D. 45. 1.

TIT. XIII.

Of Bankers, *and the Exchange of Money; how many kinds of Exchange there are; and of Bills of Exchange; and of receiving and proteſting the ſame*, &c.

BANKERS, ſometimes in the Laws ſtiled *Argentarii*, were anciently *Roman* Citizens who exerciſed the Trade and the Buſineſs of negotiating Money as well at *Rome*, as in the Provinces: And from hence they were called *Nummularii* and *Menſarii* [s]. They ſtood in the *Forum* or Market, and there had Shops and Tables placed, and Perſons that lent out their Money upon Intereſt lodged the ſame in their Hands, and took Bills and other Proofs in writing for it [t]. Money was lodged with them upon a two-fold account, *viz.* either without Intereſt upon the ſcore of publick Credit, as in a ſafer Place than in private Houſes [u]; (for it was laid up in the Temple of *Caſtor*) or elſe it was lodged there for the ſake of receiving Intereſt. The Office of Bankers was heretofore a publick Office, and hence it was their principal Care and Buſineſs to keep Account-Books of all they did, and to publiſh the ſame at the Requeſt of any Perſon [v]: But at this Day it is become a private and voluntary Office; and, therefore, by the Cuſtom of *Holland*, nothing hinders but that Women may now keep a Banker's Shop, ſince they may be Merchants and Traders. And as by the *Civil* Law, all Perſons who keep Books of Account in virtue of a publick Office, as Bankers, Money-Changers, *&c.* are obliged to publiſh the ſame at the Requeſt of ſuch as have an Intereſt therein [w]; ſo are Notaries at this Day bound to publiſh a Deed or Inſtrument, at the Requeſt of thoſe in whoſe Names they have wrote it. But private Perſons are not bound to denude and lay open their Accounts [x], unleſs it be on the ſcore of Equity, as in reſpect of ſuch Merchants as exerciſe ſeveral kinds of Merchandize, and keep their Accounts after the manner of publick Accounts [y]. If a Banker, Caſhier, or Money-Exchanger be required to exhibit and publiſh his Account-Books, and if he ſhall publiſh them in a knaviſh and fraudulent manner, he ſhall be puniſhed for the ſame: But a Fault herein is not criminal, unleſs it borders upon Deceit or Knavery. The Deſign of publiſhing theſe Books was to prevent fraudulent Mortgages of Eſtates, *&c.*

[s] D. 2. 14. 47. 1.
[t] D. 2. 13. 4. pr.
[u] D. 2. 13. 9. & 10.
[v] D. 42. 5. 24. 2.
[w] C. 2. 1. 6.
[x] C. 10. 34. 2.
[y] Bart. in l. 9. D. 2. 13. pr.

For all Contracts touching Mortgages and the Sale of Eſtates, were ſolemnized in their preſence, and regiſtred in their Books, which they ſtiled *Calendars:* And hence it was, that they were obliged to ſhew and lay open the ſame to all Perſons that demanded it [z]; their Office being of a publick Nature, like unto Notaries at this day, in ſpeeding of all Contracts out of Court. They have ſeveral Names given them by the Law, as *Collectarii* [a], *Argenti Diſtractores* [b], &c. and they were a Society or Company, as the Law obſerves [c].

[z] D.2.13.4.6. 9. & 10.

[a] C. 4. 2. 16. [b] C.4.18.2.2. [c] D. 17.2.52.

Theſe Perſons the Vulgar now call *Campſores*, or Money-Changers in *Engliſh*, from the *Latin* Verb *Cambio*, ſignifying almoſt the ſame as the Verb *Permuto*, according to *Plautus*, *Apuleius*, *Priſcian*, *Ennius*, and others. For there are two ancient elegant Verbs in the *Latin* Tongue, *viz.* *Cambio* and *Laudo*, from whence the *Civilians* have formed theſe Words of a barbarous Signification, *viz.* *Cambium* and *Laudum*, the firſt denoting the Exchange, and the other the Award of an Arbiter. Sometimes all kind of *Permutation* is comprehended under the Name of *Exchange*, called *Cambium:* But by the word *Exchange*, I ſhall only here point out that kind of Contract, whereby Money is exchanged and barter'd for Money, in order to diſtinguiſh it from *Permutation* properly ſo called, and from other kinds of Contracts. For in *Permutation* properly ſo called, one thing of a different Nature and Eſſence is delivered for another, as a Garment for a Horſe, and the like. In a *Sale*, the Thing ſold is delivered for Money given. And in a *Mutuum* preſent or ready Money is delivered, with a Time aſſigned for the Repayment of it, (for the intrinſick Granting of this Time is mutual:) which does not happen in *Exchange*, as here to be conſidered, as appears *de Cambio Minuto*, wherein one kind of Money is paid or delivered for the preſent Payment or Delivery of another. Wherefore, in *Exchange*, Money is barter'd or exchang'd for Money; and the Changers or Bankers are by the Emperors *Theodoſius* and *Valentinian* ſtiled *Argenti Venditores*. By the word *Campſor*, derived from *Cambium*, we mean him who pays or delivers out Money by Bills for *Exchange*; and by the word *Campſarius*, him who receives the Money by way of *Exchange:* that is to ſay, the *Drawer* and *Preſenter*, as I ſhall note by and by.

Now this kind of *Exchange* here to be treated of is twofold: The one is termed *dry* Exchange; and the other *true* or *real* Exchange. That I call *real* Exchange, whereby one *Species* of Money is *really* and *truly* exchanged for another. But *dry* Exchange is not a *true*, but a *feigned* Exchange, and is a Loan or *Mutuum* under the Shew and Image of *real* Exchange: As it happens, when the *Campſor* delivers Money to the *Campſarius* to be paid in the ſame Place where delivered, by feigned Letters or Bills, to a diſtant Place, to which Place theſe Bills are not really ſent; or if they are ſent, they have no more Operation or Effect than if they were not ſent, becauſe the *Campſor* knows the *Campſarius* to have no Money there where the Bills are ſent, either *actually* or *potentially*; and, therefore, this is nothing elſe but downright Uſury. But 'tis otherwiſe when the *Campſarius* is credited to pay Money in the Place, for which he has received it by *Exchange*, whether it be by Money received for the Sale of mercantile Goods, or by way of Loan, or by any other Contract of *Exchange*. For this is called *real*, and not *dry* Exchange; becauſe Money is barter'd for Money. 'Tis called *dry* Exchange, according to *Navarrus*; becauſe it wants Moiſture, or a juſt Title of receiving any Gain thereby: Money being ſtiled *Saliva Mercurialis* by the Poets, and others.

Real Exchange is ſubdivided in a twofold manner, *viz.* into *minute* and *local* Exchange, or Exchange by way of Bills and Letters. *Minute* Exchange is a Contract, whereby leſſer Coins or Pieces of Money are exchanged for greater, or greater for leſſer Pieces: As when Gold or Silver

Money

Money is exchanged for Copper Half-Pence or Farthings, and the like; and ſo *vice versâ*. *Local* Exchange, or Exchange by Bills and Letters, is that, whereby Money lent in one Place, that it may be paid in another, as at *London*, to be paid at *Genoa*: And is ſaid to be by Letters, becauſe Letters or Bills are uſually ſent to the Place, where the Money is to be paid or received. Now *local* Exchange, or Exchange by Bills, may be made three ſeveral ways, *viz. Firſt*, when the *Campſarius* or Preſenter firſt pays Money here at *London*, that he may receive it at *Genoa*, or elſewhere. *Secondly*, when the *Campſor* or Banker here at *London* pays to the *Campſarius*, that he the Banker may receive it at *Genoa*, or elſewhere. And *thirdly*, when the *Campſor* pays Money here at *London*, which he ſhall afterwards receive by a Poſt Re-exchange. For example, *Titius* receives of *Seius* the Banker Money here at *London*, to be paid at *Leghorne*, and he pays this Money at *Leghorne* by *Caius* unto *Seius*, or to his Agent or Proctor: But *Caius*, who is made *Titius*'s Creditor on the account of this Payment made at *Leghorne* unto *Seius*, on the part of *Titius*, tranſmits his Credit, and re-exchanges it at *London* by Bills of Exchange ſent unto *Seius* the former Banker or *Campſor* at *London*, or to any other Perſon who may demand of *Titius* ſo many pieces of Money, as *Caius* has paid for *Titius* at *Leghorne*. And this is in *Latin* called *Cambium cum Recambio*.

From the Premiſes five Difficulties occur here to be conſidered: The firſt is touching *dry* Exchange, which is nothing elſe but unlawful Uſury. The ſecond is touching *real minute* Exchange. The third concerns *local* Exchange, where the *Campſor* pays Money here to be paid elſewhere; and this is called *Exchange* by Letters given or received. But Bills or Letters, I think, are not neceſſary; becauſe it may be effected by a third Perſon, or immediately on the Faith and Credit of the Preſenter or *Campſarius*. And *fifthly*, touching Exchange *cum Recambio*, wherein the *Campſor* pays Money here, which he ſhall hereafter receive again. *Dry* Exchange, whereby a Perſon makes a Gain unto himſelf by lending of Money, is forbidden by a Bull of *Pius* the Vth, as uſurious and unlawful: For the *Campſor* or Perſon lending receives a Conſideration for the time of his Forbearance alone; which the rigid *Canoniſts* do not allow of. Nor does the *Civil* Law much countenance *dry* Exchange, though it does not ſtrictly prohibit it; becauſe it is a Type or Shadow of *Uſury* taken in the worſt Senſe for a Perſon to make a Gain of a Loan or *Mutuum*. But this Papal Bull, or Part of the *Canon* Law, is little regarded among Bankers in Countries where Trade flouriſhes, and Money may be got by Banking. But yet the *Canoniſts* themſelves do not condemn *real minute* Exchange as uſurious or unlawful; becauſe Gain here is not taken for a Loan or *Mutuum*, ſince ſeveral Reaſons may be urged why it is lawful to accept of ſomething on the ſcore of *minute* Exchange, as for a Perſon's Labour, Charges, *&c.* Hence he who exchanges Gold-Money for Silver, or for Money of any other Metal, may demand ſomething above the Value of ſuch Gold-Money for his Labour, *&c.* As when a Gold Coin is rated at twenty Shillings, the Banker may demand an Advance for the Exchange thereof. For the Banker keeps his Office or Shop not for his own Intereſt alone, but alſo for the ſake of him who has need of his help: And this is not only true in *minute*, but even in all other *real* Exchanges. And it does not only hold good in a publick Banker, but alſo in every Perſon who executes this Office without the Prince's Authority, and who exchanges Money upon another's Account. Wherefore, a private Perſon may make a Gain by Banking, according to the Stile or Cuſtom of a Country, called *the Courſe of Exchange*. Yet his Gain ought to be moderate, leſt it ſhould be an Inlet to Frauds, and his Neighbour unjuſtly aggrieved thereby. But ſome hold, that a private ought not to take ſo much as a publick Banker, (for a publick Banker has

ſeveral

ſeveral more Titles to take larger Sums for banking of Money, than a private Banker:) But this diſtinction is not regarded with us. Another Reaſon why a Banker may make a Profit of his Money in exchange, is, becauſe a *Lucrum Ceſſans* is occaſioned by keeping of Money: For if the Banker had not apply'd his Money to *exchange*, he might have made an advantage of it in Trade, and buying of Goods to ſell again. And thus a Banker may receive Money at *London* with a certain Gain, to pay it at *Milan*, or elſewhere: As when he receives a hundred and five Pounds at *London*, to pay unto me a hundred Pounds at *Milan* or *Genoa*; and this ſhall not be called *Uſury*, if it be not above the Courſe of Exchange.

This way of remitting Money by Bills was invented and introduced by the Law of Nations for many wiſe Reaſons, *viz.* not only for the ſake of keeping the *Species* within the Territory of every State, but likewiſe to prevent Robberies, and to eaſe People in carrying Money from one Place to another, which might prove an Inconvenience. Trade is greatly promoted by a *local* Exchange; and therefore every prudent State encourages the ſame under certain Reſtrictions. *Local* Exchange is not only lawful, if it be made to Places at a great diſtance, but even though it be made to Places of the ſame Kingdom or Province, if ſuch Exchange be not ſpecially prohibited. But the greater the Diſtance is, the greater is the Stipend or Courſe of Exchange, generally ſpeaking, though the Bankers of the preſent Age do not much regard the diſtance of Places, but are chiefly governed herein by Trade.

In Bills of Exchange there are three Perſons principally concerned, *viz.* the *Writer*, the *Preſenter*, and the *Accepter*. The *Writer* is he who draws or remits the Money. The *Preſenter* is he for whoſe Uſe and Service the Bill is drawn, or to whom the Money is paid. And the *Accepter* is he who pays the Money, on whom the Bill is drawn. When Bills of Exchange are accepted, the Riſque and Danger of the Money belongs to him to whom the Money ought to be paid [d]; becauſe when Bills of Exchange are delivered and accepted *brevi manu*, the Money ſeems to be paid, as the *Preſenter* takes the *Accepter* for his Pay-maſter, and only delays the Receiving of the Money (perhaps) for his own Convenience. And another Reaſon is, becauſe if this were otherwiſe, the *Preſenter* by his Negligence in receiving the Money might ſuffer the *Accepter* to become a Bankrupt, and conſequently defraud the Drawer. But this is otherwiſe, if the Perſon on whom the Bill is drawn does not accept thereof *brevi manu*, or upon ſight, or if the Bill be drawn ſo many Days after to be paid, and the like: For then if the *Accepter* becomes inſolvent before the Day of Payment happens, the Preſenter may remand the Bill to the *Drawer*. If Bills of Exchange are loſt, before a Demand is made of the Money, the Perſon who ſhould preſent the ſame, may recover the Money on the firſt Banker or Drawer thereof, upon Proof made that they are *bonâ fide* loſt, or upon Security given that no future Demand ſhall be made in virtue of ſuch Bills: And this Proof or Caution ought to be given, leſt the Perſon ſhould fraudulently pretend to have loſt them, whereas in truth he has not. Bills of Exchange are Proof againſt the Writer, not only in favour of him to whom they are directed, but alſo in favour of a third Perſon: But they are not proof againſt him to whom they are directed; nor do they produce any Obligation, unleſs they are accepted: for if the Perſon accepts of them, he remains obliged [e]. If Bills of Exchange are given out, they cannot be recalled, before that is paid for which they were drawn.

[d] Bald. in l. 6. C. 7. 72.

[e] D. 14. 6. 16.

A Debtor who has drawn a Bill of Exchange on a Perſon, is not thereby diſcharged on the Acceptance of ſuch Bill made by him on whoſe Account it was drawn: But if the Perſon on whom it was drawn, and who

is obliged to pay and fulfil the ſame, accepts thereof by making a Promiſe of Payment, the Debtor or Drawer is diſcharged, according to *Salycetus*[f]: For a Perſon accepting of a Debtor that is inſolvent, muſt impute it to himſelf. *Ex. gr. Titius* pays Money into a Banker's Hands, and deſires Bills of Exchange on a Merchant at *Leghorne.* The Banker is not diſcharged by *Titius*'s Acceptance of his Bills: But if the Merchant accepts thereof, with a Promiſe of Payment, the Banker is then diſcharged, becauſe *Titius* accepts of another Debtor, and muſt blame himſelf if he be not paid. But others hold, that if a Perſon who accepts of a Bill of Exchange, does not pay and anſwer the ſame, the Creditor may have recourſe to the Writer or Drawer: For the *Preſenter* here (ſay they) after Acceptance has a double Remedy, *viz.* either againſt the *Writer* or the *Accepter*; and (I think) this is the moſt received Opinion. A Perſon that accepts of a Bill of Exchange cannot pay the *Drawer* or principal Perſon, after it has been preſented to him to be paid; becauſe the Matter is then begun, and is *Res integra*, and the *Preſenter* acquires an Action, an undoubted Action againſt the *Accepter*: For he may either ſue the *Accepter* or *Drawer*, (as he thinks fit) according to what I juſt now hinted, becauſe the Debtor by accepting makes himſelf liable.

[f] In l. 16. D. 14. 6.

According to the Style and Cuſtom among Merchants, any third Perſon may pay Bills of Exchange in honour of the Writer of ſuch Bills, and by paying them, he acquires an Action againſt the Drawer, and has the Writer bound to him: And he unto whom ſuch Bills are directed, may do the ſame, *viz.* by accepting of them upon a Proteſt, ſaying, *I will not accept of this Order or Commiſſion, but in honour of the Writer I am ready to pay ſuch Bill, and will have the Writer bound to me.* Becauſe though the Bill be directed to a Perſon, who does not accept of it; yet this does not take away the power of paying it upon a Proteſt. I ſay, a third Perſon that pays Bills of Exchange not directed to him, or drawn on him, acquires an Action: For he who pays Money for another, diſcharges that other Perſon, and he ſhall have an Action *for Buſineſs done* againſt him[g], becauſe the Debtor is ſo bound to him. And 'tis the ſame thing, by a Parity of Reaſon, in reſpect of him who pays them with a Proteſt, though directed to him. If the Bill be proteſted, the *Preſenter* ought to give ſpeedy notice thereof to the *Writer*, leſt the Perſon to whom ſuch Bill is directed ſhould in the *Interim* become a Bankrupt or Inſolvent. And thus a Perſon alſo who receives a Bill of Exchange, and pays it on a Proteſt in honour of ſuch Bill, ought to give notice of the Proteſt to the Writer as ſoon as poſſible. A Proteſt made at the time of accepting of Bills of Exchange, ought, according to the Style and Cuſtom among Merchants, to be repeated at the time of Payment, otherwiſe the *Accepter* ſhall be ſaid to have accepted the ſaid Bills *freely*, and without Reſerve. The Writer of Bills of Exchange that are returned with a Proteſt, is obliged to the Payment of the Sum or Sums contained therein with Intereſt, and they are Evidence for the Benefit of him, at whoſe Inſtance they were made or drawn. The time for paying Bills of Exchange is ten Days more or leſs, according to the Cuſtom of the Place, and the Courſe of the Exchange.

[g] D. 3. 5. 39.

TIT. XIV.

Of Ceſſion of Goods, *or of the Debtor's delivering up his Effects unto his Creditor, to keep himſelf from Impriſonment; and of the Methods to be purſued in doing of it,* &c.

IF a Creditor knows that his Debtor is poor, and being worth nothing, cannot expect to have any thing from him beſides his Body, he ſhall not by the *Civil* Law be admitted to arreſt his Debtor's Body, if ſuch Arreſt can be of no advantage to him: For though it be a Rule in criminal Cauſes, that he who has not *in ære, debet luere in Pelle* [h], or (as the *Canoniſts* ſay) *qui non habet, non poteſt dare* [i]; yet in all civil Cauſes the Poverty of the Debtor excludes and bars an Action [k]. But the Cruelty of our Times is ſuch in many Places, that we either impriſon our Debtors, or elſe ſtrip them to the very Skin of all their Subſtance, leaving them not wherewithal to live on. Now to the end that a Creditor may be the better aſſured, whether his Debtor be poor or not, it is neceſſary that ſuch Debtor ſhould make a Surrender of all his Goods [l]: For otherwiſe he ought either to pay the Debt, or elſe to ſuffer himſelf to be caſt into Priſon [m], without any diſtinction to be had between Man and Woman. See *Cujacius* [n] and *Peckius de jure ſiſtendi*; and a Woman that is ennobled may be impriſoned for Debt, as has been adjudged by the Senate of *Holland* [o]. But the *Civil* Law out of its great Tenderneſs to Man's Liberty and Condition has found out means, whereby a Perſon may eaſily avoid the Ignominy and Dureſs of Impriſonment, *viz.* either by Letters of longer Forbearance for the Payment of his Debts (which we call Letters of *Licence* or *Delay*) obtained from the Court in foreign Countries; or if he cannot purchaſe ſuch Letters of *Delay*, becauſe (perhaps) he cannot find proper and ſufficient Sureties (for theſe Letters are not to be obtained without the Debtor's giving Caution for the Payment of his Debts [p],) he may do it by the Benefit of *Ceſſion* [q], or a Surrender made of his Goods unto his Creditors. For,

[h] D.2.1.7.3.
D.2.4.25.
D.48.19.1.2.
[i] VI.5.13.
[k] D.4.3.6.
D.50.17.54.
[l] D.42.3.4.1.
[m] C.7.71.1.
[n] Lib.9. Obſ. 37.
[o] Neoſtad. Deciſ.57.
[p] C.1.18.4.
[q] Bertich. Deciſ.233.

The *Latin* word *Ceſſio* ſignifies a transferring or aſſigning over of ſome Right or Action unto another: For Rights and Actions are transferred unto him, to whom ſuch *Ceſſion* is made: Becauſe as in Bargain and Sale, or in any other Title of Alienation, it is neceſſary to make a Delivery of a corporeal Thing, in order to transfer the Property thereof; ſo in order to transfer an incorporeal Thing, as a Right and Action is, we make uſe of *Ceſſion*, which is deemed to be in the place of Delivery. Hence there is a two-fold kind of *Ceſſion* mentioned in our Law: The firſt being ſtiled *Beneficium Cedendarum Actionum*, or the Benefit of aſſigning over Actions; and the other called *Beneficium Ceſſionis Bonorum*, or the Benefit of delivering up a Man's Goods unto his Creditors. The firſt is, when there are ſeveral Sureties, and one of them is ſued for the whole Debt, to force the Creditor by an Exception to aſſign over his Actions againſt the reſt of the Sureties, or elſe he ſhall not oblige him to pay the Debt [r]. But of this hereafter under the Title of *Sureties*. The ſecond is an Act in Law, whereby

[r] D.46.1.17. & 36.

whereby Creditors are put into poſſeſſion of their Debtor's Goods and Eſtates, if they, being overwhelmed with their Debts, do of their own accord deliver up their Goods and Effects unto their Creditors. And this laſt Benefit of *Ceſſion* was introduced by the *Julian* Law in favour of Debtors, that by yielding up their Eſtates they might be free from the Injuries of Bonds and Impriſonment, wherewith Debtors were heretofore aggrieved [f].

[f] Aul. Gell. lib. 20. c. 1.

This Benefit of *Ceſſion*, which is a Protection to a Debtor againſt all his Creditors, was granted to all Debtors, both to Fathers, and Children in the Father's Power, and likewiſe to Women as well as Men [s], though they had no Eſtate at preſent; provided they might have Eſtates at ſome time or other. But no one ſhall have the Benefit of the *Ceſſio Bonorum*, unleſs he either firſt makes a judicial Confeſſion of the Debt [t], or be condemned therein: For to prevent Fraud, a Debtor cannot have this advantage, unleſs the Debt be firſt made liquid; and, therefore, in *France* an extrajudicial Confeſſion will not avail, though (perhaps) it may ſerve well enough according to the *Civil* Law. And the Debtor, who deſires to have the Benefit of *Ceſſion*, ought in this Caſe to make a full and faithful Inventory of all his Goods under an Oath, and to tender the ſame to the Court, or to his Creditors (at leaſt) and ought not fraudulently to ſuppreſs or conceal any thing from the Knowledge of his Creditors, under the pain of perpetual Impriſonment. See *Gudelinus de jure noviſſimo* [u], and *Groenvegen de Legibus Abrogatis* on the *Code* [v]. But the Law does not grant this Benefit or Indulgence unto all Perſons indiſtinctly, but only to ſuch as are decay'd in their Fortunes by ſome fortuitous Caſe [w]. For if Men fall into Poverty by their own Profuſion, or riotous Courſe of Life, or have fraudulently contracted Debts, when they know themſelves to be inſolvent, they ſhall not have the Benefit of *Ceſſion*, but may be arreſted and impriſoned [x]. The Law alſo excludes ſuch Perſons as have already obtained the *quinquennial* Letters of *Licence* or *Delay* [y]: And thus it has been adjudged at *Paris*, *A. D.* 1611. See *Bourich. de Officio Advocat. c.* 38. and *Groenvegen*, as above-cited. Bankrupts and declared Prodigals are likewiſe excluded [z]; and ſo alſo are ſuch Perſons as abſcond, *&c.* to avoid the Payment of their Debts; and ſuch as are Debtors unto the [a] Exchequer. *Mornacius* [b] aſſures us, that this Benefit is not granted unto Foreigners againſt the *French* in *France*: But it is otherwiſe in the *Netherlands*, who do not deny this Benefit unto Strangers, unleſs it be to ſuch as deny it to them [c]. Again, it is not eaſily granted in the Caſe of a *Depoſitum*, wherein *quinquennial* Letters of *Licence* or *Delay* are not granted [d]. And laſtly, as this Benefit is only admitted on the account of civil Debts, it is not allowed of on the ſcore of any Mulct or Fine ariſing from a Crime committed; nor on the account of perſonal Duties, and the like [e].

[s] C. 7. 71. 7.

[t] D. 42. 3. 8.

[u] Lib. 4.

[v] Groenv. in L. 6. C. 7. 71.

[w] Bertich. Deciſ. 236.

[x] D. 42. 1. 16. C. 7. 71. 2. dd. ib.

[y] Arg. C. 7. 71. 8.

[z] Mornac. in L. 11. C. 2. 12.

[a] C. 10. 19. 2.

[b] In l. 28. D. 4. 6.

[c] Groenv. in L. 4. C. 7. 71.

[d] Morn. in L. 10. C. 4. 34.

[e] D. 50. 4. 4. C. 7. 71. 5.

I have before hinted, that a *Ceſſion* of Goods may be made as well out of Court, as in Court, according to the *Civil* Law, and that a ſimple Declaration of the Will of the Debtor is ſufficient hereunto [f], though ſuch a Declaration be made by a Letter or by a Meſſenger [g]. But the Debtor was not entirely diſcharged from the Debt by ſuch a *Ceſſion* of his Goods, unleſs the Creditor thereby received the full Sum of his Debt, but this was only a Suſpenſion of a further Payment thereof for a time [h]; and the Debtor could not in the mean while be moleſted by his Creditor, nor caſt into Priſon [i]. For if he ever afterwards ſucceeded to a better Fortune, he was obliged to pay the whole as far as he was able [k]. After ſuch *Ceſſion* was made, the Creditors were to ſell the Debtor's Good s to the beſt Bidder, and not to divide them among themſelves by their own proper Authority [l], leſt they ſhould undervalue them, and injure the Debtor thereby. But before Auction or Sale is made, the Perſon who thus ſurrenders and delivers up

[f] C. 7. 71. 6.

[g] D. 42. 3. 9.

[h] C. 7. 71. 1.

[i] D. 42. 3. 1. & L. 4. 1.

[k] D. 42. 3. 4. 6. & 7.

[l] C. 7. 71. 4.

up his Goods unto his Creditors on the ſcore of his Debts, may redeem them if he pleaſes: For he is not hereby underſtood to make an entire Dereliction of them, but may repent and recall the Act before his Goods are ſet to ſale, if he be ready to pay his Debts, or ſatisfy his Creditors [m]. And thus a *Ceſſion* of Goods is not an obligatory Contract, but only a Refuge for unfortunate and miſerable Men: For if it were an obligatory Contract, there would be no room for Repentance or drawing back, ſince a Contract which is ever made by mutual Conſent, muſt always be diſſolved by mutual Conſent or Diſſent, and not otherwiſe. The Perſon who thus makes a Surrender of his Goods, is ſaid to be the Proprietor of them *habitually*, though not ſo *actually*; becauſe he has not loſt the Property of them *ipſo jure:* And if a *Ceſſion* of Goods be made, the Creditors cannot *jure Dominii* detain or divide them by their own Authority, as juſt now remarked, but the ſame muſt be ſold, if they are the proper Goods of the Debtor [n]. The States of *Holland* have by a *Placaert* of theirs added to the Wiſdom of the *Civil* Law in reſpect to the *Ceſſion* of Goods, ordaining, That a Curator ſhall in the *Interim*, before the Goods are ſold, be ſet over them for the Care and Adminiſtration of them, who ſhall find Sureties for the faithful Diſcharge of his Office.

[m] D. 42. 3. 3. & 5. C. 7. 71. 2.

[n] C. 7. 71. 4.

It has been noted in the Premiſes, that before a Debt is liquidated, the Perſon who is willing to give up his Goods ſhall not be heard as to his advantage herein. *Titius* convened his Debtor into Court, and his Debtor thereupon immediately ſaid, *Domine Judex*, I am unwilling to litigate the Debt, but am ready to deliver and yield up my Goods. His Creditor, on the contrary, ſaid, that he ought not to be heard, though he was willing to give up his Goods; becauſe there was no *Conſtat* of the Debt, ſaying, that he had Letters or Witneſſes which he could produce to liquidate the Debt, which Witneſſes (perhaps) he could have hereafter; and if there be no *Conſtat* of the Debt, and the Debtor ſhould afterwards come to a better Eſtate, how ſhould he the Creditor prove his Debt? Hereupon it was reſolved, that the Debtor who was willing to yield up his Goods, ſhould not be heard without firſt acknowledging the whole Debt, either by a judicial or an extrajudicial Confeſſion, or by a Sentence on hearing of the Witneſſes. But if a Creditor conſents, a *Ceſſion* may be made without liquidating of the Debt. A Debt, as to the preſent Caſe, is liquidated three ſeveral ways [o], *viz.* either extrajudicially in the preſence of the adverſe Party; and ſuch a Confeſſion makes a Debt liquid, according to the Rules of the *Civil* Law [p]. *Secondly*, if the Debtor confeſſes it in Court after Conteſtation of Suit. And *thirdly*, it is liquidated by a Sentence pronounced thereon. And thus a Perſon, who would enjoy the Benefit of *Ceſſion*, in ſuch a manner that he may not be moleſted by Creditors [q], ought not only to make a voluntary Profeſſion of giving up his Goods, but likewiſe *bonâ fide* acknowledge his Debts, and by irrefragable Proofs ſhew that he really is a Debtor, leſt by this means he ſhould defraud his Creditors by a clandeſtine Surrender of them [r].

[o] D. 42. 3. pen.

[p] C. 7. 71. 6.

[q] C. 7. 71. 1. 4. & 7.

[r] D. 42. 3. 8. & C. 7. 71. 6.

A *Ceſſion* is likewiſe to be made in ſuch a manner, that the Debtor cannot retain the leaſt Penny to himſelf, but his whole Eſtate muſt be excuſſed (as we ſay) *uſque ad Baculum & Peram*; for if he with-holds or retains any thing from his Creditors, ſuch *Ceſſion* is not valid, according to *Baldus* [s]: yet this is to be underſtood with a Limitation. For the Perſon who delivers up his Goods unto Creditors, has his daily wearing Apparel, which he had by him at the time of ſuch *Ceſſion*, ſecured to him, as a Perſon that is condemned to die, has [t]: And this is the common Opinion, as [u] *Cynus* teſtifies; becauſe a Man's wearing Apparel does not come into a general Obligation of his Goods [v]. For if a Debtor ſhall be impriſoned, he ſhall have his wearing Apparel, becauſe it is not decent for him to go [w] naked.

[s] In l. 9. D. 42. 3.

[t] D. 48. 20. 6.

[u] In l. 1. C. 7. 71.

[v] D. 20. 1. 6.

[w] D. 12. 51. 13.

Thus

Thus though all the Debtor's Goods are taken from him, which he had at the time of the *Ceſſion* made; yet in reſpect of thoſe, which he acquires afterwards, he has this Benefit from *Ceſſion*, *viz.* that being convened, he is only liable to Creditors ſo far as theſe Goods do extend, ſaving to himſelf the Neceſſaries of Life [w]. But this Benefit of *Ceſſion* does not hinder future Creditors from moleſting him, if ſuch Perſon giving up his Goods ſhall become a Debtor to them. In a *Ceſſion* of Goods, the Debtor may retain ſuch Effects as are left him by a Laſt Will and Teſtament, under a Prohibition of Alienation: But not otherwiſe. He may likewiſe retain all *Fiefs* or *Feudal* Eſtates, though he cannot retain the Uſufruct thereof, according to *Baldus* [x]; becauſe an Uſufruct, during the Life-time of the Uſufructuary, may be transferr'd to another Perſon [y]. If a Father makes a *Ceſſion* of his Goods, the Goods of his Children are not included therein [z], tho' the *Civil* Law gave the Father great power over the Goods of his Children.

[w] D.42.3.6.

[x] In l. 1. C. 7. 71.

[y] D. 7. 1. 17.

[z] C. 7. 71. 3.

This Benefit of *Ceſſion*, which accrues to Debtors according to the *Civil* Law, belongs only to ſuch Debtors as deliver up their Subſtance unto their Creditors, and is of no advantage unto their Sureties [a]: For whenever the principal Debtor is in ſuch a manner diſcharged by his Creditor, that the Debt in its own nature ſtill remains unpaid, the Surety is ſtill liable, and may be judicially convened [b]. Thus we read in the *Code*, that a Debtor being condemned before the Emperors *Verus* and *Antoninus*, and a third part of his Goods being confiſcated, the Creditor could only bring his Action againſt him for two parts of the Debt, but might convene his Surety *in ſolidum* [c]. Moreover it is to be noted, that by a *Ceſſion* of Goods, a more open and ready way is made for the Creditor againſt Sureties, the principal Debtor by ſuch *Ceſſion* being ſufficiently excuſſed; ſo that by this means an immediate Action lies againſt the Sureties. The Perſon who ſurrenders his Goods ought to do it of his own accord, and to perſevere in the ſame Mind, if he will have the Benefit of *Ceſſion*; for he who ſays, that he will do it, may repent [d]. It has been a Queſtion among ſome, whether a Debtor ought to be impriſoned till ſuch time as it is determined, whether on a Diſpute he ſhall have the Benefit of *Ceſſion* allowed him, or not? And it is held in the Negative, *viz.* that he ſhall not; ſince in doubtful Caſes *Benignius præferendum eſt.*

[a] I. 1. 14. 4. D. 46. 1. 21. 3. Bart. ib.

[b] D. 46. 1. 61.

[c] C. 8. 41. 1.

[d] C. 7. 71. 2.

Touching the *Ceſſion* of Goods, we meet with two *Species* of it in our Law-Books. The firſt is, when a Perſon looks upon his Goods as a *Derelict*, and quits them with a Deſign of no longer retaining the Property of them [e]: And under this *Species* of *Ceſſion* we may reckon the Aſſignment of Actions, *viz.* when we transfer our Right unto another [f]. The other *Species* of *Ceſſion* is what we have been here treating of under this Title; and is, when a Debtor, decay'd in his Circumſtances, and oppreſſed with Debts, delivers up his whole Subſtance unto his Creditors, preſſing hard upon him for the Payment of his Debts. And though this be ſtiled a Benefit according to the Senſe of the common Law; yet, according to the Manners and Cuſtoms of divers Countries, it is branded with ſome kind of Infamy, ſince the Perſon who thus ſurrenders up his Effects, is really ſtigmatized in the Opinion of the World [g]. Indeed, he is not branded with an Infamy of Law; becauſe there is no Law which makes ſuch an unfortunate Wretch infamous [h], though ſuch *Ceſſion* caſts a Stain on his Credit among Men. At *Rome*, the Perſon thus ſubmitting to a Surrender of his Goods, was to mount and ſet aſtride a marble Lion, which was placed on a Step to the Capitol, and there ſay in a loud Voice, *That he ſurrenders up all his Goods*, to the end that all Perſons might ſee and hear him: which at *Paris* he does on a Stone in ſome Market-Place. Nor do the *French* think this enough, that he be thus diſtinguiſhed and marked out, but he muſt ever after, till he has paid all his Debts, wear a green or

[e] D.41.2.17.1.

[f] C. 4. 35. 23. & 24.

[g] Nov. 135. c. 1.

[h] C. 2. 12. 11.

yellow Cap on his Head [1]. See *Choppinus de Moribus Paris*, lib. 3. In many Places, he ſtands in ſome publick Place naked to his Shirt or inner Garment for a whole Hour together, to be viewed by the People, as *Peckius* relates in his Treatiſe *de jure Siſtendi*. Hence, though *Ceſſion* be ſtiled a Benefit, I think it more adviſeable to procure Letters of *Licence*, if poſſible, than to enjoy this Benefit of *Ceſſion*. But as the Benefit of *Ceſſion* is only admitted on a juſt Account; ſo likewiſe *quinquennial* Letters of *Delay* ought only to be granted for weighty Reaſons. And a juſt Reaſon for granting theſe Letters is, if a Man's Eſtate or Lands ſuffer Devaſtation by the Fervor of Wars [k], *&c.* In which Caſe, a Demand of Rent, and the like, ought to be deferred, but cannot be entirely taken away or prohibited. Hence *Theodorick* gave the People of *Sipontum* a Term of two Years for the Payment of their Dues, being much harraſſed with an Army. In *Naples*, Letters of *Licence* were granted to the People [l], on the ſcore of a Ravage committed on their Eſtates by the *French*.

[1] Mornac. in L.8. C.7.71.

[k] Chop. de Mor. Par. Lib. 3. Tit. 2.

[l] A. D. 1594.

By a Law of the twelve Tables, it was enacted, that inſolvent Debtors, and ſuch as refuſed to pay their juſt Debts, ſhould be impriſoned, and put into Bonds upon the Execution of a Sentence, if their Eſtates were not ſufficient to ſatisfy their Creditors. This was *in terrorem* to all Debtors of diſſolute Lives: For the *Prætor* was to judge, whether they deſerved this Puniſhment or not, by diſſipating their Subſtance. But Bonds and Impriſonment were ſometimes not regarded, Debtors living eaſy and plentiful Lives in a Goal, either by the Support of Friends, or elſe concealing their Eſtates, a Law was afterwards eſtabliſhed by *Cornel. Scipio Aſiaticus*, enacting, That ſuch Debtors ſhould be whipped and ſet to work for the Benefit of their Creditors, beſides the pain of Impriſonment. And if we may believe *Aulus Gellius*, he tells us, that it was lawful for Creditors to put their obſtinate Debtors to death, and to divide their Bodies between them if they pleaſed (for ſuch as concealed their Eſtates were puniſhed with Death:) which Law in time grew into diſuſe by publick Conſent, as being thought too cruel, and the Puniſhment of Death was converted into a Mark of publick Shame and Infamy by a Proſcription of their Goods, with the Continuance of Impriſonment. But, in abatement of this Rigour of Bonds and Impriſonment, a Law was afterwards made, according to *Livy*, that no one ſhould ſerve his Creditors either by work, or Bonds for Money borrowed, unleſs they were fraudulent and obſtinate Debtors. Then in *Sylla*'s Dictatorſhip, an Ordinance of the People was made at the Inſtance of *Caius Popilius*, that if a Debtor delivered up all his Goods unto his Creditor, he ſhould be free from all Bondage or Service to him. But this Law being almoſt aboliſhed by a Diſuſer, it was revived by the *Julian* Law, which introduced the Benefit of the *Ceſſio Bonorum*, which is a voluntary delivering of a Man's Eſtate unto his Creditors, as aforeſaid, that he may eſcape the Infamy and Hardſhip of Impriſonment for his Debts.

TIT.

TIT. XV.

Of Bankrupts, *and how many ſorts of them; which of them favoured in Law, and which of them odious and puniſhable; and what Puniſhment they underwent by the* Roman *Law.*

A *Bankrupt*, as deſcribed by *Angelus* in his *Conſilia Juris* [m], is one, who, being oppreſſed with Debts, and labouring under Poverty, refuſes to pay what he owes, and either runs away, or conceals himſelf from his Creditors. But *Stracca* defines a Bankrupt to be him, who either through his Fault, or through ſome Misfortune in Trade, becomes inſolvent, and delivers up his Goods to his Creditors; or elſe to be ſuch a Perſon, as thus becomes ſo either partly by his own Fault, and partly by Misfortunes in Trade. And he is ſaid to be a Bankrupt by Misfortunes in Trade, who loſes his Goods by Streſs of Weather, or a Storm at Sea, or elſe by the Ravage of Pyrates, and the like. And he is ſaid to be a Bankrupt by his own fault, who waſtes his Eſtate by riotous Expences, and a profligate way of Life. The *Civil* Law has a great Compaſſion for the one, who is thus reduced to Poverty, and little or none for the other; for theſe laſt are the worſt of Men, and not the Object of Pity. By the *Roſcian* Law there was a certain Place appointed for ſuch Bankrupts as diſſipated their Eſtates by a diſſolute way of Life, that they might ſtand there in the lower Ground, and be pointed at by the People.

[m] Conſ. 61.

Baldus inveighs againſt Bankrupts as common Cheats, and with him they are not only infamous Perſons, but the moſt infamous of all Men; and ought, according to the antient Law of the twelve Tables, to be delivered up to their Creditors to be torn to pieces. For by reaſon of their Fraud they do not ſeem to have the Benefit of *Ceſſion*, which is a Refuge only to the Unfortunate, and ought not to be a Protection to Knaves and Cheats [n]. But, I think, *Baldus* has treated them with greater Severity than the Nature of the Thing (perhaps) requires. According to *Juſtinian*, ſuch Debtors as deliver up their Goods, though they are not ſold upon this account, are yet not deemed infamous. For it ought to be conſidered, whether ſuch Perſon became a Bankrupt by the Unkindneſs of Fortune, and then ſuch Perſon is not reputed infamous: But if he became a Bankrupt by his own Vice and Folly, as by loſing his Subſtance through the means of Gaming, or by the Allurements of Harlots, or by ſumptuous Tables or Entertainments, he ſhall be adjudged infamous. And 'tis the ſame thing if it be partly by the Jilts of Fortune, and partly by his own Vice and Folly.

[n] D.42.8.25.

It is a common way among Bankrupts to alienate all their Subſtance in Truſt, or (at leaſt) the greateſt part of it, with a deſign of cheating their Creditors; and hence we have an excellent Title in the *Digeſts* [o] againſt theſe private Robbers. For if ſuch Alienation was made on a ſudden, and not long before the Act of Bankruptcy, it is a ſtrong Preſumption that it was done with a knaviſh Purpoſe, and then ſuch Alienation is not [p] valid.

[o] D.42.8.

[p] D.42.8.10.

Again,

Again, it alſo was an uſual way with Bankrupts, ſome few days before their Bankruptcy, to enter themſelves Debtors in their Books to ſuch a Perſon in the Sum of a thouſand Pounds, and to ſuch a one in the Sum of five Pounds, and the like for Goods ſuppoſed to be bought, whereas in truth there is no ſuch Money due. But who can reckon up all the Frauds of Bankrupts, ſince they are almoſt innumerable? But there are two Actions given by the *Prætor*, which come to the ſame thing, whereby the Frauds of Bankrupts, and ſuch as are privy thereunto, are reſtrained and puniſhed. The firſt is called *Actio Pauliana* from *Paulus* the Prætor who firſt introduced it; and the other is ſtiled *Actio Calviſiana* from *Calviſius* the Prætor, who made an Edict touching this matter. The firſt is a *real* Action, whereby Creditors may reclaim the Effects of their Debtors, that are alienated in Fraud of them, by reſcinding the Delivery thereof, as if they had never been deliver'd [q]. This Action accrues to Creditors and their Succeſſors [r], and alſo to Curators of Goods, if any thing be done or alienated by any Contract whatſoever, in order to defraud them [s]. It likewiſe lies againſt thoſe, who knowing a Debtor to be inſolvent, do covenant and tranſact any thing with him, in order to conceal or convey away his Eſtate from his Creditors, as being Partakers of the Fraud [t]: But it does not lie againſt a Perſon that is ignorant of ſuch Fraud, unleſs he enriches himſelf thereby [u], nor againſt a third Perſon that is a Poſſeſſor of the Bankrupt's Goods by fair and honeſt means [w]. But it lies entirely againſt Debtors themſelves, that alienate their Subſtance in fraud of their Creditors, ſo far as they are able to anſwer, and likewiſe againſt their Heirs for what comes to their Hands of the Goods of the Deceaſed [x]. Moreover, this Action not only lies to recover all Goods that have been alienated in fraud of Creditors, but to reſtore Matters to their former State, in which they were before ſuch Alienation made [y], together with the Fruits that were growing on the Land at the time of ſuch Alienation, and which were received after a Suit commenced, but not for the meſne Profits. If a Perſon has wittingly paid any thing to ſuch a Bankrupt or Cheat, he ſhall not recover the ſame again either in part, or in the whole, if he knew him to be a Bankrupt, but the ſame ſhall go to the Bankrupt's Creditors [z]. This Action has a Retroſpect to the Day of the Alienation made, but it ought to be brought *infra annum utilem*, from the time of his Bankruptcy [a]. And it is given *in ſolidum*; and, according to the Uſage in ſome Places, it may be commenced at any time within thirty Years. By it all Perſons ſuſpected to be concerned in ſuch Fraud either by Concealment or otherwiſe, may be examined upon Oath: And it extends not only to Bankrupts, but to all other fraudulent inſolvent Debtors, and their Accomplices.

[q] I. 4. 6. 6.
[r] D. 42. 8. 10. 1. & 2.
[s] D. 42. 8. 1. 2.
[t] D. 42. 8. 1. 2. D. 42. 8. 10. pr. D. 42. 8. 6. 8.
[u] D. 42. 8. 9.
[w] D. 42. 8. 10. 22.
[x] D. 42. 8. 7.
[y] D. 42. 8. 6. D. 42. 8. 10. pr.

If Creditors have remitted part of a Debt unto Bankrupts, in order to obtain the Reſidue, they may recover what they have ſo remitted by a *Condiction* or *perſonal* Action *ob turpem cauſam* [z], if ſuch Bankrupts afterwards come into better Circumſtances. For as Bankrupts are, for the moſt part, an ill ſort of Men, and do commonly extort ſuch a Pact of Diſcharge from their Creditors, that which is given *ob turpem cauſam*, upon a diſhoneſt account, is not fully remitted, but may be recovered when their Debtors come to a better Fortune. Wherefore, we ought to conſider, whether a Bankrupt has refuſed to pay or do any thing, unleſs his Creditors come into Terms with him to remit a Part, in order to obtain the Reſidue, or whether the Creditors did this out of meer Will and Choice, and whether the Bankrupt refuſed to pay what he was able to perform: For if the Bankrupt did not make a Refuſal, and the Creditor did out of meer Will and Choice remit a part to obtain the Reſidue, the Creditor ſhall recover no further. For there is a manifeſt difference between a *gratuitous* Pact, and a Pact extorted by foul means. *Paulus de Caſtro* obſerves [a], there is a

[z] D. 12. 5. 1. 2.
[a] Conſ. 179.

Law

Law among Merchants, That if a Creditor by Pact diſcharges a Bankrupt Debtor from his whole Debt upon Payment of part of it alone, he cannot afterwards moleſt him for ſuch a part of his Eſtate as remains with him after ſuch Agreement and Payment made, and which the Debtor had at the time of the Agreement; becauſe in reſpect of thoſe Goods which the Creditor then had, he ſeems to be contented and ſatisfy'd that the Reſidue ſhould remain in his Debtor's Hands: Wherefore, if he would afterwards trouble him for more than the Sum agreed on, he ought to prove that ſuch Debtor afterwards bettered his Fortune, otherwiſe he ſhall not be heard. And this, I think, is true, when a Bankrupt has not refuſed Payment of what he is able, and the Pact of Diſcharge was not extorted by unjuſt means, but made by way of Gratification.

Whenever any Debtor becomes a Bankrupt, as he does by abſconding with a Deſign of cheating his Creditors, the Creditors ought to apply themſelves to the Judge, and upon Oath to ſuggeſt that ſuch a Perſon being their Debtor abſconds himſelf in ſuch a manner, that he cannot be effectually ſummoned into Court for the Payment of his Debts. Whereupon the Judge declares him a Bankrupt, and by Decree iſſues out a Proclamation, commanding all Perſons that have any of the Bankrupt's Goods or Effects in their hands, to come in and diſcover the ſame under a ſevere Penalty mentioned in the ſaid Proclamation. And a Reward is likewiſe offered in the ſaid Proclamation unto any Perſon, who ſhall diſcover any of the Bankrupt's Goods concealed from his Creditors. Then the Judge, after he has by Proclamation ſummoned the Bankrupt to appear, decrees an Inventory to be made of all the Bankrupt's Goods, Debts, and Credits; and orders his Caſh-Books, and all other Writings, to be ſeized to the Uſe of his Creditors. This Inventory ought to be granted and made in the firſt place [b]; and likewiſe an Appraiſement of the ſaid Goods by lawful Men. The Bankrupt, if he appears, ought to be examined upon Oath touching the Concealment of his Goods, and ought to declare whether the Inventory ſhewn to him be a full and perfect Inventory of all his Subſtance, and ſo may any other Perſon whatſoever, who is ſuſpected of concealing the Bankrupt's Eſtate. The *Civil* Law ſays, they may be put to the Rack, if the Suſpicion be ſtrong, in order to induce a Diſcovery: But this Severity is now out of uſe in many Places.

[b] D. 48. 17. 5. pr.

If a Merchant became a Bankrupt by his own Vice and Folly, he was caſt out of the College of Merchants, and never ſuffered to trade again: But if it happened by real Misfortunes, he only delivered up all his Effects unto his Creditors, and had the further Payment of his Debts poſtponed, till ſuch time as he arrived at better Fortune by his future Induſtry, but was never entirely diſcharged from them. The riotous Bankrupt was ſet to hard Labour for his Creditors, if no one relieved him from his Debts; and if he was found to have knaviſhly alienated his Eſtate, he was put to death as a common Cheat, no longer to be endured in the Land of the Living. And ſo was he, who borrowed Money, and then immediately broke thereupon *animo fraudandi*. A Bankrupt is in pure *Latin* called *Decoctor*, from the Verb *Decoquo*, to waſte away and conſume by degrees, as Liquors do by boiling: Therefore, by a Metaphor taken from thoſe things, which being for ſome time placed near the Fire, are uſually reduced to nothing, it ſignifies to waſte or conſume one's Subſtance, and to become a Bankrupt as we ſtile him. Hence theſe Perſons antiently were called *Decoctores*, *Conturbatores*, and *Bonorum Conſumptores*; but now by the modern Language are termed *Fallito's* and *Ceſſantes*. And, therefore, ſome ſay, that *Accurſius* is miſtaken *toto cælo* in his Expoſition of this Term: There being ſome Lawyers, who ſay, that the Verb *Decoquo* has the ſame Signification among the Ancients as *Bonis cedo & derelinquo Creditoribus*,

with whom I cannot agree. Hence the *Latin* word *Decoctio* in the *Engliſh* Language ſignifies Bankruptcy; and in modern barbarous *Latin* the word *Fallimentum* imports the ſame thing, becauſe Bankrupts are wont to deceive their Creditors.

Having recited thus much of the *Civil* Law touching Bankrupts, I ſhall next enquire what our Law ordains in relation to them: For the *Civil* Law makes all Perſons to be Bankrupts, who become inſolvent, and fraudulently abſent or conceal themſelves from their Creditors; but by the Law of *England* no one can be deemed a Bankrupt, who does not exerciſe ſome Trade or other. And touching Bankrupts, we have ſeveral Statutes: As the 13th of *Eliz.* cap. 7. the 1ſt of *Jac.* I. cap. 15. the 21ſt of *Jac.* I. cap. 19. the 13th of *Car.* II. cap. 24. ſome of which I ſhall here briefly conſider, tho' all theſe Statutes ſeem to be ineffectual to prevent the Frauds ariſing from Bankrupts. By the Statute of *Eliz.* if any Perſon (Subject or Denizen) exerciſing Trade departs the Realm, conceals himſelf, or ſuffers himſelf to be arreſted, outlaw'd, or impriſon'd without juſt Cauſe, with an Intent to defraud Creditors being alſo Subjects born, he ſhall be deemed a Bankrupt. And the Lord-Chancellor or Keeper upon a Complaint in writing againſt ſuch Bankrupt, may appoint honeſt and diſcreet Perſons to take ſuch Order with the Body of ſuch Bankrupt, whereſoever found, and alſo with the Lands (as well Copyhold as Free,) Hereditaments, Annuities, Offices, Writings, Goods, Chattels, and Debts, whereſoever known, which the Bankrupt has in his own Right, with his Wife, Child or Children, or by way of Truſt to any ſecret Uſe; and to cauſe the ſaid Premiſes to be ſearched, rented, or appraiſed, and ſold for the Payment of the Creditors rateably, according to their Debts, as in the Diſcretion of ſuch Commiſſioners (or the moſt part of them) ſhall be thought fit. The Vendees of Copyhold-Lands ſhall compound with the Lord for their Fines, and then ſhall be admitted, and make Fealty according to the Cuſtom of the Manor. Such of the Commiſſioners as execute the Commiſſion, ſhall (upon the Bankrupt's Requeſt) render him an Account, and alſo the Overplus (if any be) to him, his Executors, Adminiſtrators, or Aſſigns. And the Commiſſioners have power to convene before them any Perſon accuſed or ſuſpected to have any of the Bankrupt's Goods, Debts, or Chattels to be indebted to him, and for a Diſcovery thereof to examine them upon Oath, or otherwiſe, as they (or the moſt part of them) ſhall think fit. The Perſon demanding or detaining any of the Bankrupt's Goods, Lands, Debts, Chattels, *&c.* (not juſtly due) ſhall forfeit double the Value to be levy'd, recover'd, and employ'd by the Commiſſioners. And the Perſon refuſing in that behalf to diſcloſe or ſwear, ſhall forfeit double the Value of the Goods, Debts, *&c.* ſo concealed, to be ordered or employed by the Commiſſioners, or the greater part of them. If after all the Creditors are paid out of the Bankrupt's Eſtate, and the Forfeitures, any Surpluſage ſhall remain, it ſhall be by the Commiſſioners divided betwixt the Queen, her Heirs and Succeſſors, and the Poor of the Place where ſuch Bankrupt happens to be. And if any Perſon indebted abſents himſelf from his uſual Place of Abode, upon Complaint, the Commiſſioners (or the moſt part of them) ſhall award five Proclamations to be made upon five ſundry Market-days near the ſaid Place, commanding him to render himſelf to the Commiſſioners, or one of them; which if he does not within a convenient time, he ſhall be adjudged out of the Queen's Protection: And the Party wittingly concealing or receiving him ſhall (upon Information of the Commiſſioners, or the moſt part of them) ſuffer ſuch Impriſonment, and pay ſuch Fine, as the Lord-Chancellor or Keeper ſhall think fit. The Creditor not fully ſatisfy'd by this means, may (notwithſtanding this Act) take his Courſe at Law againſt the Bankrupt, for the Reſidue of his Debt. The Eſtate which comes to the Bankrupt by

by Purchaſe or Deſcent after he becomes a Bankrupt, ſhall alſo be extendable by the Commiſſioners, or the major part them. This Act ſhall not extend to annual Eſtates of Land (Free or Copy) by him convey'd before he became a Bankrupt, provided they were ſo convey'd *bonâ fide*, and not to ſuch as were privy to his fraudulent Purpoſe.

The next Statute touching Bankrupts is that of the 1ſt of *Jac.* I.[c] which is an Improvement of that of *Eliz.* by adding ſome things thereunto. For by this Statute every Subject born, or Denizen, who uſing Trade ſhall keep Houſe or abſent himſelf, or ſuffer himſelf to be arreſted for Debt not juſtly grown due, or fraudulently ſuffer his Goods to be attached, or make any fraudulent Grant of Lands or Goods, with an Intent to deceive his Creditors being Subjects born, or being arreſted ſhall lie in Priſon ſix Months or more, ſhall be adjudged a Bankrupt. For to avoid the former Act of Bankruptcy, Perſons would procure their Goods to be attached, and make fraudulent Grants of their Lands and Goods, and after an Arreſt (perhaps) procured by themſelves, be content to lie in a Goal during Life, in order to defraud their Creditors. Hence this Deſcription of a Bankrupt was further added to that in the foregoing Statute. And by this Statute any Creditor ſhall be admitted to take his part, if he comes in within four Months after the Commiſſion ſued out, and pay his part of the Charge, otherwiſe the Commiſſioners may proceed to Diſtributions; which was not provided in the former Statute. If a Bankrupt grants his Lands or Goods, or tranſfers his Debts into other Mens Names, except to his Children upon Marriage, (they being of Age to conſent) or upon valuable Conſideration, the Commiſſioners may (notwithſtanding) ſell them, and ſuch Sale ſhall be good. If upon Warning in writing left three times at the moſt uſual Place where he dwelt, within one Year before he became a Bankrupt, he appears not before the Commiſſioners, they may cauſe him to be proclaimed at ſome publick Place or Places: And if upon five ſuch Proclamations, he yields not himſelf, they ſhall by warrant cauſe him to be brought before them to be examined concerning his Eſtate, *&c.* If the Bankrupt ſhall refuſe to be examined, the Commiſſioners ſhall commit him till he conforms: or if being examined, he commits Perjury in prejudice of the Creditors to the Value of ten Pounds or more, he ſhall be indicted for the ſame, and after Conviction ſtand upon the Pillory, and have one of his Ears nailed thereunto, and cut off. This is ſince made Death by the Statute of Queen *Anne*. If any Perſon be known or ſuſpected to detain any of the Bankrupt's Eſtate, and does not appear or ſend ſome lawful Excuſe at the next Meeting after warning given him, or appearing, refuſes to be examined upon Oath, the Commiſſioners by Warrant ſhall cauſe him to be arreſted; and if he ſtill refuſes, ſhall commit him till he ſubmits. The Witneſſes ſhall have convenient Charges allowed them rateably by the Creditors; and ſuch of them as ſhall be perjured, and their Procurers, ſhall be indicted on the Statute of the 5th of *Eliz.*[d] No Debtor ſhall be prejudiced by Payment of his Debt to the Bankrupt, before he has notice that he is a Bankrupt.

[c] Cap. 15.

[d] Cap. 9.

TIT.

TIT. XVI.

Of a Commodatum, *or a Loan made to a certain Uſe, and for a certain Time,* &c. *What Things may be thus lent; and in what manner they ought to be reſtored at the end of the Term; and what Actions lie on this Contract,* &c.

A Second kind of Contract, which is made by ſomething done, the *Romans* called a *Commodatum.* And it is a Grant of ſomething made in a gratuitous manner for ſome certain Uſe [e], and for a certain Term of Time [f], either expreſſed or implied, to the end that the ſame *Species* ſhould be returned or reſtored again to us, and not another *Species* of the ſame Kind or Nature, and this in as good a Plight as it was firſt deliver'd. It is ſtiled a *Commodatum*, either becauſe it is lent or granted *commodo utentis, viz.* for the Benefit of the Perſon that uſes it; or elſe becauſe it is lent *cum modo*, that is to ſay, for a certain End preſcribed [g]. We have no one Word in the *Engliſh* Tongue to expreſs it by. It was firſt introduced by the Law of Nations, and not by the *Civil* Law, tho' confirmed by it; and is a real Contract *bonæ fidei.* It muſt be of ſuch Things as do not periſh, nor are conſumed in the uſing; becauſe the very ſame Thing is to be returned [h], and not a Thing of the ſame Quantity or Quality, as in a Mutuum.

[e] I. 3. 15. 2.
[f] D. 13. 6. 1.
[g] D. 13. 6. 17. 3.
[h] D. 13. 6. 8. & 9.

In this Definition I *firſt* call it a Grant of *ſomething*, becauſe this Contract has no Being, unleſs there be ſomething done or intervening: For this is of the very Subſtance of the Contract. *Secondly*, I ſay for ſome *certain Uſe*, and a *certain Term of Time*, in order to diſtinguiſh it from a *Precarium*, which is granted indefinitely without the Determination of any certain Uſe or Time [i]: And, therefore, a *Precarium* may be revoked, whenever the Granter pleaſes; and herein only Deceit or groſs Negligence renders the Perſon accountable, as I ſhall hereafter obſerve again under the Title of a *Precarium.* But in a *Commodatum* there is a certain and determined Uſe of the Thing lent, which if any one exceeds or tranſgreſſes by making any other uſe of it than that for which it was lent, he commits a Theft [k]: And, therefore, ought to be puniſhed with Damages; but the *Commodant*, or Perſon thus lending, cannot revoke the Thing ſo lent till ſuch time as the Uſe thereof be ended and accompliſhed; nor ſhall the *Commodatary* be obliged to reſtore it till then [l]. *Thirdly*, the word *Uſe* apply'd in this Definition excludes a Pawn and a *Depoſitum*; becauſe if a Creditor makes uſe of a Pawn, or a Depoſitory of a *Depoſitum*, he commits Theft, according to the *Civil* Law. *Fourthly*, I have added the Words in a *gratuitous manner*, in order to diſtinguiſh a *Commodatum* from letting to hire: For whenever any Reward or Preſent is made for the Uſe of a Thing, or any Recompence intervenes, it then paſſes into another *Species* of a Contract, and becomes an *innominate* Contract, or a letting

[i] D. 43. 26. 1. pr.
[k] D. 13. 6. 5. 8.
[l] D. 13. 6. 17. 3.

to hire [m]; for a *Commodatum* of its own Nature ought to be *gratuitous*, and without Fee or Reward [n]. *Fifthly*, I have rather chose to make use of the word *Grant* than *Transfer*; because the *Commodant* still retains the Property of the Thing thus lent by way of *Commodatum*. And lastly, I have subjoined these Words, *viz.* That *the same* Species *be returned again* to distinguish it from a *Mutuum*, wherein the same *Species* is not returned, but only a Thing of the same Nature in Quantity or Quality, as aforesaid. A *Mutuum* and a *Commodatum* have different Names in *Latin*, though not in *English*.

[m] I. 3. 15. 2.

[n] Glanv. lib. 10. c. 13. Flet. lib. 2. c. 56.

A *Commodatum* consists in Things moveable and immoveable [o], as of a House or Land; and may also be of Things incorporeal, as of Rights, *&c.* yet a *Commodatum* does not consist in those Things which are consumed by use, unless such a *Commodatum* be made for Shew and Ostentation, as when a Person borrows Silver-Plate, and the like, that he may appear like a rich Man [p]. It may also be made of that which belongs to another Person [q]. And every Person may lend and borrow a Thing by way of *Commodatum*, unto whom it is permitted to make any other Contract. The *Commodatary*, or Person to whom the Thing is lent, is not obliged to answer for any uncontroulable Force, or for the Loss or Damage of the Thing which happens by any fortuitous Case [r]; provided such Accident does not intervene through his Fault or Neglect. But if he be guilty of any Fraud or gross Negligence, he shall make the Loss and Damage good: For it is necessary that he should take the same Care of the Thing, as every prudent Man would do of his own Goods; since this Contract is entred into for his sake (perhaps [s].) But if it be made for the sake of the *Commodant*, as sometimes it is, then he shall only be accountable for his Fraud and Knavery [s]. If it be entred into for the sake of each Party, he shall then be answerable for Fraud and Negligence, but not for the bare Custody of the Thing [t]. This Contract is of frequent use, and of absolute necessity in Society, for no one would buy or hire every day those Things which he had occasion to use but for a little time; and therefore by Agreement Men will often supply each other upon Urgencies.

[o] D. 13. 6. 1. 1.

[p] D. 13. 6. 4.

[q] D. 13. 6. 3. 6. D. 13. 6. 15.

[r] D. 13. 6. 5. 2. & 4. D. 13. 6. 10. 18. & 20.

[s] D. 13. 6. 5. 2.

[s] D. 13. 6. 5. 10.

[t] D. 13. 6. 18. fin.

A *Commodatary* by impawning or alienating the Thing lent him, does not, according to the *Civil* Law, prejudice the Proprietor thereof [u], but is himself by that Law deemed to be guilty of Theft [v]; and consequently the Thing thus alienated or impawned does not become the Property of him who receives it [w]. For lest any one should be deceived by the Fault or Negligence of him, who has delivered his Goods to a bad Man to be kept [x], the *Civil* Law is thus severe against him who alienates or impawns a Thing lent or committed to his Trust, if he sells, or any wise alienates the same, without a formal Commission had from the Proprietor. But by the Custom and Usage of *Holland*, the Proprietor has not an Action against him who receives a Thing fairly alienated, or transferred to him by a just Title: or if the Thing be not alienated, but only impawned, he cannot claim it, unless he redeems the Pawn; and thus it has been adjudged in their dernier Resort, according to *Groenvegen de ll. Abr.* [y] By the *Saxon* Law, the Property and Possession is transferred on the *Commodatary*: And, therefore, this Paragraph of the Institutes being abolished with them, if the *Commodatary* shall lose a Thing by Theft, the Person lending it cannot have an Action against the Thief. See *Zobellus* on the *Saxon* Law [z]. But this Disposition of the *Saxon* Law, I think, is not observed in practice; and, therefore, their Practice is agreeable to that of *Holland*.

[u] D. 17. 1. 22. 7.

[v] I. 4. 1. 12.

[w] C. 6. 2. 2.

[x] I. 3. 15. 3.

[y] I. 4. 1. 16.

[z] Lib. 2. Art. 60.

From this Contract of a *Commodatum*, two Actions do arise, *viz.* the one a *direct* Action *ex Commodato*; and the other a *contrary* Action. The first is given to the *Commodant* and his Heirs, against the *Commodatary* and his Heirs [a], whereby the *Commodant* demands and sues for a Restitution of

[a] C. 4. 23. 3.

[b] D.13.6.3.1. the Thing lent [b]. And the ſecond is granted to the *Commodatary* and his Heirs, againſt the *Commodant* and his Heirs. *Firſt*, to oblige him or [c] D.13.6.17. them not to hinder the *Commodatary* from uſing the Thing lent [c]. *Secondly*, 3. to recover the great Expences the *Commodatary* has laid out on the Thing [d] D.13.6.18. lent [d]. And, moreover, if there be any one that has lent another faulty 2. Veſſels, wherein Wine or Oil being put, is ſpoiled and corrupted, he is liable [e] D.13.6.18. to this Action, provided he did it knowingly [e], and ſhall recover Damages. 3. But if a Perſon ſhall lend another a Bondman, Horſe, or any other Animal, the *Commodatary* ſhall not be allowed for the Suſtenance of ſuch Bondman, *&c.* nor for any moderate Expences, which, according to the Rules of right [f] D.13.6.18. Reaſon, the Perſon that uſes the Thing is wont to wear [f]. The *Commodant* 2. ſhall not only recover the Thing lent *in Specie*, as a Horſe, and the like, but alſo all Fruits and other Acceſſaries thereunto, as the Young of Cattle, [g] D.13.6.5. whenſoever they fall or grow due [g]. By the *Civil* Law, the *Commodatary* cannot retain a Thing lent him, under any pretext of a Debt, unleſs ſuch Debt be liquid, or he has laid out great Expences on the Thing lent, and [h] Gloſſ. in l. un. C.4.23. the Lender refuſes to pay him his Charges [h]. In *Holland*, if the Borrower has the Thing in his Houſe, he may ſtop it by a judicial Arreſt for any Debt, till ſuch time as the Debt is paid, or Security given for the ſame: But he cannot do it by his own private Authority.

TIT. XVII.

Of a Depoſitum, *or a Thing lodged with another to be ſafely kept without a Reward. How it differs from a* Mutuum *and a* Commodatum; *how many kinds of it, and what; unto what the Depoſitory is obliged,* &c.

AS Things are not only wont to be delivered to a Perſon for his uſe, but are ſometimes committed to him only for the ſafe Cuſtody thereof, I will therefore here ſay ſomething of a *Depoſitum*, and of the Action that ariſes thereupon. A *Depoſitum*, as taken for the Thing depoſited, is that which is delivered unto any one to be ſafely kept by him in a *gratuitous* manner; that is to ſay, without any Fee or Reward for the Cuſtody of it, and to be reſtored unto the Perſon that thus lodges it in the ſame [i] D.16.3.1.pr. 1.3.15.3. *Species*, whenever he ſhall be pleaſed to require it [i]. For the Perſon, who depoſits a Thing, may demand it at any time, and the Depoſitary [k] D.16.3.5.fin. upon yielding up the ſame ſhall be diſcharged from his Office [k]. The *Depoſitary* is the Perſon in whoſe hands the Thing is placed and lodged, for the ſafe keeping and preſerving the ſame. And though, generally ſpeaking, it denotes him, with whom the *Depoſitum* is left and entruſted; yet ſometimes it is taken for him who leaves a Thing in Truſt or Cuſtody with another. The Prepoſition (*de*) here increaſes the Force of the word *Poſitum*: So that it is not deemed to be ſimply placed and lodged there, or put into the Hands of the Perſon with whom it is lodged, but that it is alſo committed to the Truſt and Honeſty of him who receives the ſame. I ſay, *only for the ſafe Cuſtody of a Thing*; becauſe in a *Depoſitum* as ſuch, the Dominion and Property is not transferred and alienated; nor

nor is the Uſufruct of it given to the Depoſitary, but the Depoſitary has only the Cuſtody and Keeping of the Thing committed to him.

And upon this account a *Depoſitum* is *firſt* diſtinguiſhed from a *Mutuum*, or Thing lent not to be returned in the ſame kind, but in another Thing of the ſame Quantity, Nature, and Value, as Money for Goods [l], *&c.* becauſe in a *Mutuum*, the Dominion and Property of the Thing borrowed is transferred to the *Mutuary*; and the *Mutuum* cannot be recovered or re-demanded, unleſs it be after a certain time: But a *Depoſitum* may be recovered at any time [m], as aforeſaid. *Secondly*, a *Depoſitum* differs from a *Commodatum*, or a Thing lent *gratis* to be returned after a certain Time, *&c.* becauſe a *Commodatum* is granted for a certain Time and Uſe [n]: And only on this ſcore it differs from a *Precarium*, which may be made uſe of, though recalled at any time when the Grantor pleaſes. But a *Depoſitum* is only delivered for the ſafe keeping of the Thing depoſited, unleſs there be ſome other Contract mingled with it, and added thereunto. And hence I infer, that the Depoſitary cannot uſe the *Depoſitum*; yea, he commits Theft by uſing it [o]: For he meddles with that which belongs to another Perſon, without or againſt the Will and Conſent of the Proprietor; which meddling the *Civilians* call *contrectatio rei*, and is a Treſpaſs according to their Law. And the *Depoſitum* being delivered to him not for Uſe, but for Cuſtody only, an Action of *Theft* lies, according to the *Civil* Law, if it be uſed any otherwiſe, than to the end for which it was committed in Truſt. Some ſay, that a Depoſitary making uſe of a *Depoſitum*, which carries an Uſufruct along with it, as a Garment, Horſe, and the like, contrary to the Will of the Owner, is bound to make Reſtitution of the Uſe and Profit to the Owner, whenever the Uſe of a Thing may be rated and valued at a Price, (for the Price of that is a kind of Fruits and Profits:) And it is a common ſaying, namely, *Res Domino fructificat*, meaning, that the Thing yields Fruits and Profits to the Owner thereof. For which Reaſon, if the Depoſitary makes uſe of the Horſe or Garment depoſited with him, he is obliged to reſtore the Value of ſuch Uſe unto the Proprietor; provided he believes the Owner of the *Depoſitum* would have it reſtored and paid him, or if it does not appear that he has remitted it to him, or (at leaſt) if there be no reaſonable Preſumption of Forgiveneſs from ſome Act of the Proprietor thereof. But in ſome certain Caſes, the Depoſitary may uſe the Thing depoſited with him.

As *firſt*, when he really believes, that this will not diſpleaſe the Perſon of the Owner, though he ſhould afterwards find himſelf deceived, and the Owner ſhould be diſpleaſed thereat: For fair and honeſt Dealing, here called *bona fides*, excuſes ſuch an Act. *Secondly*, when the Owner does either expreſſly or tacitly grant the Uſe of the *Depoſitum* to him: In which caſe it changes the Nature of a *Depoſitum*, and it becomes a *Mutuum*, at leaſt, when the Depoſitary firſt began to make uſe of it. And this is in reſpect of ſuch Things as he conſumes or alienates, but not in reſpect of other Things, whoſe Property ſtill remains with the *Deponent*. And theſe, I think, are the only Caſes wherein the Depoſitary may make uſe of the Thing lodged with him.

But ſome divide a *Depoſitum* into a *Depoſitum* ſtrictly or eſpecially ſo called, and a *Sequeſtration*. A *Depoſitum in Specie* is, when a moveable Thing that is not become *litigious* is lodged by one or more Perſons, to the end aforeſaid [p], and is, for the moſt part, a voluntary Act, unleſs it be in theſe three Caſes, *viz.* in that of Fire, Ruin, and Shipwreck, when it is accounted neceſſary [q]. But a *Sequeſtration* is, when a Thing, touching which there is a Law-Suit depending, or ſome other Diſpute, is lodged in the Hands of a *Sequeſtrator*, to be there kept till the Suit or Diſpute is ended, and then to be reſtored to him that gets the better in the Cauſe [r]. And

[l] I. 3. 15. pr.
[m] D. 16. 3. 2.
[n] I. 3. 15. 2.
[o] D. 16. 3. 29.
[p] D. 16. 3. 1.
[q] D. 16. 3. 1. 22. 25. 27. & 43.
[r] D. 16. 3. 5. 1. 2. 3. 1. & 2.

And ſuch a *Sequeſtration* may be either *voluntary*, as agreed on by the Parties, which is always juſt; or elſe *neceſſary*, as commanded by the Judge or Magiſtrate, which is not permitted, unleſs it be in certain Caſes, (hereafter to be remembred in the ſecond Volume of this Work) becauſe it is not a kind of Execution, but alſo becauſe it deprives the Poſſeſſor of his Poſſeſſion before the time [f]. And thus a *Depoſitum*, ſtrictly ſo called, differs from a *Sequeſtrum* or Sequeſtration; becauſe the Depoſitary is in the firſt Caſe preciſely obliged to reſtore the *Depoſitum*, or Thing lodged in his Hands, unto the *Depoſitor*: But in the other Caſe, he is not ſtrictly obliged to reſtore the Thing ſequeſtred to either of the Litigants, but indeterminately to him who ſhall get the Victory in the Suit [g]. Again, theſe two Things differ in the Form, Matter, and Conſequence, ſince only Things that are moveable are the proper Object or Subject of a *Depoſitum*: But Things immoveable may be the Object of a Sequeſtration, as Lands, Houſes, and the like, as well as Things moveable, as a Man, Horſe, Money, *&c.* The *Sequeſtrator* is a middle Perſon between the Litigants, on whom the Poſſeſſion of the Thing in diſpute is transferred, (being taken away from the Litigants,) till ſuch time as the Controverſy is determined, or the Sequeſtration is relaxed: which Thing does not happen in a *Depoſitum*, ſtrictly ſo called; becauſe he, who depoſits a Thing, has both the Property and Poſſeſſion whenever he pleaſes, if the Property belongs to him.

[f] C. 4. 4. l. un.

[g] D. 16. 3. 7. & pen.

A *Depoſitum*, as already intimated, ſometimes paſſes into a *Mutuum*: As when the Depoſitary on his Requeſt is permitted to make uſe of the Thing depoſited. And a *Depoſitum* made for the ſake of a *Mutuum* to follow thereupon, aſſumes the Nature of a *Mutuum*, in ſuch a manner that if the Thing depoſited be loſt or periſhes, the Depoſitary ſhall ſtand to the Loſs thereof: But then, according to *Azo*, this muſt happen by the Fault of the Depoſitary, otherwiſe it would be hard (ſays the Law [t]) to make him, ſince the Proprietor himſelf ought rather to bear the Loſs thereof [u]. And though the *Depoſitum* be made for the ſake of the Depoſitary; yet it only aſſumes the Nature of a *Commodatum*, and we ought to form the ſame Judgment of it. If a Depoſitary ſhall refuſe to re-deliver a *Depoſitum* on a Demand made, he is ſaid to commit Theft; and being condemned therein, he is rendred infamous. By the Law of Nature, or of Nations, a *Depoſitum* ought to be returned to him, who has lodged it with a Perſon: But by the *Civil* Law it is not to be reſtored to ſuch Perſon, if he be condemned of a capital Crime, and his Goods are confiſcated; for in this Caſe the *Depoſitum* is to be given to the Publick [v]. Thus the Debtors of a Perſon condemned, whoſe Effects are confiſcated, ought to pay what they owe him unto the Exchequer, and not to a private Hand.

[t] C. 4. 26. 6.

[u] C. 4. 24. 9.

[v] D. 16. 3. 31. pr.

If I depoſit a Bag of Money, or the like, with another Perſon, which Bag is ſealed up, and the Perſon with whom this *Depoſitum* is lodged ſhall purloin or embezzle the ſame, or meddle with any part thereof againſt my Will, I may have both an Action of *Theft*, and an Action *ex Depoſito* againſt him [w], but not both together. But if the Perſon, with whom the Money is lodged, ſhall by my Permiſſion make uſe of the Money thus depoſited, he ſhall only be compelled to pay the Intereſt upon that account, as in other Pleas *bonæ fidei* [x]; this being a Contract *bonæ fidei*. If Money ſealed up in a Bag be depoſited, and one of the Perſons that made this *Depoſitum* ſhall come and claim the ſame, the Seal is to be taken off of the Bag in the preſence of the Judge, or in the ſight of other honeſt Men; and the Money being told out in their preſence, the Heir ſhall be paid his Share or Proportion, and then the Reſidue ſhall be ſealed up again, and lodged with the Depoſitory, if he pleaſes to have it ſo; or elſe it ſhall be depoſited in the publick Bank or Treaſury. The Seals in this caſe ought to be put on again by the Judge, or by thoſe

[w] D. 16. 3. 29. pr.

[x] D. 16. 3. 29. 1.

Perſons before whom they were taken off. And if the *Depoſitum* be of ſuch Things as cannot be divided, the Depoſitary ſhall deliver the whole upon taking proper Caution or Security of the Perſon that made ſuch Demand, to refund what is above his Part or Proportion. But if the Perſon cannot give ſuch Security, it ſhall be lodged in the publick Bank or Treaſury, and the Depoſitary ſhall be releaſed from any Action [y]. [y] D. 16. 3. 1. 36.

He that has made a *Depoſitum*, or committed any Thing to the Cuſtody of another, may reclaim it whenever he pleaſes (as before hinted,) even before the Time ſettled and agreed on for reſtoring the ſame; and it ought to be reſtored him on his Demand [z]. For as the Buſineſs of a *Depoſitum* entirely depends on the Advantage of the Perſon that makes it; ſo ſurely it ought to be governed and directed by his Will and Pleaſure, which he may change without any Inconvenience to the Depoſitary; and thus he may recover the Thing depoſited before the time determined. Nor ought the Depoſitary to ſhuffle or delay in returning of the *Depoſitum*, or object any thing by way of Exception to an Action *ex Depoſito*, on the account of Stoppage or Compenſation for Damages, or on the account of any Suit between him and the Depoſitor, as Debtor and Creditor, touching what is due to each other [a]. But if the Depoſitary has been at any Charge or Expence on the Thing which he has received as a *Depoſitum*, he may recover the ſame by a contrary Action, whereby he may ſue the Perſon who made ſuch a *Depoſitum*, in order to indemnify himſelf as to the ſaid Charge [b]. But what if the Depoſitary has expended Money on the Thing depoſited with him, may he retain the *Depoſitum* on this account, till he has had a Refuſion of his Expences made him? And in this caſe, it is to be obſerved, That if he has made ſuch Expences as are for his own Advantage, he ſhall not retain it, ſince it does not belong to the Office of a Depoſitary to be at any Expences of this kind: nor can he, in my humble Opinion, ſue for ſuch Expences by a croſs or contrary Action. But if he ſhall be at any neceſſary Expence, *viz.* at ſuch Expences, which unleſs they had been made, the Thing muſt either have periſhed, or have been rendred in a worſe Condition: In ſuch a Caſe (I ſay) the Depoſitary may retain the Thing depoſited on the account of ſuch Expences [c]. See *Cynus*, *Baldus*, and *Caſtrenſis* on the Law here quoted. Thus a Depoſitary, for the Expences he has been at in keeping of a Horſe, or any other brute Animal, has the Right of retaining the ſame in reſpect of ſuch Beaſt depoſited with him, till Satisfaction has been made him for the Charges he has been at in keeping the ſame. And a Taylor may alſo retain a Garment, if he be not paid for his Workmanſhip thereon; and a Farrier may retain a Horſe which he has cured of a Diſtemper, for want of being paid for the ſame: And thus of Things of the like ſort. For a Hoſt may retain the Goods of his Gueſt, till Satisfaction be paid or made for entertaining him. But a Goaler cannot retain a Priſoner for the Charges of Maintenance, though the contrary is often practiſed; and the Reaſon is, becauſe he is a Freeman: But it is otherwiſe in reſpect of Goods, as before related. For a tacit Hypotheque lies for feeding another's Horſe, or when a Man ſells Hay, or lets out Paſture for this end; and the Perſon feeding may retain and ſell ſuch Horſes, if he be not paid. But Retention, generally ſpeaking, is condemned and prohibited by the Law: And, therefore, one Thing cannot be retained for another [d]. For the Doctors hold it as a Rule in Law, that a Creditor cannot retain in his power the Creditor of his Debtor, in ſuch a manner as to make him his own Debtor. Nor can Advocates and Proctors retain in their hands the Writings and Inſtruments of their Clients, till Satisfaction be made them for their Salary or Wages due, according to *Jaſon* on the Law here cited [e]: For that would be to right themſelves by their own proper Authority, and to judge in their own Cauſe, which the Law does not

[z] D. 16. 3. 1. 46.

[a] C. 4. 31. 14. I. 4. 6. 30.

[b] D. 16. 3. 5.

[c] C. 4. 34. 11.

[d] C. 8. 15. 5. C. 4. 23. l. ult.

[e] D. 12. 6. 26. 4.

[f] C. 3. 5. 1. not ſuffer [f]. And, therefore, if a Perſon finds another's Cattle doing him damage on his own Eſtate, he cannot retain them till amends be made him; but he may retain them till he knows whoſe Cattle they are, in order to have an Action againſt him for the Damage [g]. The way in *England* is by impounding them, and the Owner may replevy them if he pleaſes; and ſo the Law goes on. But if a Perſon has fed another's Cattle (as aforeſaid,) he may retain them, till he has been re-imburſed his Charges, and paid for feeding them; but cannot retain them for Damage done him. According to *Alciatus* [h], a Thing may always be retained for Expences disburſed thereon; becauſe otherwiſe Things might periſh, which Humanity does not permit. Thus, regularly ſpeaking, Execution cannot be ſerved on a Scholar's Books [i]: But if a Perſon ſpends Money on a Scholar's Funeral, the Perſon may retain his Books, or any Thing for ſuch Expences. See *Jaſon, ut ſupra.*

[g] D. 9. 2. 39. & 40.

[h] Præſ. 50.

[i] Gloſſ. in l. 125. D. 50. 16.

All Perſons whatever may make a *Depoſitum*, whether they are Bond or Freemen, Fathers, and Children in the power of the Father [k], nay even Thieves and Robbers [l]: But if the true Proprietor of the Goods comes and demands them, they ſhall be reſtored to him on proof that he is the Owner, and he ſhall be preferred herein unto ſuch Thieves and Robbers [m]. If there be ſeveral Perſons, or more than one that depoſit a Thing, they ſhall have their Action only for their reſpective Shares, unleſs it be otherwiſe agreed [n]. And all Things may be the Object of a *Depoſitum*, which are ſubject to the Cuſtody of another; and it matters not, whether they are a Man's own proper Goods, or the Effects of another Perſon, though theſe laſt are depoſited to a vain Purpoſe, becauſe the Proprietor may claim them [o]. If the Depoſitor ſhall die and leave two Heirs, who are at variance about the Heirſhip; the one ſaying, that he is ſole Heir, and therefore demands the *Depoſitum*: It ſhall in this caſe be reſtored to him who is ready to defend the Depoſitary againſt the Action of the other Heir.

[k] D. 16. 3. 11. & 19.

[l] D. 16. 3. 1. 39.

[m] D. 16. 3. 31. 1.

[n] D. 16. 3. 17.

[o] D. 16. 3. 15.

A Depoſitary ought only to be liable to an Action on the ſcore of Fraud [p] and groſs Negligence [q], and not for a light or the lighteſt Fault; and this Law has place when the *Depoſitum* is made and lodged in Cuſtody for the ſake of the Depoſitor: But if it be lodged for the ſake of the Depoſitary, or if the Depoſitary receives any Gain or Reward, or Money ſtipulated for the keeping thereof, then he is not only liable on the account of Deceit and groſs Negligence, but alſo on the ſcore of a light Fault [r]. The Depoſitary is alſo obliged and anſwerable for a light Fault, if he of his own accord offered himſelf ready to receive the *Depoſitum*; for then he has thereby bound himſelf to make good the Loſs and Danger that ſhall happen thereunto: So that he ought not only to be anſwerable for Fraud and ſupine Negligence, but for any Negligence that ſhall happen in the keeping thereof, and for the Cuſtody itſelf [s]. But he is not bound to make good fortuitous Caſes, unleſs ſome Fault of his was previous thereunto; or it be expreſſly covenanted touching the ſame [t]. If a Depoſitary becomes inſolvent, then the Loſs of the Thing depoſited belongs to the Depoſitor himſelf. When a Creditor on a juſt account refuſes to receive the Thing depoſited, he is not liable, becauſe it is not then in the Depoſitor's Power to recover the *Depoſitum* which was not accepted of by the Creditor: But if the Creditor had without juſt Cauſe refuſed to accept of this *Depoſitum*, the Creditor then himſelf incurs the hazard, if it be at length loſt and deſtroyed. For it would not be Equity, that the Depoſitary ſhould be obliged to make good the Money loſt; becauſe he would not have been liable, if the Creditor had been willing to have received the ſame. Wherefore, that ought to be accounted *pro ſoluto*, if the Creditor has been tardy, or made any delay in the Receipt thereof. But if there be any juſt Cauſe for ſuch Refuſal, no Delay ſeems to be contracted thereby. Yet 'tis to

[p] D. 16. 3. 1.

[q] D. 16. 3. 32.

[r] D. 16. 3. 1. 8.

[s] D. 16. 3. 1. 35.

[t] D. 16. 3 1. 6.

be noted, that he who chuſes an ill Depoſitary, muſt blame himſelf and incur the Danger of the Thing depoſited: But if he chuſes a Banker for his Depoſitary, being ſuch as all Perſons in general make choice of, he is excuſed.

Though a Depoſitary ought not to make uſe of the *Depoſitum* under the Guilt of Theft, as aforeſaid; yet if he ſhall in Money pay any Thing by way of recompence for the Cuſtody of the *Depoſitum*, he ſhall not be charged with Theft for uſing the ſame: For he is only then liable to an Action of Theft, when the Thing is lodged with him in a *gratuitous* manner. If a Depoſitary ſhall receive Uſe or Intereſt from a *Depoſitum*, or ſhall make uſe of the Thing depoſited, he ſhall pay Intereſt for the ſame [t]. It is otherwiſe by the Law of *England*, eſpecially in a Banker. If the Heirs of a Depoſitary deceaſed ſhall divide a Sum of Money among themſelves, which has been depoſited, they ſhall all of them be liable, according to their reſpective Parts or Shares: But if they have not divided it, but have melted it down in Bullion, and the like, they ſhall be liable *in ſolidum* [u]; becauſe if it be an entire Body, as a Wedge of Gold, *&c.* it cannot be divided. If a Depoſitary be in delay of reſtoring the Thing depoſited with him, he ſhall not only be liable to anſwer for the lighteſt Fault [v], but he ſhall alſo be obliged to pay Uſe and Intereſt for the ſame [w]; becauſe he is from ſuch Delay preſumed to have made Profit thereby: But a Perſon who receives Intereſt from thence, ſeems to have waved the Privileges of a *Depoſitum* [x].

[t] D. 16.3.28.

[u] D. 16.3.22.

[v] D. 16.3.12. fin.

[w] D. 16.3.24.

[x] D. 16.3.7.2.

From this Contract of a *Depoſitum*, there are two Actions ariſing, *viz.* a *direct* and a *contrary* Action. The firſt lies for the Depoſitor, even though he be a Thief and a Robber [y], and paſſes to the Heirs of the Depoſitor, and the Poſſeſſors of his Goods: And if there are ſeveral Heirs, each Perſon may have it according to his hereditary Share, if the *Depoſitum* may be conveniently divided [z]; and it alſo lies for a third Perſon in Equity, if it has been agreed that the Thing depoſited ſhould be reſtored to him [a]. It is granted againſt the Depoſitary and his Heirs, whether they have the power of reſtoring it, or by Fraud have ceaſed to have this power. It is given either to recover the Thing depoſited, or the Value of it, if it be perempted by the Fraud or groſs Negligence of the Depoſitary, or be made worſe in his Hands. It lies only *in ſimplum*, unleſs the Thing be depoſited on the account of Fire, Shipwreck, Tumult, *&c.* or unleſs the Depoſitary be convicted of a Lye; in which Caſes he is condemned in two-fold [b]. A *contrary* Action is granted to the Depoſitary and his Heirs, againſt the Depoſitor and his Heirs, to recover ſuch Expences as have been laid out on the *Depoſitum* [c], and ſometimes alſo for Damages, as when a Man knowingly depoſits ſtolen Goods, and the Depoſitary is troubled thereupon.

[y] D. 16.3.1.39.

[z] D. 16.3.1.36.

[a] D. 16.3.26.

[b] D. 16.3.1.1. & 2. & l. 18.

[c] D. 16.3.23.

TIT.

TIT. XVIII.

Of Pawns *and Mortgages, commonly termed* Hypotheques; *how they are contracted, and how many kinds there be of* Pawns; *what Things are not ſubject unto Pawns; and in what caſe a Pawn or Hypotheque is tacitly contracted. What Perſons are preferred unto others in a Pawn or Mortgage, and of thoſe that ſucceed in the Place of former Creditors; and* laſtly, *of the Sale of Pawns and Mortgages,* &c.

AS an Entrance to the enſuing Title on Pledges, I think it not amiſs to obſerve, that unto all Contracts which are grounded upon Credit, as a *Loan* of Money is, there are ſometimes Things, even foreign to the Contracts themſelves, which are wont to be added, not only as Proof and Evidence thereof (among which we may reckon Deeds and Witneſſes) but by way of collateral Security, in order to oblige Men unto the Performance of their Promiſes; as *Pawns* and *Hypotheques* are by the *Civil* Law, in order to compel Debtors, who borrow Money upon Credit, either to ſatisfy their Creditors, or elſe to forego the Goods which they have impawned as ſuch Security.

Now theſe two Words or Terms of Law, as to the general Signification of them, only differ in point of ſound [d], and a Pledge may be comprehended under each of them: But ſtrictly taken a *Pawn* is ſaid of a Thing, which is delivered to the Perſon to whom it is made; and an *Hypotheque* or Mortgage is predicated of a Thing not yet delivered, but in the poſſeſſion of the Perſon that makes it [e]. And from hence, according to *Hoſtienſis* (a good Writer on the Laws) an *Hypotheque* is properly ſaid to be of a Thing immoveable, as a Houſe or Land; and a Pawn is of a Thing moveable, becauſe it may be delivered by the Hand, and is therefore in the Text of the Law [f], and in *Latin* called *Pignus*, from the word *Pugnus*, a Hand. Wherefore, the Criticks ſay, that a Pawn cannot be apply'd unto Lands and Tenements *. But this Difference, as it rather depends upon Sound alone, and not on the Nature of the Obligation itſelf, I ſhall here chuſe to wave, and uſe the two Words indiſtinctly, as the Doctors or Interpreters of the Law

[d] D. 20. 1. 5. 1.

[e] D. 50. 16. 238. 2.

[f] D. ut ſupra.

* Though we here in *England* vulgarly diſtinguiſh between *Pawns* and *Mortgages*, as the *Roman* Law does between *Pignus* and *Hypotheca* in the ſtrict Senſe of the Words; yet we have been obliged to borrow theſe two Terms from foreign Languages, ſo little was the Practice of Impawning anciently known among us. *Mortgage*, from the *French* words *Mort* and *Gage*, a dead Pledge or Obligation; and the word *Pawn* of *German* Extraction, *viz.* a moveable Chattel bound as a Security for a Debt. In Law, the word *Mortgage* is a Pawn of Lands and Tenements laid or bound for Money borrowed, to be the Creditor's for ever, if the Money be not paid at the Day agreed upon: And the Creditor holding Lands or Tenement upon this Agreement, is called *Tenant in Mortgage*. Of this we read in the *grand Cuſtumary of Normandy* [g], which ſee. *Glanvil* likewiſe defines it thus, *viz. Mortuum vadium dicitur illud, cujus fructus vel reditus interim percepti in nullo ſe acquieſcant* [h]. So that he ſeems to have borrowed the Notion of it from the *Roman* Law, and calls it a *dead Pledge* or *Gage*, becauſe whatever Profit it yields, yet it redeems not itſelf by yielding ſuch Profit, except the whole Sum borrowed be paid on the Day. See *Skene de Verb. Sign.* v. *Mortgage*. He that pledges this *Gage* is called the *Mortgagor*, and he that takes it, the *Mortgagee*. The word *Pledge* or *Plegius* antiently did not denote a Thing, but a Perſon being Surety for another, from the *French* word *Pleiger*, and ſo it is uſed by *Glanvil* [i]. The Reader may make his Inferences from what I have ſaid.

[g] Cap. 113.

[h] Glanv. lib. 10. cap. 6.

[i] Lib. 10. c. 5.

Law have done before me: For in other reſpects, eſpecially in the Obligation, they are almoſt the ſame. For the general Word (*Hypotheque*) appertains to all Things that are ſubject to an Obligation, by way of Caution or Security: *Hypotheca* in *Latin*, being derived from the *Greek* word ὑποθῆναι, to ſubject or put under. And thus in *Greek* we uſe the word *Hypotheca* for every thing, which is ſubject and liable to an Obligation; wherefore we may define a Pawn or Hypotheque to be a Thing, which is bound or ſubject to an Obligation by way of *Security* for the Payment of a Debt [k]. And the Contract itſelf, which gives the Creditor his Right unto the Pawn, and whereby the ſame is bound to him, is alſo in the Books of the *Civil* Law termed by the Name of a *Pignus* [l], as well as the Thing itſelf, which is impawned [m]. A *Pawn*, ſtrictly ſo called, is not contracted by a Nude Pact, or a bare Promiſe, but by ſomething done [n]; but an *Hypotheque* may be contracted by a Nude Pact, or an Aſſurance of the Thing to be delivered hereafter; though (I think) this diſtinction is now taken away entirely, by what I ſhall obſerve by and by: And each of theſe ways of Pledging may be contracted either *purely* or *conditionally*, or elſe *in diem* [o].

[k] D. 20. 1. 34.
[l] D. 20. 3. t. t.
[m] D. 20. 5. t. t.
[n] D. 44. 7. 1. 6. D. 20. 1. 4.
[o] D. 20. 1. 135.

As a Pledge or Pawn has both a general and a particular Acceptation (of which in the foregoing Paragraphs) ſo in the general Senſe thereof, it includes what the *Civil Law* calls an *Antichreſis*, or a mutual Uſe: As when a Man borrows one thing, and leaves another in Pawn for the Lender to make uſe of, till ſuch time as he reſtores the Thing borrowed. And thus a Creditor may make uſe of the Land mortgaged, or in lieu of Intereſt for Money lent, may live in the Houſe of his Debtor, which is mortgaged to him, till ſuch time as the Money borrowed be paid or ſatisfy'd to the Creditor [p]; whereas otherwiſe the Fruits and Profits of the Pawn or Mortgage are reckoned into the Principal, and computed as part thereof. And, in this ſenſe, an *Antichreſis* is a *Fiduciary* Poſſeſſion, or a Poſſeſſion in Truſt: which kind of Poſſeſſion is not perfect and abſolute, but (as it were) a depoſitary Thing, out of which an Account muſt afterwards be given touching the Fruits and Profits thereof received; and the *Fiduciary*, or Perſon in Truſt, may be compelled to render this Account.

[p] D. 20. 1. 11. 1.

Note, This *Fiduciary* Poſſeſſion is in *France* called a *Re-credence*, and a Poſſeſſion granted *ſub manu Regis*, by the King, *viz.* on a Perſon's plighting his Faith for the Reſtitution of the Thing impawned or mortgaged to him, whenever it ſhall be lawfully demanded of him. See *Imbert's Enchiridion Juris*.

And thus, from what has been before offered, an *Antichreſis* may be defined to be the Poſſeſſion of a Thing, which is impawned to the Creditor to be made uſe of by him, for the Uſe of Money due to him: And the Pact or Covenant, whereby this Aſſurance or Poſſeſſion is convey'd to him, is by the *Civilians* ſtiled *Pactum Antichreſeως* [q]. But more of this is in the Sequel of this Diſcourſe. Only thus much I have thought fit to premiſe, for the better underſtanding of the Reader: That having a thorough Knowledge of the Terms of a *Pawn* and *Hypotheque*, from the Books themſelves, as well as from the Etymologies of the Words, he may be the better able to go through with this Eſſay on Pawns and Mortgages with eaſe and pleaſure.

[q] D. 20. 1. 11. 1.

And, therefore, I ſhall next conſider how many kinds of Pledges there be, according to the *Roman* Law, and after what manner they are diſtinguiſhed into *Conventional*, *Prætorian*, and *Judicial* Pledges. And then I ſhall enquire what is the Object of a Pledge, what Perſons may make the ſame, and what kind of Contract this is. And, after this I ſhall examine into the antient and preſent Method of letting of Pledges, and ſhew what Perſons have a precedent or better Right therein, and what Action ariſe hereupon. And, *laſtly*, I ſhall ſpeak

of the Remiſſion of Pledges, and how the *Civil* Law is changed at this day, by the Laws and modern Practice of moſt Trading Countries. Theſe Conſiderations and Enquiries ſhall be the main drift of the Detail in the following Sheets; with ſome few general Remarks on the whole.

And, *Firſt*, it has been obſerved, that a Pawn or Pledge is diſtinguiſhed in a threefold manner, according to the *Roman* Law, *viz.* into a *Conventional*, *Prætorian*, and *Judicial* Pawn. The *firſt* is that which is con-
[q] D. 13. 7. 1. tracted by the Conſent and Convention of the Parties themſelves [q], and is moſt common in practice among trading and neceſſitous People; and under ſuch a Pawn or Pledge, both a *general* Hypotheque of all a Man's Goods and Eſtate, and a *ſpecial* Hypotheque of one particular Thing alone, may be included: and it matters not by what Form of Words ſuch a Pledge is made; nay, it may, according to the *Civil* Law, be made without writing,
[r] D. 10. 1. 1. provided it may be proved, that the Parties made ſuch an [r] Agreement. But in *Holland*, *France*, &c. Mortgages are now made in writing always before Notaries or publick Officers, according to *Groenwegen de Legibus*
[s] I. 4. 6. 7. *Abrogatis* on the *Juſtinian* Inſtitutions [s]. And in *England* by writing,
[t] 29 Car. 2. cap. 3. when Lands are mortgaged [t], (for that is the diſtinction among us at preſent between Pawns and Mortgages) but not of Neceſſity to be regiſtred or
[u] 27 H. 8. cap. 16. engroſſed, unleſs it be a Conveyance of the Freehold [u], or in ſome particular Counties, according to ſome Acts of Parliament in the Reign of Queen *Anne*, which the Reader may ſee.

Beſides the Pact or Covenant itſelf, whereby a Mortgage or Hypotheque is eſtabliſhed, other Pacts may be added thereunto, as a *Pactum Anti-*
[y] D. 20. 1. 6. 1. *chreſeos* [y] before mentioned, and the like. But a *Pactum legis Commiſſoriæ*, or a commiſſory Pact, cannot be added thereunto, ſince ſuch a Pact is more cruel and oppreſſive in the Eye of the *Civil* Law unto the poor Debtor,
[w] C. 8. 35. 3. than any Uſury almoſt can be [w]. Now a *commiſſory* Pact is, when it is agreed between Debtor and Creditor, that if the Debt be not paid within a certain time, the Pledge ſhall be abſolutely forfeited without any Equity of Redemption; and it was called in the *Roman* Law a *commiſſory* Pact, becauſe the word *Committere* ſometimes denotes the ſame, as to forfeit by an Offence committed. This Agreement (I ſay) was forbidden, that cruel Creditors ſhould not take the advantage of indigent Debtors.

A *Prætorian* Pawn is that, which the Judge or *Prætor* eſtabliſhes by decreeing a Perſon to be let into the Poſſeſſion of another's Goods or Eſtate: And this is, when the Judge, without any previous definitive Sentence, proceeds againſt the Defendant (perhaps) on the ſcore of Contumacy, and the like; and, according to an ancient Edict of the *Prætor* in the *Digeſts*, does
[x] C. 8. 21. t. t. by his firſt Decree put the Plaintiff into the poſſeſſion of the Debtor's Goods [x], as aforeſaid: and this he may do in ſome Caſes beſides Contumacy, according to the Books of the *Civil* Law, as upon ſuſpicion of Flight, *&c.* In a *Prætorian* Pawn it is ſufficient, if there be no Deceit or Fraud in the Caſe either on the Debtor or Creditor's Part. But touching the difference between this and a *Conventional* Pawn, I ſhall ſpeak by and by in the next Paragraph ſaving one; for there is a manifold diſtinction to be ſeen between them.

A third kind of Pledge or Pawn is called a *Judicial* Pawn, which is induced when the Judge has pronounced a definitive Sentence, and in Execution of ſuch Sentence puts the Creditor into poſſeſſion of the Debtor's Goods after a Condemnation of him, if the Perſon condemned does not ap-
[y] D. 42. 1. 15. pear, but remains contumacious in refuſing to ſatisfy the Judgment [y]: And herein the Authority of the Judge has the ſame Operation in Law in ſettling a *Judicial* Pawn, as the Conſent of the Parties contracting has in aſcertaining a *Conventional* Pawn. Nor ought it to be thought ſtrange that a Judge ſhould have the power of appointing a *Judicial* Pawn, ſince every

Perſon may in his Laſt Will and Teſtament order a Pledge to be given for the fulfilling thereof; and aſcertain the ſame. Though a *Judicial* Pawn is ſometimes by the Law ſtiled a *Prætorian*, becauſe both of them are ſped by the Office of the Judge: yet there is a remarkable difference between theſe ſorts of Pawns; one being after a definitive Sentence given, and the other before, as already noted.

A *Conventional* Pledge differs from a *Prætorian* in many particulars. For, according to the *Civil* Law, a *Conventional* Pledge may be contracted by conſent alone without any Delivery thereof. And thus it *firſt* differs in the way and manner of conſtituting the ſame; becauſe a *Prætorian* Pledge is only contracted by Poſſeſſion and Delivery of the Goods, according to a Decree of the Judge, as before intimated: And this, when the Pledge is in the hands of the Court, or a third Perſon, may be termed a *Sequeſtration*. *Secondly*, a *Prætorian* Pawn may be contracted on the Goods of a Minor, as well as of a Major, or Perſon of full Age; which is otherwiſe in a *Conventional* Pawn. For a Minor cannot impawn or mortgage an immoveable Eſtate without the Decree of the Judge [z]. They alſo differ in the Effect of Acquiſition in reſpect to the Creditor. For in a *Conventional* Pawn the Poſſeſſion paſſes to the Creditor by a Delivery made; but it is otherwiſe in a *Prætorian* Pawn [a], for the Reaſon juſt now aſſigned, *viz.* becauſe it is in the hands of the Court, or a third Perſon. And from hence another difference ariſes or follows; *namely*, that in a *Conventional* Pledge the Creditor receives the Profits by his Poſſeſſion thereof, called the *Utile Poſſeſſorium*: But it is otherwiſe in a *Prætorian* Pledge [b]; for there the Court or Sequeſtrator receives the Profits, and is accountable for them, when the poſſeſſion is delivered to the Creditor, or again reſtored to the Debtor. Yet they both agree in this, *viz.* that every Creditor has an *Hypothecarious* Action. See what this Action is afterwards.

[z] D. 4.4. t.t.

[a] D. 41.2.3. 23.

[b] D.43.17.3. 8.

But it is not my Deſign or Buſineſs here to treat of *Prætorian* and *Judicial* Pledges, becauſe they more properly come under the ſeveral Titles of a *firſt Decree* or *Sequeſtration*, and of the Execution of a definitive Sentence, which I ſhall ſoon publiſh. Only thus much I ſhall further obſerve, touching the difference of theſe two kinds of Pledges, ſtiled *Conventional* and *Prætorian*, *viz.* that in the former, he that is firſt in point of Time is preferred in reſpect of Right, unleſs there be a privileged Creditor: But it is not ſo in a *Prætorian* Pledge. From henceforward I ſhall confine myſelf to a *Conventional* Pledge, as being the main Buſineſs in hand.

As to the Object of Pawns, all Things which may be bought and ſold, that is to ſay, which conſiſt in Commerce, may become ſubject unto a Pledge or Hypotheque [c]: As Lands, Houſes, moveable Goods; and alſo Things of an incorporeal Nature, as Debts, Actions, and other Rights. But it is otherwiſe by the Laws of *England*; for a *Choſe in Action* (as our common Lawyers call it) cannot be transferred. The Tools of Husbandry and other mechanical Implements heretofore were not ſubject to an Hypotheque [d]: But at this day it is otherwiſe, as I ſhall hereafter remark.

[c] D. 20.1.9.

[d] C.8.17.8.

In reſpect of moveable Goods pawned, the Inconvenience is ſo great of having them out of the poſſeſſion of the Creditor, (as formerly they might be) that in *France*, and other foreign Countries, at this day, they are no longer a Pledge than they remain in the Cuſtody of the Creditor, and his power. See *Groenwegen de ll. Abrog.* on the *Code* [e]. But we have ſome Things which cannot be impawned or mortgaged, either becauſe they do not admit of an Obligation in their own nature; or becauſe they are not plighted by proper Perſons, and the like. Now all thoſe Things, which are extra-commercial [f], or which the Law forbids to be alienated [g], are not the proper Object of a Gage or Pawn, as Things ſacred, *&c.* And hence

[e] C.4.10.14.

[f] D.20.1.1.2.

[g] D.20.1.1.fin.

hence *Feudal* Eſtates, according to the *Feudal* Law, are not ſubject to a Mortgage againſt the Will of the Lord, or the Conſent of the Kindred by the Father's Side [h], though the Fruits of ſuch Eſtates may well enough be impawned. There are ſome Perſons who cannot make a Mortgage, though their Eſtates may be otherwiſe engaged: As a Pupil without the Conſent of his Guardian, and the Decree of the Judge; a Son, heretofore under the power of the Father, without his Father's leave, in reſpect of thoſe Goods which he acquired for his Father's Uſe; and a Bondman without the Will of his Maſter [i]. But the power of the Father, ſo peculiar to the *Romans*, and the Obligation of Bondage is now at an end. He who was redeemed or ranſomed from the Hands of the Enemy, was formerly in the place of a Pawn, till ſuch time as he paid off the Price of his Redemption by his Labour, or otherwiſe [k].

[h] F. 2. c. 34.

[i] D. 20. 1. 1. pr. & 1.

[k] D. 49. 15. 15.

A *Conventional* Pledge, according to the more general Diviſion of it, is two-fold, *viz. expreſs* and *tacit*. The firſt is that which is either eſtabliſhed by an expreſs Agreement of the Parties [l]; and then it is called a *voluntary* Pawn or Hypotheque: or elſe it may be without ſuch Agreement, *viz.* by the Authority of the Magiſtrate [m], and then it is ſtiled a *Sequeſtration* or *Prætorian* Pledge, of which before. A *voluntary* Pledge was often performed without writing, in the preſence of three honeſt Witneſſes [n], and without being acknowledged before a publick Officer: So that Debtors from hence often took occaſion to antedate Mortgages unto later Creditors. To cure this Fraud or evil Practice, it is now in moſt Countries ordered, that all Mortgages ſhall be made in writing before Notaries or publick Officers, as before related.

[l] D. 20. 1. 4.

[m] C. 8. 22. 1.

[n] C. 8. 18. 11.

Tacit Pledges, or ſuch as are made by Implication of Law, are in our Books called *Pignora legitima*. By a Decree of the Senate, a *tacit* Pledge is given to him who has lent Money for the Repairing of Houſes, on thoſe Houſes on which the Money is lent and appropriated [o]. And in the ſame way a Pupil has a *tacit* Hypotheque or Mortgage on the Eſtate and Goods of his Guardian, to anſwer all Accounts and Damages [p]; and a Wife on the *Allodial*, but not on the *Feudal* Goods of her Husband; which kind of Hypotheque is not only underſtood to be contracted on the account of her Dowry, according to the Gloſs and Doctors on the Law here cited [q], but likewiſe on the ſcore of Alimony and her *Paraphernalia*, as *Jaſon* obſerves [r]. And the ſame *tacit* Security has a Landlord on the Goods of his Tenant (brought into the Houſe, or upon the Farm) for his Rent [s]: But not on the Goods of an Under-Tenant [t]; becauſe there is no Contract between him and the Proprietor.

[o] D. 20. 2. 1. D. 42. 6. 8. 1.

[p] C. 8. 15. 5.

[q] D. 24. 3. 22. 8.

[r] In l. 21. C. 2. 13.

[s] C. 8. 15. 7.

[t] D. 13. 7. 11. 5.

In *England* the Goods upon the Eſtate are liable to a Diſtreſs for Arrears of Rent, whether they belong to the Tenant or not, which ſome think to be hard.

In ſhort, the Commonwealth has ſuch Security in the Eſtates of all Men for publick Taxes [u], and the like; and the Exchequer has ſuch a Pledge in the Eſtate of all ſuch as are Officers accountable to it [w], as Farmers and Collectors of the Revenue, *&c.* But Cities and Corporations have not a *tacit* Hypotheque in the Goods of the Citizens, unleſs it be of ſuch Perſons as have the Direction and Management of their Affairs; or unleſs they have this Privilege from the Grant of the Prince [x]: Becauſe they are in the Place of private Men [y].

[u] C. 8. 15. 1.

[w] C. 8. 15. 2.

[x] D. 50. 1. 10.

[y] D. 50. 16. 16.

There is, moreover, this difference between an *expreſs* and a *tacit* Pledge, namely, that Things *expreſſly* impawned cannot be alienated, unleſs it be with the Incumbrance charged on them [z]: As a Penſion or Annuity iſſuing out of ſuch an Eſtate; for the Eſtate itſelf is a Security for the Payment of ſuch Penſion or Annuity. But Things *tacitly* pledged may be freely alienated, before they are arreſted, or an Equity of Redemption paſſes againſt

[z] C. 8. 28. 12.

againſt them [y]: For a *tacit* Pledge is a general Thing, and comprehends all Things; yet the extant Fruits of a Thing impawned or mortgaged, are, by a Covenant, implied and underſtood, deemed to be incident to the Pledge, and to go along with it. As an *expreſs* [z] Pawn is not deſtroyed or taken away by a *tacit* Pledge; ſo, on the other hand, neither is a *tacit* Pledge by an *expreſs* one [a].

[y] D. 20. 2. 9.

[z] C. 8. 15. 3.

[a] Dd. in l. 11. C. 5. 14.

From the Obligation of a Pledge or Pawn, the Creditor has not only the power of retaining [b], but alſo the power of alienating and ſelling the ſame [c], if payment be not made of the principal Debt within a certain time. But becauſe the ſame thing is ſometimes plighted and engaged unto ſeveral Perſons, it often happens that Controverſies ariſe about the Proſecution and ſelling of Pledges; one of the Parties claiming a Preference of Right unto the other. In which caſe this general Rule is to be obſerved, *viz.* that he ſhall be preferred in point of Right, unto whom the Pledge was firſt engaged [d]: And it matters not, whether it be a *Conventional*, *Prætorian*, or *Judicial* Pledge; or whether it be a *general* or a *ſpecial* Pawn. Hence aroſe the diſtinction between *ſimple* and *privileged* Pledges; ſo that here may be an Exception to the general Rule.

[b] D. 20. 1. 17.

[c] D. 20. 5. t. t.

[d] D. 20. 4. 8. & 10. C. 8. 18. 2. & 7.

Privileged Pledges are, where one Creditor has preference before other Creditors: As when one lends Money to build a Houſe, or to repair it (which is afterwards mortgaged) the Lender ſhall firſt of all be paid his Money, and the Houſe ſhall ſtand Security for it [e]. It is to be noted, that we meet with three ſort of Creditors in our Law-Books, *viz.* *Firſt*, Creditors upon *Promiſe*, (in writing or without writing) and theſe have no concern in the Priority of an Obligation. *Secondly*, Creditors upon a *ſimple* Mortgage, amongſt whom priority of Time regularly gives the Right. And *thirdly*, Creditors that are *privileged* Creditors. A *privileged* Creditor may have preference over the whole Eſtate before other Creditors (but not before Creditors upon Mortgage [f]) though prior in reſpect of Time. Such is a Debt for Funeral Charges [g], which ought to be allowed according to the Character and Condition of the Perſon deceaſed [h]; becauſe it is an Expence of Neceſſity, and for the Honour of a Nation. Alſo the Coſts of adminiſtring the Eſtate of the deceaſed; for that Expence is for the ſake and benefit of all the Creditors. Or this Preference of Debt may regard *one* particular Thing only, as when Money is lent to repair Houſes; for it concerns the State to encourage beautiful Buildings. Architects and Workmen enjoy this Privilege upon the ſame Foundation, *viz.* on the ſcore of their Materials and Workmanſhip. The Cauſe of the Debt here ought to be conſidered, not the Time of the Contract entered into. This diſtinction, I think, is unknown unto the Laws of *England*. Proprietors alſo of a Houſe or Land have this Preference over the Goods of their Tenants lying upon the Eſtate for their Rent: But thoſe which are brought upon an Eſtate only [i] for ſome time, by way of Trading, are not ſubject to ſuch a Seizure.

[e] D. 20. 2. 1.

[f] C. 8. 18. 9.

[g] D. 11. 7. 45.

[h] D. 35. 2. 72.

[i] D. 20. 1. 32.

The Exchequer has no Privilege of a Mortgage among Creditors [k], but only claims in point of order, unleſs it be in Goods or an Eſtate acquired by the Debtor or Officer of the Exchequer after the Obligation was entred into [l]. Where there is no Mortgage, but only a ſimple Debt, the Exchequer is always to be preferred, for that has always a *tacit* Hypotheque [m], as before hinted. But tho' the Exchequer be preferred in reſpect of ſimple Debts, yet not on the account of pecuniary Fines and Mulcts. In *Florence*, he that has a Pledge or Mortgage is not preferred before other Creditors by writing. See *Anſardus de Anſardis* touching Commerce [n]. A Pupil, tho' a latter Creditor, is ſometimes in favour of his Perſon preferred unto prior Creditors [o]; and ſo is a Woman in favour of her Dower [p]. A Perſon that has lent Money for the Conſervation of the Thing impawned, is alſo deemed a

[k] C. 7. 73. 2.

[l] D. 49. 14. 28.

[m] D. 42. 5. 36.

[n] Diſcurſ. 13.

[o] D. 20. 4. 7.

[p] Nov. 97. c. 3.

privileged Creditor, and ſhall have the Preference, becauſe he has ſaved
[q] D.20.4.5. & 6. the whole Pawn [q].

Among *conventional* Pledges, there is one kind likewiſe, which is *general*; and another, which is *ſpecial* or *particular*. This laſt only affects certain Goods, and is confined to them: But the firſt extends itſelf to all the Goods, except thoſe which probably a Perſon would not ſpecially engage to his Creditors, either through Affection; as a Man's Hand-maid being his Concubine, or natural Children; or elſe on the ſcore of his daily Uſe, as his Houſhold-ſtuff, wearing Apparel, *&c.* which ought to be en-
[r] D.20.1.6.7. & 8. tirely left to the Debtor [r]. For it is a loſs to the Publick if any one be rendred uſeleſs by Beggary. Not only Goods in preſent poſſeſſion, but even Goods in reverſion are comprehended under a general Pawn or Hypotheque; as Corn in the Ground, and antiently (before the Law was
[s] C.8.25.1.1. altered) the Young in the Body of a Man's Cattle [s], *&c.* Bonds, Debts, and Actions are alſo by the *Civil* Law included under a general Pledge. And the Eſſence of ſuch a Pledge conſiſts in the generality of the Words, which includes all Things, not before excepted: But it is otherwiſe if
[s] D.50.17. 147. the Words of the Pledge do not lie in the generality [s]. And a Pledge of all Goods ſhall thus extend to all future Acquiſitions, though not mentioned
[t] C.8.17.9. by any diſtinct Agreement [t]. Yet if one engages his Goods for Money which he ſhall borrow *hereafter*, the Obligation is void, as I ſhall note more largely by and by; for the Pledge is acceſſary to the Obligation. And if ſuch Bargains were allowed of, it would be eaſy to defraud Cre-
[u] D.20.3.4. ditors by an Agreement of this nature [u].

If a *particular* Thing be pledged, every Thing that is the Product or Part of it is under the ſame Obligation, if it continues in the ſame State,
[v] D.20.1.13. and is of the ſame Nature [v]. But if Wood be mortgaged, and the Debtor
[w] D.13.7.18. 3. builds a Ship with the Timber of it, the Ship is not part of the Pledge [w]; for the Ship is one Thing, and the Timber is different from it: But a Clauſe may be inſerted to comprehend it. And though Corn in the Ground, and the Profits of the Land mortgaged, (as already remembred) are part of the Pledge or Mortgage; yet *other* Lands purchaſed with the Money ariſing from thoſe Profits, are not under that Obligation: for thoſe Lands
[x] C.8.15.3. are not part of the Thing in Mortgage [x].

The end of a Pawn or Hypotheque is to ſecure Creditors on the account of the Thing credited, as appears from the Definition itſelf: it being for the advantage of Creditors to have ſomething beſides the Perſon of their Debtors to depend on. I ſay, *beſides the Perſon of a Debtor*; for his Perſon is not diſcharged by a Pledge given, if it does not anſwer the Debt. Hence it is, that a Debtor by delivering up the Pawn, according
[y] C.8.14.1. to the old way of holding it, to his Creditor, is not fully diſcharged [y]; becauſe a Releaſe does not enſue but by the Payment of what is due, *Ceſſion* not being in the Place of Payment; no, though a Man ſhould deliver up all his Effects. Moreover, it may happen, that when a Pawn is delivered up for a Debt, ſuch Pawn does not amount to the Value of the Debt, as juſt now hinted: therefore, ſuch Creditor is not forbidden to ſue for the Remainder, or what is due, ſince one Thing cannot be given in
[z] D.12.1.2.1. Payment for another, againſt the Will of the Creditor [z]. A Debtor that gives a Pledge or Pawn to his Creditor as a Security, cannot be impriſoned, though he ſhould be ſuſpected of Flight as a fugitive Debtor, unleſs the Creditor be immediately prepar'd to prove, that ſuch Pledge or Pawn is not ſufficient to anſwer his Debt. See *Peck, de Jure Siſtendi.* Which leads me to ſpeak of the Effect of a Pledge.

Now the Effect of a Pawn or Mortgage is, that the ſame ſhould become the Goods of the Creditor, even without a Delivery, after the Term of
[a] C.8.14.18. the Pledge is expired; and the Creditor may have an *Hypothecarious* Action [a],

which is a *real* Action for a Recovery of the Thing itſelf, if he does not think fit to take poſſeſſion thereof, by his own private Authority. For the Action does not ariſe from the Obligation, but from a Right of the Pledge veſted in the Creditor, as the Pawn or Mortgage is covenanted between the Parties: which Right is ſo annexed to the Thing pledged, that the Debtor cannot ouſt the Creditor of it by any Alienation, nor by any future Obligation unto another [b]. Where a Diſpute ariſes about the Property of a Thing impawned with a third Perſon, an Action or a Plea of *Defence* does in the firſt place belong to the Debtor: For as the Property of that Thing belongs to him; ſo likewiſe does the Riſque and Hazard thereof. And, therefore, if the Thing be evicted, he ſhall be perſonally liable to the Creditor for Damages [c], and the Creditor may have a *Pignoratitious* Action againſt the Debtor for the Value of the Pledge, ſince he cannot recover the Pledge itſelf. And hence it is reaſonable, that the Debtor ſhould have a Plea of *Defence*.

[b] C.8 14.15.

[c] D.12.1.28.

A *Pignoratitious* Action is a *Perſonal* Action, ariſing from the Contract itſelf, and upon a Delivery of the Thing pledged; and as ſuch it is uſually given to the Debtor, either for the Thing plighted after Payment of the Debt, or elſe for Damages againſt the Creditor [d]. But in ſome Caſes it may lie for the Creditor, as juſt now mentioned. But an *Hypothecarious* Action is a *real* Action accruing to the Creditor, whereby he may obtain the Right and Poſſeſſion of the Pledge againſt any Poſſeſſor whatſoever: But this as a *real* Action does not give Damage, but only recovers the Thing itſelf. They are both Actions *bonæ fidei*, and not *ſtricti juris*. But of theſe Actions hereafter.

[d] D.13.7.9.1. D.50.16.238. 2.

A Creditor that receives a *Conventional* Pledge, is obliged not only to anſwer for every kind of Fraud, but even for groſs and light Negligence [e], but not for the lighteſt Fault. Wherefore, he who takes Books in Pawn ought not to make uſe of them without the Conſent of the Debtor, and (according to the *Civil* Law) it is no leſs than Theft ſo to do; becauſe they were not delivered to him for the ſake of *Uſe*, but on the ſcore of *Security*. And ſo of other things of the like Nature: Becauſe when a Pawn is delivered into the hands of the Creditor, he ſhall be obliged to make it good, if he loſes or endamages the ſame. But if it was not thus deliver'd to him, as ſometimes it happen'd by the *Roman* way of holding Pawns, he was not liable, if the Pawn miſcarry'd. But though a Creditor, being in poſſeſſion of a Pawn, muſt not only anſwer for all Loſſes and Damages, but even for thoſe Things which happen by his neglect, as juſt now declared; yet he is not bound to anſwer for any inevitable Accident [f], as Fire, Inundation of Water, Robbers, *&c.* unleſs occaſioned by his means. But this will be again remembred under the Paragraph of Actions.

[e] D.50.17.23.

[f] I.3.15.4.

Upon Payment of the Debt, the Creditor and his Heirs are under a perpetual Obligation to reſtore the Pledge, for the Creditor cannot acquire a Title by an *ordinary* Preſcription or Limitation of Time [g]. But though an *ordinary* Preſcription cannot be objected to extinguiſh the Property of a Pledge [h]: Yet by length of Time, a Preſcription may be pleaded in bar of an *Hypothecarious* Action. In an extraneous Poſſeſſor this Preſcription is extended to thirty Years [i]; and in the Debtor and his Succeſſors the Preſcription is founded upon a forty Years *Uſucaption* [k]. The Law introduced this Limitation of Time in abatement of the aforeſaid Action, in order to avoid remote and diſtant Law-Suits, not only in reſpect of an extraneous Poſſeſſor, who might perhaps come fairly and honeſtly by the Thing pledged, tho' not the lawful Owner thereof, but likewiſe in favour of Succeſſors who otherwiſe would never be ſafe in their Adminiſtrations.

[g] C.4.24.10. & 12.

[h] D.44.3.12.

[i] C.7.39.4.

[k] C.7.39.9.

As the Creditor muſt render an Account of the Profits received on one hand; ſo muſt the Debtor, on the other, make an Allowance unto the Creditor

Creditor for neceſſary Expences laid out upon the Mortgage, provided they are moderate, as for the Repairs of the Houſe, though afterwards [l] D.13.7.8. burnt down by Accident [l]. But as for the Expences made on the Improvement of an Eſtate, it depends much upon the Circumſtances of it, whether the Debtor ought to allow them. *Improvements* are ſaid to be thoſe things, which render an Eſtate the better for them, and are ſo fixed to the [m] D.25.1.5.3. & l.6. Eſtate, that they cannot be ſeparated. Among theſe [m] Meliorations there are ſome owing to Nature, others to Induſtry, and others that are ſtiled *civil* Improvements. There are ſome that are *neceſſary*, and if theſe are not made, the Eſtate will either come to nothing, or grow worſe; as not to repair an old Building, and the like: and here the Mortgagee or Creditor ſhall have his Expences allowed him. But Repairs generally come not under the Notion of Improvements. There are ſome Improvements ſtiled *uſeful* and *convenient*, but not *neceſſary*; and theſe are ſuch as make the Eſtate the better for Sale. And if the Eſtate mortgaged yields a greater Price upon Sale, the Mortgagee ſhall alſo here be allowed for ſuch Improvements, but then the Expences muſt not be immoderate. And there are Improvements made for delight and pleaſure only, and as they are only for Ornament, they do not (perhaps) increaſe the Value of the Eſtate. For theſe the Creditor ſhall not be allowed.

If a Debtor upon a Pledge does not pay the Debt within the time limited, [n] D.20.5.9. or be ſuſpected of Flight, and the like [n]; the Creditor may by virtue of this Contract, *which* is a Contract *bonæ fidei*, by an *Hypothecarious* Action proſecute the Pledge, and obtain the Poſſeſſion thereof, if he has it not already; and after he has obtained ſuch Poſſeſſion, if the Debtor boggles or delays Payment, he may in this Caſe, (and not before) ſell the [o] D.20.5.4. Pledge [o], and ſatisfy himſelf out of the Price thereof. And though there be no ſuch Covenant expreſſed between the Parties for ſelling the ſame; [p] D.13.7.4. D.20.5.8. yet ſuch Covenant is here implied [p], as ariſing from the Nature of the Contract itſelf. Therefore, if a Covenant be expreſſly added, the Creditor may [q] C.8.34.3. by virtue of ſuch Convention ſell it as from the Will of the Debtor [q], after he has given the Debtor notice of his deſign. For if he ſhall not give [r] C.8.28.4. & 9. this Notice, he ſhall be liable to a *Pignoratitious* Action [r]. But if there be no Intervention of a Covenant, the Creditor ſhall before Witneſſes give [s] C.8.28.4. the Debtor thrice notice of his Intention of ſelling the Pawn [s], unleſs Payment be made of the Debt; and then by a Law of *Juſtinian*, which is now out of uſe in ſome reſpect, the Creditor ought to wait two Years [t] C.8.34.3. before he may ſell it [t]. The time for ſelling a Pawn at this day, by the Judge, is generally ſpeaking ſix Months after notice given. See *Bugnion* [t] In Tit.8.28. *de ll. Abrog.* on the *Code* [t].

After a Sale is rightly made, the Creditor transfers that Right, which the Debtor had who gave the Pawn unto the Purchaſer, in ſuch a manner that the Debtor, or any other Perſon, cannot recall the Thing out of the [u] C.8.28.18. D. 20.5.4. hands of the Purchaſer [u]; for regularly a Pawn or Pledge is not of its own Nature a litigious Thing, and a Claim cannot be made on the account [v] C.8.27.1. of a bad Title [v]. The Judge transfers this Right by the very Act of ſelling the Pledge; for the Credit or Title of the Court cannot be ſhaken. If a Creditor has obtained his Debt from the Fruits and Profits of the Pledge, [w] C. ut ſup. he cannot ſell it [w]; and in ſome caſes Intereſt ſhall be allowed him, though not contracted for, as where the Creditor is a Sufferer by the Loan: For there muſt be either a Ceſſation of Gain, or emergent Damage to the Creditor thereby, ſince the *Romans* did not permit a *lucrative* Intereſt of [x] C.4.32.2.6. Money [x]. If a Creditor ſold a Pledge *malâ fide*; yet if the Buyer did not participate of the Fraud, ſuch Sale could not be reſcinded, becauſe he had no ſhare in the Fraud: For in this Caſe the Creditor, and not the Buyer, ſhall be convened and impleaded in an Action of *Deceit*. A

Pledge

Pledge may be ſold, though it be of leſs Value than the Money due, and that too without any prejudice to the Creditor. And alſo though it be agreed that it ſhould not be ſold; yet it may be ſold after thrice notice given thereof [y]; for it is given in ſatisfaction of the Creditor. Though a Creditor may in the Right of a Creditor ſell a Pledge, and transfer the Right of Ownerſhip or Property to ſuch Pledge; yet a Creditor who ſells a Pledge, is obliged and may be compelled to reſtore the Surpluſage of the Price thereof to the Debtor, after his Debt is ſatisfied [z]. If the Fruits and Profits of a Pledge received ſhall be co-equal unto the Principal and Intereſt of a Debt, ſuch Pledge ſhall not be ſold for the Satisfaction of the Creditor, the Pledge being *ipſo Jure* diſcharged thereby from the Obligation it lay under [a]: But if a Pact intervenes, that the Creditor ſhall have the Profits in lieu of Intereſt, it is otherwiſe. A Tender of the Reſidue of a Debt hinders the Sale of a Pledge; and if there be any diſpute about the Sum of ſuch Reſidue, the Judge ſhall determine the matter [b]. And the whole Pawn muſt anſwer for ſuch Reſidue, becauſe a Pledge is an individual thing [c]. So that a Creditor may ſell a Pawn, though he has received the greater part of his Debt. Yet in ſome Countries the Judge arbitrates this matter; and that he may do, I think, according to the *Civil* Law, in point of Equity, if there are ſeveral *Species* of Goods impawned for the ſame Debt [d]. If the Price of a Pledge when ſold, be not ſufficient to anſwer the Debt, the Creditor may petition for the Reſidue of his Debt to be made good by ſome other means. Things *ſpecially* impawned are to be ſold in the firſt place, that it may appear whether the Debt may be ſatisfied out of the Price of ſuch ſpecial Pawn; and after them Things *generally* pledged may be ſold [e].

[y] D.13.7.18.

[z] C.8.28.6.

[a] C.8.28.

[b] C.8.28.5.

[c] D.21.2.65.

[d] Arg.D.27.9.

[e] C.8.28.9.

I do not remember to have any where read of this Diſtinction between a *general* and a *ſpecial* Pledge in the Laws of *England* (at leaſt) in reſpect to the Sale of a Pledge; nor is it much regarded now in other Countries.

Though a bare Tender of Money, which is made in a Court of Judicature, is ſufficient to inhibit the Sale of a Pledge, ſo that it cannot be ſold: Yet this Tender ought to be previous to the Sale thereof; for a Tender ſubſequent to ſuch a Sale does not diſſolve a Sale once made [f]. But in a judicial Tender the Debtor muſt depoſit and lay down the Money on the Board, and tell it out to the Creditor [g]. So that if, upon ſuch a judicial Tender of the whole Debt unto the Creditor, the Creditor ſhall afterwards preſume to ſell the Pledge, the Debtor may either recover Damages for the ſame by a *Pignoratitious* Action againſt the Creditor [h], or the Perſon in poſſeſſion may be convened in a *real* Action to recover the Thing itſelf. But this Law in reſpect of Actions to be thus brought againſt the Creditor and Poſſeſſor, is now out of uſe in Countries where the Judge ſells the Pledge.

[f] C.8.28.8.

[g] C.4.32.19.

[h] D.13.7.20.2.

A Pledge, which cannot be ſold to another, is an ineffectual Pledge; and ſuch Pledges are ſometimes made: As when Lands and Houſes are mortgaged, where the Mortgagor is only Tenant for his own Life, and the Reverſion afterwards paſſes to another. But even in this caſe the Fruits and Profits thereof may be pledged during the Tenant's Life. And it is the ſame thing in a Feme-Covert, that by colluſion impawns her Husband's Goods, which may be ſold with the Connivance or Diſſimulation of the Husband [i]. A Debtor cannot purchaſe a Pledge or Pawn, which he has given unto his Creditor, though he may redeem the ſame, becauſe a Man cannot purchaſe what is his own already; and if he ſhould do it, ſuch Purchaſe is null and void. *Titius* mortgaged an Eſtate unto *Seius* for a hundred Pounds: And afterwards *Titius* purchaſed the ſame. This Purchaſe, I ſay, is vain and fruitleſs; becauſe *Titius* purchaſed what was his own. But if an Equity

[i] C.8.28.11.

of Redemption be once expired, and the Eſtate be ſet to publick Sale, he may do it; leſt the Eſtate ſhould be under-ſold, and himſelf become a Sufferer thereby. A Perſon that has purchaſed of a Creditor a predial Eſtate mortgaged to him, ought to be inducted into the Poſſeſſion of it; that is to ſay, he ought to have Livery and Seiſin, otherwiſe he ſhall not
[k] C.8.28.13. have a *real* Action [k]; for the Property is not transferred by Sale, but by the Delivery of Poſſeſſion. A Creditor upon a ſimple Note of Hand-writing cannot ſell a Pledge in prejudice of a Creditor upon a Mortgage.

The Laſt Will and Teſtament of a Debtor does not infringe the Right of a Creditor in point of ſelling a Pledge: For a Debtor cannot in his Will hinder a Creditor from ſelling an Eſtate which is mortgaged to him,
[l] C.8.29.1. if ſuch Sale be made according to Law [l]. *Titius* mortgaged an Eſtate unto me, and he not paying the Money according to the Day appointed by him, I was willing to ſell the Eſtate thus mortgaged; but his Heir forbad me ſelling the ſame, ſhewing me *Titius*'s Will, whereby it was provided, that ſuch Eſtate ſhould not be expoſed to ſale, for that he had deviſed it to another. And it was adjudged that I might ſell it, notwithſtanding the Teſtator's Prohibition. Nor can a Debtor hinder a Creditor from ſelling a Pledge by any Proteſtation whatſoever, unleſs he pays or tenders the whole Debt: For unleſs he does this, the Creditor may ſell the Pledge, though but a ſmall Sum be in Arrears of Payment, as before ſhewn; becauſe the Proteſtation of the Debtor does not infringe the Right of the
[m] C.8.29.2. Creditor [m]. *Seius* mortgaged the Uſufruct of an Eſtate unto *Sempronius*. *Sempronius* mortgaged the Eſtate unto *Titius*, who ſold the ſaid Eſtate. And in this caſe it was held not to be valid. For a nude Uſufructuary of a Pledge, that has only the Uſufruct, and not the Property of it, cannot plight or alienate the Property thereof, but can only engage or alienate
[n] C.8.24 1. the Uſufruct [n]. And thus the Uſufruct of a Thing may be impawned.

If a Creditor ſells a Pledge *malâ fide*, or contrary to Law, ſuch Creditor is liable to a *Pignoratitious* Action for Damages, and not the Buyer to reſtore the Poſſeſſion of it, unleſs two Things concur, *viz.* that the Creditor is inſolvent, and the Buyer participates of the Fraud: For then the Debtor on a Tender of the Price with Intereſt, though after Sale, ſhall recover the
[o] C.8.30.1. Thing pawned [o]. A Debtor may ſell a Pledge againſt the Will of the Creditor, with a *ſalvo Jure Creditoris*: For the Sale of an Eſtate made
[p] C. 8.28.12. by a Debtor, ſhall not prejudice the Creditor or Mortgagee in his Mortgage [p]. If a Thing be pledged for a Debt, and ſuch Debt be only diſcharged in part of the whole, this does not releaſe or diſſolve the Pledge, but that the Whole of the Pawn may be ſold for the Remainder of the Sum due or promiſed; becauſe the Right of a Pawn is an individual Thing, as before intimated. *Titius* owed me a hundred Pounds under the Obligation of a Pledge, whereof he paid ninety-nine Pounds, ſo that only one Pound remained due: And the *Quære* was, whether I might ſell the Pledge for
[q] C.8.28.6. the Non-payment of that one Pound? And it was reſolved that I might [q]. But if there are ſeveral Things or Effects pawned to him, and the Creditor would ſell a Thing of a very great Value for the ſatisfying of a very ſmall Debt, when he might obtain his Debt by ſelling a Thing of leſſer Value, he does not ſeem to act the part of an honeſt Man, and may therefore be
[r] Arg.D.27.9. prohibited [r].

Heretofore, by the *Civil* Law, Creditors could not by way of Purchaſe
[s] C.8.28.10. acquire to themſelves ſuch Goods as were impawned or mortgaged to them, leſt they ſhould by this means oppreſs and injure their poor Debtors [s]. And hence it ſometimes happened, that when their Debtor's Goods were ſet up to Sale or Auction, they remained a long time *ſub haſtâ*, and could not find a Purchaſer. But to remedy this Inconvenience, they at this day are publickly and in a ſolemn manner expoſed to Sale, not by the Creditor

himſelf in virtue of his own Right, and by his own private Authority as formerly [s], but by a Decree of the Judge, by the means of an Apparitor, or ſome other publick Officer of the Court. And, therefore, now Perſons cannot be relieved againſt Sales, as Minors antiently might againſt all private kinds of Sales, as well as againſt other Sales, if they were greatly injured thereby [t]. By the ancient Cuſtom of *England*, we read, that a Creditor could not ſell a Pledge by his own private Authority, either without the Conſent of the Party, or the Decree of the Judge, which was commonly had in the inferior Courts, as the Sheriffs-Turn, the Hundred-Court, and ſometimes in Court-Baron. And ſo it is now in *France*, according to *Domat*, in his Treatiſe of the *Civil* Law, as practiſed there [u]. By the Uſage of *Holland*, *Genoa*, *Florence*, *Venice*, and *Rome*, a *conventional* Pledge is ſold with the ſame Solemnity as a *Pretorian* Pawn is, and by the Authority of the Judge is ſold *ſub haſtâ*; namely, by Cant or Auction. Therefore, this Law of the *Code* [v], which gives Relief unto Minors againſt private Sales of Pledges, does not now obtain in thoſe Places. For, the private Sale of a Pawn being out of uſe, it muſt be ſold by the Authority of the Judge, and the Sale can only be reſcinded by an Appeal [w], ſince the Credit of the fiſcal Spear is of great Authority.

[s] C.8.28.4.

[t] D.4.4. t.t.

[u] Tom. 2. lib. 3. Tit. 1. & 3.

[v] C.8.28.4.

[w] Groen. de ll. Abrog.

By the *Civil* Law alſo, if a Creditor could not find a Perſon to purchaſe the Pledge on its being expoſed to Sale, he might upon Application made to the Prince, obtain a Grant of the Property of it, paying the Debtor the Surpluſage in value, if any due [x]. But this Method is now out of uſe, as I ſhall farther obſerve hereafter. The Creditor and Debtor may agree, that if the Money be not paid at a certain time limited, the Creditor ſhall poſſeſs the Thing pawned by way of Sale, at a juſt and certain Price [y]; and this ſhall not come under the odious Name of a *commiſſory* Pact. When the Eſtate is to be ſold, and the other Creditors have notice of the Sale (as they ought to have) and being preſent do not make their Claims upon the Overplus, they ſeem to have loſt their Right of Mortgage upon it [z]. If a Thing pledged be evicted by a third Perſon in reſpect of the Right of Property, the Creditor who ſold it is not liable on the ſcore of ſuch Eviction: For he did not ſell it on his own Aſſurance of the Title, but on the Faith, Credit, and Honeſty of the Debtor; and, therefore, let the Purchaſer look to himſelf.

[x] C. 8.34.3.

[y] C.8.34.3.1.

[z] C.8.26.6.

If a Creditor avers, that he has lent Money on the Settlement of a Pawn or Mortgage aſſured to him, he ought to prove the actual Payment of the Money lent on the ſcore of ſuch Pledge, if he would have an *Hypothecarious* Action, or an Action on the Pledge againſt the Debtor, that is in poſſeſſion of ſuch Pawn or Mortgage: becauſe though the Debtor be *civilly* obliged according to the Form and Tenor of ſuch Mortgage; yet an Exception *de non numeratâ Pecuniâ* lies. For a Creditor is not in this caſe preſumed to have actually paid the Money pretended to be lent, unleſs he proves the ſame, whether he be convened in a *Pignoratitious*, or any other Action [a]. And the reaſon of this is, to prevent Fraud in ſuch Perſons as might otherwiſe pretend a Pawn or Mortgage to cover the Debtor's Goods againſt other Creditors, whereas in truth there was no real Pawn or Mortgage made. For a Pawn or Mortgage was ſometimes wont to be made (in Fraud of Creditors) for Money to be paid hereafter; and the Law which gives this Exception, was made to obviate this Cheat. But if the Creditor be in poſſeſſion of the Pawn or Mortgage, then this Exception *pecuniæ non numeratæ* does not lie, unleſs ſome Fraud be proved between the Mortgagee and Mortgagor in order to deceive and cozen Creditors: For it is a ſtrong Preſumption in Law, that the Debtor would not part with the Thing pawned or mortgaged, out of his poſſeſſion, without having the Money firſt paid down to him.

[a] C.4.30.1.

But

But Money received on the account of a Pledge or Pawn, whether it be *really*, or only by a Fiction of Law received by the Creditor, diſcharges the Debtor, unleſs the Sale of ſuch Pledge be reſcinded [b]. *Titius* lent five hundred Pounds, for which I mortgaged an Eſtate to him, and covenanted with him, that if I did not pay the Money by the time agreed on, he might ſell the Eſtate. The Term came, and the Money was not paid; whereupon my Creditor ſold the Eſtate, and received the Purchaſe-Money. In this caſe I am diſcharged, if the Sale be not reſcinded for a juſt Cauſe. Such Eſtates mortgaged with us are wont to be ſold by a Decree of the Court of *Chancery*, and by a Maſter of that Court.

[b] D. 46. 3. 26.

A Thing purchaſed with another's Money, which is borrowed of him, is not liable as a Pawn or Security unto the Perſon who lends the Money, unleſs this be either generally or ſpecially agreed upon by or between the Perſons [c]: As when *Titius* buys an Eſtate with the Money which I lent him. Such Eſtate, I ſay, is not ſubject as a Mortgage for the Money which I lent him, unleſs it was thus covenanted between us. If a Creditor purchaſes a Pawn, it ceaſes to be a Pawn, unleſs the Purchaſe be what the *Civilians* ſtile *emptio ſimulata*, or a Purchaſe in Diſguiſe, by ſome called a *Sham-Purchaſe*: But there ought to be a *Conſtat* of ſuch Diſguiſe by ſome ſure and certain Preſumptions or Conjectures. If a prior Creditor ſhall ſell a Pledge that is impawned or mortgaged to himſelf in the firſt place, and afterwards to me, which we call a *riding* Mortgage, the ſecond Creditor cannot have an *Hypothecarious* Action againſt the Purchaſer: But if the Debtor ſhall by way of Payment give it to the firſt Creditor, that Right of a Pawn or Mortgage ſtill remains with me the ſecond Creditor; and thus I may ſue for the Thing pawned, if I will pay off the firſt Creditor his Debt [d].

[c] C.8.14.17.

[d] C.8.20.1.

The Tye or Obligation of a Pledge is diſſolved ſeveral ways. As *firſt* by an actual Payment of that which is due [e]; for every Obligation may be diſſolved after the ſame manner, or by the ſame means it was eſtabliſhed. *Secondly*, by a feigned or imaginary Payment: As when the Creditor makes a Ceſſion unto the Debtor of that which is due to him [f], (for here a Payment is made without Money) or when the Creditor covenants with the Debtor not to demand or ſue for the Pledge [g]; or elſe transfers the firſt Obligation of a Pledge into a new or another kind of Obligation, by the *Civil* Law called a *Novation* [h]. A Pledge is alſo releaſed or diſſolved, either by the *expreſs* or *tacit* Will of the Creditor. By the *tacit* Will of the Creditor, when he conſents to an Alienation [i], or to a new Obligation of the Pledge [k]. For though a firſt Creditor does not loſe his Right unto a Pawn or Mortgage, though the ſame be bound to another by his Sufferance, if it be not done with his expreſs Conſent and Knowledge [l]; yet if the Creditor has given his full and expreſs Conſent, he ſeems to have remitted ſuch Pawn or Mortgage. And it is the ſame thing if the Creditor be privy thereunto by any Act of his [m]; for this is a kind of Alienation in him. But if he only ſo far conſents to ſuch Alienation, that the Cauſe or Reaſon of the Pledge ſhould ſtill be preſerved to him, or gives leave for the Sale thereof that he may be ſatisfied out of the Purchaſe-Money, the Incumbrance ſtill remains on ſuch Pledge, and he retains the Right thereof, if payment of his Debt does not follow on ſuch Sale [n]. *Note*, a Creditor is not underſtood to have conſented to the Sale of a Pawn, though he has Knowledge of ſuch Sale, unleſs it appears that he granted leave thereunto, either by expreſs Words, or by ſubſcribing himſelf to the Contract, or gives up the Specialty or Mortgage-Deed [o].

[e] D.20.6.1. & l.5.2.

[f] D.20.6.1.1.

[g] D.20.6.5.

[h] D.46.2.18.

[i] D.20.6.4.1.

[k] D.20.6.12.

[l] C.8.26.4.

[m] C. ibid.

[n] D.20.6.8.11.

[o] C.8.26.7.

Again, a Pledge is determined, if the whole Subſtance of the Thing impawned periſhes or be deſtroyed, as Land by an Inundation of the Sea, a Houſe by Fire, *&c.* But if only a part of the Thing periſhes, it is otherwiſe;

otherwiſe; for if a Houſe be burnt down, yet the Ground-Plot ſtill remains engaged to the Mortgagee, and whatſoever is afterwards built thereon [p]. For when the Quality of the Thing is only changed, the Hypotheque or Mortgage ſtill continues [q]. A Pledge is alſo extinguiſhed either by the Sentence of the Judge, or by the Oath of the Party, *viz.* when it is adjudged or ſworn, that nothing is due, or that ſuch Pledge is not engaged [r]. For if the Party ſwears to either of theſe Things, it is incumbent on the Creditor to prove his Right. *Laſtly*, a Pledge is alſo extinguiſhed by a change of the Perſon of the Debtor [s]; and likewiſe ſometimes by a change of the Thing itſelf paſſing *in materiatum*, as a golden Cup into an Ingot of Gold: And it is always merged, whenever the Thing impawned becomes the Property of the Creditor. If a Creditor has reſtored a Pawn with an Expectation, or on a Promiſe of ſuddenly receiving the Money for which ſuch Pawn was given or laid down, and yet fails in the Receipt of it, he is not in this caſe thereby deemed or reputed to have remitted his Right to ſuch Pawn, but may have an *Hypothecarious* Action to recover the ſame again. As a Pawn is preſumed to be contracted by a nude Pact, or without writing [t]; ſo it may alſo be releaſed in that ſame manner before a competent Number of Witneſſes.

[p] D.13.7.21.
[q] D.20.1.29.2. D.20.1.16.2.
[r] D. 20.6.5. & 13.
[s] D. 20.6.1.
[t] D. 20.4.

Though the Fruits and Profits, which are received from a Pawn or Mortgage by the Creditor, do *ipſo jure* extenuate the Debt, and are reckoned as Principal [u]; yet they do not leſſen or compenſate the Debt, if they are ſpent or conſumed on the Premiſes, as in the Repair of Buildings, *&c.* The Fruits and Profits being in ſuch a caſe impawned or mortgaged as the Eſtate is [w]. The firſt Money that is paid to a Creditor ſhall be interpreted in diſcharge of *Uſe* and *Intereſt* for the Money lent; for it is reaſonable, that the Creditor ſhould be firſt paid his Damages for delay of Payment: And, therefore, the laſt Money paid is in diſcharge of the Principal only, and not of Intereſt [v]. This Intereſt among the ancient *Romans* was Twelve *per Cent.* which was called *lawful* Intereſt; and for more than this none could ſtipulate, unleſs it was in the Caſe of maritime Uſury: for ſuch was the Standard of lawful Intereſt, according to the *Gabinian* Law, as *Cicero* aſſures us in an Epiſtle to *Atticus* [w]. But when Trade increaſed, and had brought into the State a greater Plenty of Money, the Meaſure of Intereſt was for the Benefit of Commerce, gradually reduced at ſeveral times, till at length it came to four *per Cent.* in *Juſtinian*'s Time, (as I ſhall more fully evince in my Work hereafter, under the Title of *Intereſt*;) and no Banker or Uſurer could take more than this Sum upon any pretence whatſoever, unleſs on the account of *Bottomry* or nautick Intereſt.

[u] C.4.24.1.
[w] D.13.7.18. dd. ib.
[v] D.13.7.35.
[w] Ep. 5.

If a Creditor ſhall do any damage to a Thing pawned or mortgaged, ſuch Damage ſhall be reckoned into the Principal, as I ſhall note hereafter: But the Creditor ſhall recover all neceſſary Charges, which he has diſburſed on the ſame, and likewiſe ſuch moderate Expences as he has been at for proper Improvements thereof [x], as before related. But though the Creditor is liable, if the Pledge be made worſe in his hands by Diſſipation or Waſte [y], yet it has been a Queſtion, whether he be bound to preſerve the Fruits, and to ſell them in ſome Time of Scarcity? To which I anſwer, that there are ſome Fruits which ought to be ſold out of hand, becauſe they are immediately ſpoiled, or grow worſe by keeping; and theſe ought not to be preſerved. A Creditor is not liable on the account of a Pawn loſt, if it be loſt without his fault or means. Fortuitous Caſes which cannot be foreſeen by human Prudence, are within the Verge of Contracts both *ſtricti juris* and *bonæ fidei*: And, therefore, a Creditor is not liable on the ſcore of a fortuitous Caſe happening to a Pledge, unleſs it be ſo covenanted, *viz.* That if a Thing be loſt by ſuch a Caſe or otherwiſe, the Debtor ſhall not be obliged to pay the Debt [z]. And the

[x] D. 13.7.8.
[y] C. 4.24.1. & 2.
[z] C.4.24.5.

being robbed by Highwaymen, and the like, is deemed a fortutious Caſe.

A Thing, which belongs to another Perſon, may be pawned or mort-
[a] C.8.16.2. gaged by the Conſent of the Proprietor, and not otherwiſe [a], unleſs it be as hereafter excepted; nor is ſuch a Pledge valid, though the Property of the Pledge ſhould afterwards by Accident ſupervene unto the Debtor: Becauſe he had no preſent Right, or Right in Reverſion thereunto. But if a Thing be given as a Pledge without the Privity of the Owner, and the Proprietor ſhall afterwards ratify the Act of the Debtor, ſuch Pledge ſhall be valid: And thus that which was invalid *ab initio* is afterwards confirmed and made good; for ſuch Ratification declares the Will and Conſent of the
[b] D.20.1.16.1. Proprietor [b]. A Perſon who knows the Thing pawned to belong to another, is not deceived by the Debtor, but deceives himſelf; and, therefore, he
[c] In l. 1. D. 20.1. ſhall not have an *Hypothecarious* Action, according to *Bartolus* [c]. Thoſe Things which may be expreſſly ſold and alienated, may alſo be impawn'd
[d] C.4.53.l.un. and mortgag'd [d], as before hinted: And, on the contrary, thoſe Things which cannot conſiſt in Commerce, as Things ſacred, religious, the Right to an Hoſpital, Things ſubject to Reſtitution, a *Feudal* Eſtate without the Lord's Conſent, the Goods of Minors without the Decree of the Judge, Things *litigious*, Caſtles, publick Theatres, the Sea, publick Rivers, and
[e] D.20.3.1.2. the like, theſe Things (I ſay) cannot be impawned [e].

If an Eſtate be mortgaged, and afterwards ſuch Eſtate ſhall be inlarged or increaſed by Alluvion, the whole Eſtate ſhall be bound by ſuch Mort-
[f] D.20.1.16.1. gage [f]. If a Thing mortgag'd or impawned ſhall afterwards be changed into another *Species*, as when a Houſe is pulled down, and laid into a Garden, *&c.* an *Hypothecarious* Action accrues in the ſame manner, as if
[g] D.20.1.16.2. it had been a Houſe ſtill [g]: And, therefore, a Pledge is not always extinguiſhed by a change of the Thing itſelf into another Form, though ſometimes it is, as before intimated, but ſtill continues a Pledge. Thus if Corn or Paſture-Land be converted into a Vineyard, the Obligation of a Pledge ſtill remains to the Creditor.

In the Claim of a Pledge, the Queſtion ſometimes is, whether the Perſon with whom the Controverſy is, be in poſſeſſion of the Thing in Controverſy? For if he be not in poſſeſſion of it, nor has not quitted the Poſſeſſion by any fraudulent Declaration of Truſt, in order to deceive the Creditor, he ought to be acquitted; for a Creditor may claim the Pledge. But if he be in poſſeſſion of it, and will either pay the Money lent thereupon, or reſtore the Thing pledged, he ſhall equally he acquitted: But if he will do neither of theſe Things, he ſhall be condemned by the Judge's Sentence
[h] D.20.1.16.3. to give up his Poſſeſſion to the Creditor [h]. And the Poſſeſſor ſhall, according to the Award of the Judge, be obliged to reſtore all the Fruits of the Pledge received after Conteſtation of Suit, or Iſſue joined in the Cauſe, if the Eſtate be of leſſer Value than the Debt due to the Creditor: But if greater, he ſhall be obliged to reſtore the Fruits or Iſſues received before Conteſtation of Suit, unleſs they are extant, and the Thing impawn'd be
[i] C.8.15.3. not ſufficient to ſatisfy the Creditor in his juſt Debt [i].

Though, properly ſpeaking, a Thing already pledged cannot be im-
[k] C.8.24.1. & 2. pawned by the Creditor unto another [k], becauſe the Creditor has not the full and abſolute Property thereof, yet it may be pledged, either under an expreſs or tacit Condition, *viz.* That if the firſt Debtor ſhall redeem it, it ſhall be releaſed. *Mævius* gave a Pledge unto *Titius* for a hundred Pounds; *Titius* afterwards impawned the ſame Pledge unto *Caius*. *Mævius* may in this caſe diſcharge the Pledge which he gave unto *Titius*, by a hundred Pounds paid unto *Caius*, by the Conſent of *Titius*; and if *Titius* will not give his Conſent, the Court will compel him hereunto. Which brings me to ſpeak of the *Subrogation* of Pledges. For,

In

In Pawns and Mortgages we have ſuch a Thing as *Subrogation* or Ceſſion of Right, which is the putting of another Perſon in the Place and Right of the Creditor. It may be done either *gratis*, or for Money. And the *Ceſſionary* or Aſſignee ſhall ſucceed in the room of the Creditor, and exerciſe all manner of Right in relation to the Mortgage, or the Privilege of the Mortgage [l]. Thus a Debtor may borrow Money to pay the Creditor or Mortgagee, and by conſent that the Creditor ſhould aſſign over the Mortgage, as a Security for Money borrow'd, unto the Lender [m]; reciting that the Money was paid by him. This is no prejudice to the other Creditors, for their Condition is neither worſe nor better by means of ſuch a Change and Aſſignment. Theſe Aſſignments and Subrogations may alſo be made by the Authority of the Judge [n], without the Conſent of the Creditor. If the Creditor conſents that his Pledge ſhall be aſſigned to another, he has remitted his Right [o]: But bare Notice and Silence cannot amount unto a Conſent, as before declared; as when he knows that his Debtor is ſelling Land that was mortgaged to him, and ſays nothing to the contrary, or againſt the Sale [p]. For this Conſent ought to appear by ſome external Act, as when one mortgages Land a ſecond time, and declares that it is free from all Incumbrances, and the firſt Mortgagee or Creditor ſigns the Deed, either as a Party, or as a Witneſs [q]: Here he is an Accomplice in the Fraud, and the Circumſtances are ſo groſs, that it muſt be eſteemed to be done with his Conſent.

[l] D.18.4.6.
[m] D.20.3.3.
[n] C.8.22.1. C.7.73.7.
[o] D.20.6.12.
[p] D.20.6.8.15.
[q] D.20.6.9.1.

Where a ſpecial Pledge was not deliver'd to the Creditor, to prevent ſecond Mortgages, and other Frauds and Abuſes committed by Debtors, the *Romans* introduced a general Hypotheque of all the Debtor's Goods to anſwer for any Fraud committed by him, and ſuch general Hypotheque was regiſtred before the Preſident of the Province, or ſome other proper Magiſtrate, that all Perſons might apply and ſee in what Condition the Debtor ſtood: But this way of coming at the Truth of the Debtor's Circumſtances having been ſince either found inconvenient, or (at leaſt) inſufficient, this Method is now alter'd in many Countries, and the Goods, if moveable, muſt either be put into the Creditor's Hands, or elſe into ſome publick Lumber-Houſe, and enter'd there in the Debtor's and Creditor's Names, and kept diſtinct from other Goods. If the Pledge conſiſts in Immoveables, and not deliver'd, then a bare Regiſter before a proper Officer for that purpoſe is ſufficient. By the *Engliſh* Law, if the Debtor does not give notice in writing of the firſt Mortgage, to the ſecond Mortgagee or Creditor, he ſhall have no Equity of Redemption againſt the ſecond Mortgage, but ſhall loſe the whole [r]. But this Law has not been found ſufficient to hinder fraudulent Mortgages with us; which nothing will prevent but a general Mortgage or Regiſter, as it is fear'd; or a ſanguinary Puniſhment, which ſome may think carries too much Cruelty with it. By the *Civil* Law, if a Man pawns a Thing, which is already impawn'd to another, or which belongs to the State, and the like, he is guilty of *Stellionate*, or of a high Crime and Miſdemeanor; and may be puniſh'd arbitrarily for ſuch Fraud, according to the Diſcretion of the Court: But if he does not know it to belong to another, his Ignorance ſhall in this caſe excuſe him from the Guilt and Puniſhment of his Crime [s].

[r] 4 & 5 W. & M. cap. 16.
[s] D.13.7.16.1.

Suppoſe I pawn or mortgage a Houſe to you for a hundred Pounds, and ceaſe to pay Intereſt for the ſaid Sum of Money for ſo long a time, that the Debt comes to more than the Houſe is really worth: *Quære*, whether I am diſcharged of the Debt by a Surrender made to you of the ſaid Houſe? And it is held, that I am not; becauſe *Ceſſion* is not a full Satisfaction of the Debt, as before related.

A Creditor may retain a Pledge, not only on the account of Expences laid out thereon, but likewiſe on the ſcore of any future imminent Danger of

of having ſuch Pledge evicted in his hands [s]. He that has a Pledge aſſigned to him by way of ſatisfying a Judgment, is in the Place of a Purchaſer: And, therefore, if ſuch Pledge be evicted againſt the Debtor, the Party ſhall not recover it by a *Pignoratitious* Action, but by an Action *ex empto*, founded upon Equity [t]. Nor does a Creditor loſe an *Hypothecarious* Action, even though he has a Judgment againſt his Debtor: For a Creditor does not ſeem to be ſatisfy'd in point of his Debt, though he has ſuch a Judgment, unleſs he receives his Money by virtue thereof [u].

[s] D.13.7.8.1.

[t] D.13.7.24.1.

[u] D.20.1.13.4.

If a Pledge be in the Hands of a Creditor, and it be agreed between him and the Debtor, that the ſame ſhould not be ſold, and the Debtor is in perpetual Delay of paying the Sum lent thereon, the Creditor ought in this caſe to give notice before Witneſſes unto the Debtor, that he deſigns to ſell the Pledge at ſuch a time; and then if the Debtor be guilty of delay in Payment, it may be ſold by the Order of the Judge [v]: Otherwiſe this notice is not preciſely requir'd, (as ſome think, though without any Foundation of Law.) He, that accepts of a Pledge, is not only obliged to reſtore the ſame to the Debtor, but even to the Debtor's Heirs, in caſe of his Deceaſe, even though no mention be made thereof in the Deed of Pledge; for that is underſtood to be a tacit Agreement between Debtor and Creditor, on payment of the Debt [w]; for if the Creditor receives his Debt, he loſes the Right of a Pledge. A Debtor does not make the Cauſe of the Creditor the worſe, either by the Sale, Donation, or Bequeſt of a Pledge; for the Creditor may follow and recover it, to whomſoever it paſſes [x]; and this he may do by an Action at Law. And this almoſt neceſſarily obliges me to ſay ſomething of ſuch Actions, as relate to Pledges.

[v] D.26.7.17. fin.

[w] I.3.15.4.

[x] C.8.15.15.

I have before obſerved, that an Action which lies for the Recovery of a Pledge out of the Hands of the Creditor, is called a *Pignoratitious*, and not an *Hypothecarious* Action: Becauſe it does not lie to recover a Pledge in the Poſſeſſion of the Debtor, as an *Hypothecarious* Action does, but to re-poſſeſs a Pawn, which is in the Hands of the Creditor [y]. There are ſome Actions given during the time that the Contract has a Continuance or Subſiſtence: And others, after a Diſſolution of the Contract. During the Time of its Subſiſtence we have an Action in *Latin* ſtiled *Serviana*, and *quaſi Serviana*; meaning, an *Hypothecarious* Action, whereby the Creditor claims and ſues to have the poſſeſſion of the Pledge delivered to him: And after a Diſſolution of the Contract, a *direct Pignoratitious* Action lies for the Debtor; and a contrary *Pignoratitious* Action lies for the Creditor. I ſhall diſcourſe of theſe Actions in the two following Paragraphs.

[y] D.50.16.238. D.13.7.9.1.

Now a *direct Pignoratitious* Action is a civil perſonal [z] Action, whereby the Debtor who has pawn'd or mortgag'd a Thing, though it be another's Goods [a], on payment of the Debt may implead the Creditor, and compel him to re-deliver the Pledge; and likewiſe oblige him to repair the Damage, if any has happen'd to it through his Fault or Knavery [b]: and this is a *dividual*, as an *Hypothecarious* is an *individual* Action. Though a Perſon cannot rightly have this Action before payment of the Debt; yet if he makes a lawful Tender thereof in Court, he ſhall have it (as already ſhewn,) and recover the Thing itſelf, or Damages [c]. And if the Creditor ſhould (perchance) injure the Pledge by uſing it, the Debtor ſhall alſo recover Damages [d]; becauſe he uſed it contrary to his Truſt. And it is the ſame thing if he hinders the Debtor from making uſe of his own Right therein [e]. Not only the Perſon with whom the Contract is made, but even he who has a Right of poſſeſſing the Pledge, may have this Action againſt the Creditor [f], and alſo againſt his Heir (for it is a tranſitory Action) but not againſt any other Poſſeſſor of the Thing pledged according to the *Civil* Law [g]: But by the *Canon* Law it lies againſt a third Poſſeſſor. See *Gregory*'s Decretals [h], and *Innocentius* thereon. The Suit in this Action is for

[z] C.8.28.20.

[a] D.13.7.9.4.

[b] D.13.7.9.3. C.4.24.7.

[c] D.13.7.9.5.

[d] D.13.7.9. fin.

[e] D.13.7.43.

[f] D.3.5.32.

[g] D.13.7.27.

[h] Cap. *cum conſtet.*

Reſtitution of the Thing pledged, together with the Fruits and Profits thereof, (which the Creditor does not make his own, unleſs it be in an *Antichreſis*, as aforeſaid, but ſhall be compelled to reſtore them, if the Debtor pleaſes, or to convert them into Principal [i];) and likewiſe to make good the Damage done by the Fraud and Negligence of the Creditor unto the Thing pledged [k]. For a Creditor ought not only to avoid Fraud and Deceit, but ought to ſhew the Care of a prudent Maſter of a Family, becauſe a Pledge is chiefly given for his Sake and Security [l]. But he ſhall not be liable to an uncontroulable Force, or a fortuitous Caſe; becauſe no Care or Cuſtody is a ſufficient Defence againſt ſuch Accidents [m]. Therefore, the Owner of the Thing pledged muſt run the Riſque of it, unleſs he can prove that it periſh'd through the Fault of the Creditor [n]. But if a Pledge be ſold (as it may be on the Debtor's Non-payment of the Money borrowed thereon) an Action will lie for the Overplus of the Price, which the Creditor ſhall be obliged to refund [o].

[i] D.13.7.22.2. C. 8.28.9.
[k] D.13.7.25. C.4.24.11.
[l] D.13.7.25.
[m] D.10.1.31.
[n] D.13.7.30. C.4.24.9.
[o] D.13.7.42.

A *contrary Pignoratitious* Action is given to the Creditor againſt the Debtor [p] to indemnify him in caſe he ſhould (peradventure) ſuffer any Damage by the means of ſuch Pledge given [q]; or if he has been cheated therein, as (for inſtance) in receiving Braſs for Gold, *&c.* or if he has been at any neceſſary Expence on the Pledge [r]; or even if he has been at any Charge for the Improvement thereof [s]; or if the Debtor has regained the Pledge out of his hands by a falſe View of being paid his Money [s], and ſo in the like Caſes [t]: Wherein it is reaſonable, that the Creditor ſhould be indemnify'd [u]. A *contrary Pignoratitious* Action founded on Equity is alſo given to the Creditor againſt the Debtor's Heir, in order to compel him to ſuffer the Thing pledged to continue as a Pledge, in as much as the Heir of the Deceaſed is bound to ratify and make good the Debtor's Act [v].

[p] D.13.7.16.1.
[q] D.13.7.31.
[r] D.13.7.36.
[s] D.13.7.8.
[s] D.13.7.3.
[t] D.13.7.22.
[u] D.13 7.31.
[v] D.13.7.22.

A Creditor that brings an *Hypothecarious* Action, or an Action on a Mortgage, is bound to prove the Mortgager to be the Proprietor of that Eſtate, touching which he ſeeks Relief in virtue of ſuch Mortgage: And it is enough for him to prove, that the ſaid Eſtate was the Eſtate of the ſaid Mortgager at the time of the Obligation made. See *Accurſius* on the Inſtitutes [w]. But becauſe it is a difficult matter to prove another to be the true Proprietor of a Thing, or ſuch an Eſtate; it is therefore adjudg'd ſufficient Evidence, if it be proved that the Eſtate mortgaged was then in the Mortgager's Poſſeſſion, and that he received the Profits of it, when the Debt and Mortgage were contracted; becauſe thoſe Things ſeem to be in a Man's Property, according to the Gloſs [x], which he has poſſeſſion of, *&c.* And the Creditor may likewiſe ſubjoin, that the Debtor was the reputed Proprietor thereof. An Action of Theft accrues to a Creditor on the account of a Pawn ſtolen, or privily taken away from him [y]; for by the *Civil* Law, Theft was not a capital Offence or Felony, as with us; but a civil Action might be commenced for Damages [z], or a criminal Action to puniſh the Offender by a pecuniary Mulct or Fine to the Exchequer. And thus much of Actions for Pawns and Mortgages; wherein I have been obliged to mention ſome Things before hinted at, becauſe the Buſineſs would otherwiſe have been obſcure to the Reader. But I cannot take my leave of this Title on Pledges, without making ſome few general Remarks on the whole, touching the preſent State of Pledges in all trading Countries almoſt.

[w] I.4.6.7.
[x] In B.7. I.4.6.
[y] D.13.7.22.
[z] I.4.6.16.17. &c.

For there are ſeveral Laws which were in force among the *Romans*, and well enough adapted then to the State of Things as they ſtood at that time, which are ſince grown obſolete or aboliſhed by the ſubſequent municipal Laws of divers Nations. As for inſtance, a Wife can neither borrow Money, nor impawn her Effects, as ſhe might have done by the *Roman* Law [a]: For the Husband, and the Heir of the Wife, is not obliged

[a] C.8.14.12.

in *Holland* and *France* to pay ſuch Money borrowed, unleſs it be apply'd to the advantage of her Family. In *Holland*, and other Countries, by Cuſtom, both the moveable and immoveable Effects of the marry'd Couple, though in the diſtinct Property of each of them before Marriage, yet by Intermarriage become common both as to the Poſſeſſion and Property of ſuch Goods without any Delivery, unleſs they are *Feudal* Eſtates, which do not come under this Community; or unleſs this Community of Goods be expreſſly reſtrained by ſome ante-nuptial Covenants, publickly taken from the Husband on the ſcore of ill Manners. See *Groenvegen de ll. Abrog.* on the Inſtitutes [b].

[b] I. 2. 8. pr.

Secondly, The Tools of Husbandry, and other mechanical Implements, enumerated in the *Authentick* here cited [c], heretofore were not ſubject to an Hypotheque: But at this day, in Aid and Defect of other Goods it is otherwiſe, as appears from *Bugnion de ll. Abrog.* [d] And this is now the common Practice in *Spain*, *Brabant*, and other States, as well as *England*. See *Gutierez*'s practical Queſtions of the Laws in *Spain*, and *Anſelm*'s *Belgick* Code of Laws. Again, it is lawful for the Creditor, or any one that perſonates him, to purchaſe the Pledge; becauſe they are now in moſt Places ſold by publick Authority, as before related. By the Uſage of *Holland*, and the Laws of other Countries where Pledges are ſold by the Judge's Decree, which obtains the Force of a Sentence demanded to Execution, Creditors, how ancient ſoever, and tho' they be *privileged*, cannot have an Action againſt the Buyer of a Pledge, or the lawful Poſſeſſor thereof by this means: For if Creditors being admoniſh'd by a *Programma* or Bill publickly ſet up in Writing, for their Appearance, when the Pledge is ſold *ſub haſtâ, viz.* by publick Cant or Auction, do attend and are ſilent in their Claim of Right, they ſeem to have remitted their Right to ſuch Pledge [e]. But if a Creditor be abſent, he may be relieved, eſpecially if he was abſent on the account of the State, or be a Pupil [f]; and ſo it has been adjudged by the Parliament of *Bourdeaux* in *France*. See *Paponius de Arreſtis* [g].

[c] C. 8. 17. 8. *Agricultores.*

[d] L. 1. Sat. 242. L. 2. 31. 58.

[e] C. 8. 26. 6.

[f] D. 26. 7. 17.

[g] 18 Art. 6.

Thirdly, By the *Roman* Law, all the Goods of a Perſon pledging a particular Effect, were put under a general Hypotheque, if the Pledge was not actually delivered to the Creditor; and therefore if ſuch Pledge was alienated without the Creditor's Conſent, all the Debtor's Goods were liable to anſwer for it [h]. But at this day Pledges in moveable Goods are actually delivered; and, therefore, this *Novel* is entirely antiquated, or repealed by contrary Uſage. A general Hypotheque of Goods is not only extended to ſuch as a Man has at preſent, but even to ſuch as he ſhall acquire hereafter [i]: So that under ſuch a Hypotheque we may reckon all Debtors Bonds, Obligations, and other Specialties in Writing, according to the *Civil* Law: though it be otherwiſe (I think) according to the *Engliſh* Law, becauſe theſe Things *in Action* are not transferrable. *Sed Quære.* But there was no diſtinction by the *Roman* Law between a *general* and a *particular* Hypotheque in point of Right or Precedency by way of *Privilege*, though there was in point of *Time*: For a *general* Hypotheque is only preferred in point of Time to a particular one, which comes after it in reſpect of Time, if it be ſued. The Prerogative of *Time* in reſpect of Pledges, (whether *Conventional*, *Prætorian*, or *Judicial*) is conſidered by that Law even to an Hour, and a Moment, though we are not ſo nice here in *England*.

[h] Nov. 4. c. 2.

[i] C. 8. 17. 9.

By the Laws and Cuſtom of *Holland* likewiſe, the bare Averment of a Debtor is not ſufficient to avoid the Obligation of a Pledge, if the Money for which it is engaged be not actually paid, as by the *Civil* Law [k]; but a Proof of ſuch Non-Payment ought to be made within two Years from the Time the Pledge engaged: And if the Debtor be not able to prove his Exception, he may require the Plaintiff, *&c.* or Creditor, to declare the Truth upon

[k] C. 4. 30. 13.

upon Oath, or to give the Oath back to the Debtor. But this Exception *Pecuniæ non numeratæ* is obſerved in *Frieſland*, according to the Form of the *Civil* Law [l]. By the Law of *England* (I think) the Debtor may have Relief in a Court of Equity, though not of Law. A Plaint or Exception *Pecuniæ non numeratæ* ought no more to be made in writing at this day than other Exceptions, in Imitation of which it is drawn, as the Law is practiſed in *Holland*: But in *England* it muſt be framed in writing. Again, by the *Roman* Law, a ſecond or latter Creditor could not ſell a Pledge, unleſs he paid or tendred the Debt unto a former Creditor [m]. But now he may, by ſaving the Right of a third Perſon, becauſe it is ſold by the Authority of the Judge; and therefore theſe Tenders of a Debt are at this day grown into diſuſe [n].

[l] Groenv. de ll. Ab. C.4.30.

[m] C.8.18.8.

[n] Autumn. in l. 1. C.8.18.

The laſt principal difference between the *Civil* Law and the Practice of modern Times, which I ſhall here mention in relation to Pledges, tho' there be others of leſs Conſequence, is, That in caſe no one will purchaſe the ſame, the Creditor need not now apply himſelf to the Prince for the Right of Property therein: For if there be no Bidder or Purchaſer to be found, the Judge may aſcertain the Price thereof to the Creditor, and by paying the juſt Value of it (as ſettled by the Court) unto the Debtor, he ſhall acquire the full Property. See *Faber's* Definition on the *Juſtinian* Code [o]. What I farther add hereunto is, that when the ſame Debtor has ſeveral Creditors, each Poſſeſſor convened in an *Hypothecarious* Action, may tender his Debt, and by a lawful Tender or Payment of the Thing hypothecated, it may be retained, and bar the Creditor from ſelling the Pledge: Provided always that he tenders the whole Debt, becauſe a Tender in part can be of no advantage to the Poſſeſſor againſt the Creditor. And this Power of Tendering accrues not only to the Poſſeſſor of a Pledge, but to every Creditor of the ſame Debtor.

[o] C. 8. Tit. 22. defin. 1.

TIT. XIX.

Of Permutation, *or the Exchange and Barter of Goods, how it differs from buying and ſelling; whether it be an* innominate *Contract, and whether it differs from the Contract ſtiled* Do ut des; *and whether it be Permutation if a Thing be delivered, and a Price paid for it.*

THE moſt antient of all commercial Contracts between one Man and another, ſeems to be that of *Permutation*, or the exchanging of Goods for Goods. For till ſuch time as Money was found out, and the Service thereof made uſe of for the more convenient carrying on of Trade, there could be no other way of ſupplying of the Neceſſities of one with the Abundance of another Perſon: And, therefore, one certain *Species* of Goods being given *gratis* for another, as an Ox for a Horſe, *&c.* it was called *Permutation* [p], or the bartering of Goods for Goods. If a *Genus* be exchanged for a *Genus*, as a Garment for Cloth, or for a *Species*, it is not, properly ſpeaking, ſtiled *Permutation*, but rather an innominate Contract, as

[p] I. 3. 24. 2. D. 19. 4. 1.

as *do ut des* [q]. For though the word *Permutation* may well enough be extended to all Contracts, wherein Goods are exchanged even for Money; yet this is not in the ſtrict Acceptation of the Word, as I ſhall uſe it here: For then it becomes a Contract of Bargain and Sale, unto which this Contract of *Permutation* is like in many reſpects [r]. And thus the word *Permutation* in a general Signification of it is a Term of a large extent, containing all Contracts, as well nominate as innominate. For Contracts are nothing elſe but a mutual Commerce of Things had between Men by changing one Thing for another by the Intervention of Conſent. And, therefore, tho' *Permutation* has a Name, yet it is a Name *ſui generis*, and not a particular Name.

[q] D.19.4.1. dd. ib.

[r] C. 4.64. 2.

Permutation, as here uſed, is a Contract *bonæ fidei* [s], and it was founded on the Law of Nations [t], as all ſuch Contracts are. It was antecedent to Bargain and Sale; becauſe this laſt was introduced on the Uſe of Money, and not before: And though *Permutation* be like unto Bargain and Sale in many reſpects, as aforeſaid, and is governed almoſt by the ſame Rules in Law; yet it differs from it in ſome Particulars. For in Bargain and Sale there muſt be a certain Price paid in Money by the Buyer, and there muſt be a Thing delivered on the Part of the Seller: But in Permutation ſomething is delivered on both ſides without the help of Money [u], as when a Man delivers me ſo much Lead for ſo much Cloth. Bargain and Sale is perfected by Conſent alone: But Permutation is not perfected without the Intervention of ſomething delivered or done [w]. In Bargain and Sale the Vender may ſell that which is another Man's Property: But in Permutation the Barterer can only exchange that which is his own [x]. In Exchange or Permutation you cannot diſcern who is the Seller or the Buyer, or what is the Price, and which is the Merchandize that is bought or ſold [y].

[s] C.4.64.2.

[t] D. 2. 14. 7. pr.

[u] D.19.4.1.2.

[w] D.19.4.1.2.

[x] D.19.4.1.3.

[y] D. 19.4.1. D. 18. 1. 1.

The conſtituent Parts of Permutation or Exchange of Goods are the *Species* of Things, the Conſent of the Parties, and the Delivery of the Goods exchanged, and ſometimes Stipulation and Warranty intervene [z]. For Eviction lies on Permutation, as it does on Bargain and Sale [a]. And if Animals or living Creatures are exchanged for each other, they ought to be ſound Wind and Limb [b]; for if the Creature or Beaſt has any Fault, it may be returned on the Owner's Hands that exchanged it [c], and he ſhall be obliged to receive the ſame again, and to reſtore the Counter-part. If a Thing bartered be evicted, an Action *præſcriptis verbis*, or on the Caſe, lies againſt the Perſon to reſtore the Value of it in Damages. In exchange of Goods, if a Perſon has delivered a *Species*, he may recover the ſame again out of the hands of the adverſe Party, if he does not accept of the ſame by a Delivery of Goods on his part alſo [d]: But it is otherwiſe in Bargain and Sale; for there the Action lies to compel the Perſon to fulfil the Contract. Permutation does not produce an Action for Damage on the Goods before the Thing be delivered [e]: But it is otherwiſe in a Contract of Bargain and Sale, which is perfected by Conſent alone. Yet in Permutation a Perſon may have an Action to compel the Perſon to perform his Promiſe [f], or to anſwer Damages for his Non-compliance therewith [g]. *Tacitus* ſomewhere obſerves, ſpeaking of the Manners of the *Germans*, that heretofore Permutation was peculiar to that People, who at that time knew no other way of Trading: And *Virgil* himſelf in his *Georgicks* [h] gives a Hint of this way of dealing without Money among the old *Romans*;

[z] C.4.64.3.

[a] C.4.64.1.

[b] D. 19. 4. 2.

[c] D. 19. 4. 5.

[d] D.19.4.1.4.

[e] D.19.4.1.2.

[f] C.4.64.8.

[g] C.4.64. 1.

[h] Lib. 1.

Teque ſibi generum Tethys emat omnibus undis.

But as this Way or Method of Traffick is now almoſt grown into diſuſe among Men, I ſhall here ask leave to cloſe this Title, and ſay no more of it.

TIT.

TIT. XX.

Of a Precarium, *or Contract whereby one Perſon grants the Uſe of ſomething unto another, with a Power of revoking ſuch Grant whenever he pleaſes,* &c. *How it differs from other Contracts, and what are the Conditions of a* Precarium; *and how a* Precarium *is determined,* &c.

A *Precarium* is a Contract founded on the Law of Nations, whereby one Perſon at the Inſtance of another, grants ſomething to be made uſe of by him, till ſuch time as the Grantor ſhall think fit to recall the ſaid Grant [g]. As when I grant unto *Titius* the Uſe of a Book at his Requeſt, or grant unto *Seius* a Way or Power of paſſing through my Ground, with a Pact, reſerving unto myſelf the Power of revoking, or of redemanding my Book whenever I think fit. A *Precarium* is a *Species* or Kind of Liberality [h], in as much as it is like unto a *Donation*, though it differs from it in ſome reſpects; becauſe he who gives a Thing, gives it in ſuch a manner as not to receive the ſame again: But he who grants a Thing as a *Precarium*, ſo gives it as to receive the ſame again, whenever he pleaſes [i]. As a *Precarium* is a kind of Liberality, it is ſuitable to natural Equity, that you ſhould only have the Uſe of it during my pleaſure, and that I may recall it whenever I change my Will: Wherefore not only an *Interdict* of Reſtitution lies, but alſo an Action on the Caſe for the Recovery of it [k]. It is called a *Precarium, à Precibus, viz.* becauſe it is made at the Requeſt of him for whoſe advantage it is granted.

[g] D.43.26.1. pr.
[h] D.43.26.1.1.
[i] D.43.26.1.2.
[k] D.43.26.2.2.

A *Precarium* may be granted not only in reſpect of Things corporeal, but alſo in regard to Things immoveable, and of an incorporeal Nature, as Rights, Services, and the like [l]. It does not transfer the Property, but only the Uſe of the Thing granted, nor is it given for a certain Uſe, or for a certain Time [m], in ſuch a manner that it cannot be revoked before the Determination of that Time. Hence a *Precarium* differs from other Contracts. For, *firſt*, it differs from a *Mutuum*, becauſe in a *Mutuum* the Property of the Thing is transferr'd and alter'd; but it is not ſo in a *Precarium*. By this it alſo differs from a *Sale*, as a Sale is an *onerous* Contract, but a *Precarium* is not ſuch: And in a Sale the Property is transferred and alienated in reſpect of the Thing ſold, which does not happen in a *Precarium*. *Thirdly*, it differs from a *Depoſitum*; becauſe a *Depoſitum* is uſually made in favour of the Perſon that depoſits the Thing: But a *Precarium* is made in favour of the Perſon, that accepts and receives the ſame. Beſides, a *Precarium* is granted, to the end that it may be made uſe of by the Perſon receiving; but a *Depoſitum* is granted for the ſake of Cuſtody alone: Though both a *Depoſitum* and a *Precarium* agree in this, *viz.* That they may be demanded and recovered at the pleaſure of the Grantor. *Fourthly*, a *Precarium* differs from a *Commodatum*, becauſe a *Commodatum* cannot be revoked whenever the *Commodant* pleaſes, but remains with the *Commodatary* till ſuch time as he has enjoyed the ſtated Uſe of it:

[l] D.43.26.1. 2.3. & 4.
[m] D.43.26. 25.1.

But a *Precarium* may be revoked at the Will of the Proprietor, even before any uſe has been made thereof; for a *Commodatum* is uſually granted for a certain Time and Uſe, though it may be granted without a Time prefixt for returning it, as when a Man borrows a Horſe to go ſuch a Journey. Yet a *Precarium* cannot in Equity be immediately revoked, unleſs it be upon ſome reaſonable account ſupervening: For a light and ſudden Revocation carries along with it a Preſumption of Fraud and Deceit. *Fifthly*, a *Precarium* differs from letting to hire, letting to hire being uſed for the advantage of both the Parties contracting: But a *Precarium* is only for the Benefit of the Party that accepts of it. A *Precarium* includes the Obligation itſelf, as well as the Thing granted.

To this Contract of a *Precarium* there are three Conditions required. *Firſt*, The mutual Conſent of the Grantor and Receiver is neceſſary. *Secondly*, A Delivery of the Thing lent is required: For this kind of Contract is perfected by a Delivery of the Thing granted. And the Things which are grantable by way of a *Precarium*, are both Things moveable and immoveable [n], as aforeſaid, and alſo Services [o]. Yet a Perſon cannot by this Contract obtain that which is his own already. Wherefore, he that grants unto another Perſon what is a Man's own, and afterwards deſires, that that ſame thing may be given him by the Creditor on a *Precarium*, is not ſaid to receive that Thing by a *Precarium* in reſpect of the Property thereof, but only in reſpect of the Poſſeſſion: For he himſelf is Lord of the Property, and only asks that Poſſeſſion to be given him, which the Creditor had. *Thirdly*, He who delivers a *Precarium* may recover the ſame whenever he pleaſes, unleſs Charity will have it otherwiſe: As it happens, when the Grantor cannot revoke a *Precarium* without very great Detriment to him, who received the ſame. Hence it follows, that in a *Precarium* a Pact or Covenant cannot be made and entred into, *viz.* that he who delivered the *Precarium* ſhould not re-demand the ſame: For ſuch a Pact is contrary to the Nature of a *Precarium*, and conſequently invalid.

[n] D. 43. 26. 15. 2.
[o] D. 43. 26. 3.

A *Precarium* is determined *firſt*, and comes to an end by the Will of him who granted it. *Secondly*, it is at an end if the Proprietor ſells the *Precarium*. And *thirdly*, it is at an end by the Death of him who received the ſame: For a *Precarium* does not deſcend to the Heirs of the Perſon, though the Perſon that received it ſhould die before the Term be elapſed. For a Grant of this Nature is a perſonal Thing, and conſequently at an end with the Death of the Grantee, without paſſing to his Heirs. But a *Precarium* is not determined by the Death of the Grantor that delivered it; becauſe it is granted under this Condition, *viz.* till ſuch time as the Proprietor ſhall revoke the ſame. And the Perſon who delivers it is not adjudged to revoke it by his Death, but to continue in the ſame Will or Mind, as before. Wherefore, the Receiver may uſe it after the Death of the Grantor, without incurring any Damage, till it be revoked by the Heirs of the Deceaſed. But if it be granted under this Form, *viz. ſo long as my Will and Pleaſure is*, and the like, it appears from what I have ſaid of Privileges, that ſuch a *Precarium* expires with the Grantor; becauſe *Voluntas & Bene-placitum Perſonæ* ceaſes with the Death of the Perſon.

As a *Precarium*, properly ſpeaking, is not a civil Contract; that is to ſay, a Contract founded on the *Civil* Law, but on the Law of Nations [p], as already remembred, it does not produce a civil Action, but only what the *Civilians* call an *Interdict*, or Injunction of Reſtitution [q]: But yet an Action in Equity lies hereupon, which we ſtile an Action *præſcriptis verbis*, or in other Terms, an Action *on the Caſe* [r]: which is a ſubſidiary Action, as being given in Equity on a Defect of other Actions [s]. And it is ſo called, becauſe the Plaintiff does in a *preſcribed* Form of Words deduced by himſelf, and not by Law, ſet forth the ſimple Matter tranſacted

[p] D. 2. 14. 7.
[q] D. 43. 26. 14.
[r] D. 43. 26. 2. 2.
[s] D 19. 5. 2.

or done. But more of this Action hereafter: Title, *Actions* [t]. By this Injunction the Judge orders him, who has received a Thing as a *Precarium* from another, or has fraudulently quitted the Poſſeſſion thereof, to reſtore the ſame to him again [u]. And if the Receiver of a *Precarium* ſhall be found guilty of any Fraud or groſs Negligence in preſerving the ſame, he ſhall be liable to this Action, but not for a light or the lighteſt Fault: But if he ſhall, after ſuch Injunction is ſerved on him, be in delay of reſtoring the *Precarium*, he ſhall be obliged to make good all Damage to the Grantor and his Heirs [v]. This Action in Equity is a perpetual Action, not barred by the Limitation of a Year [w]; and it accrues to the Grantor, whether he be the Proprietor of the *Precarium*, or not, and to his Heirs [x]. It lies againſt him who has the *Precarium*, and not preciſely againſt him at whoſe Intreaty it was granted [y], and againſt the Heirs of ſuch Poſſeſſor [z]. It is granted in reſpect of Reſtitution, and if Reſtitution cannot be made of the *Precarium*, it will give the Plaintiff Damages by a Condemnation of the Defendant therein; and after Conteſtation of Suit, he ſhall from that time reſtore all the Fruits and Emoluments of the *Precarium* to the Plaintiff [a]. A Thing may be ſo ſold, that it may remain with the Buyer by way of a *Precarium* only, until ſuch time as the whole Purchaſe-Money be paid, and if it be by the Buyer's Means that it is not paid, the Seller may recover the ſame [b].

[t] Vol. II.

[u] D.43.26.2. pr.

[v] D.43.26.8. 3. & 6.

[w] D.43.26.8. 7.

[x] D.43.26.21.

[y] D. 43 26.4. 2.

[z] D.43.26.21.

[a] D.43.26.8. 3. 4 & 6.

[b] D.43.26.20.

TIT. XXI.

Of Improper *or* Quaſi Contracts, *what they are, and the ſeveral* Species *thereof*; *as a Contract* de Negotiis geſtis, *or for Buſineſs done, touching the Adminiſtration of Guardianſhip, the* Communio Bonorum, *a* Judicium finium regundorum, *the* Aditio Hæreditatis, *or Accepting of the Heirſhip,* Solutio Indebiti, *Contracts by Accident, and Contracts by Fraud: of all which in their reſpective Order.*

HAVING hitherto treated of ſuch Obligations as ariſe from *a proper* Contract; I ſhall, in the next place, diſcourſe of thoſe which ariſe from an *Improper* or a *Quaſi* Contract: which is ſo called, becauſe it is not a Contract, properly ſpeaking; the word *Quaſi* here denoting an Impropriety of Speech [c]. For in other Contracts, a Man is of his own accord obliged by his own proper Act, and the Conſent of both the contracting Powers, is held neceſſary, though ſometimes even ſomething more than Conſent is required: As in Contracts which are celebrated by ſomething done, ſtiled *real* Contracts, the Intervention of a Thing is neceſſary to eſtabliſh the ſame. So likewiſe in verbal Obligations, the Preſence of the Parties, and a Solemnity of Words in ſome of them is accounted neceſſary. But in *improper* Contracts, a Perſon is bound even without his own Privity, and ſometimes

[c] D.41.3.14. fin.

ſometimes in his Abſence, and againſt his Will. For though the expreſs Conſent of both the Parties does not intervene; yet the Law does in the *Interim* conſent for one of them: Preſuming that no one is ſo weak and fooliſh, but that he is willing to better his own Condition even in his Abſence, and without his own Privity. The Emperor *Juſtinian* reckons up ſix of theſe *improper* Contracts, which I ſhall here handle under this Title.

Now the firſt *Species* of an *improper* Contract is what we call a Contract *for Buſineſs done*, or *Negotiorum Geſtio*. The *Romans* ſo thoroughly ſaw the Neceſſity that lay upon Men to perform mutual Offices and Kindneſſes for each other, that to encourage them the more to pay theſe reciprocal Duties, ſo neceſſary to each other's common Being, the Scope of their Laws tended to ſecure all Men from ſuſtaining any prejudice by being officious or active for the Benefit of other Men. If therefore I expend Money in my Friend's Abſence, or contract a Debt on myſelf to accommodate or improve his Intereſt, though I did it without his Knowledge or Privity, yet the *Civil* Law will ſee that what I have thus laid out ſhall be reſtored me, and I may compel him to ſave me harmleſs, where I either have, or can poſſibly ſuffer any Detriment for his ſake. For as it is but fitting, when I undertake to act in another Man's Buſineſs, I ſhould give an account of what I do, and anſwer for any thing I have done amiſs therein, and render unto him ſuch Profits as his Affairs and Goods have yielded: So, on the other hand, it is but juſt, where I have ſerved him with Succeſs and Advantage, that there he ſhould re-imburſe me all that I have uſefully expended, and free me from all preſent and future Damages whatſoever [d]. Hence it is, that if I pay another Man's Debt with my own Money; or free from Captivity another's Son or near Kinſman, whom Nature would oblige to redeem him; or if being a Phyſician I attend and proſecute the Cure and Recovery of another's Servant, that is ſick or wounded; the Law will not ſuffer me in any of theſe Caſes to be a Loſer in any meaſure; for what Coſt I have been at, or whatever I have disburſed, ſhall be allowed me. It is unreaſonable, ſays *Gaius* [e], that a Man for his Courteſy and Goodneſs ſhould reap a prejudice. Upon the Equity hereof is that Proceeding in the Court of Admiralty clearly juſtify'd, whereby, if a Ship being aſſaulted by Pyrates or Enemies, ſhall be reſcued by another's Ship ſeaſonably coming in to her Deliverance, it charges the Ship that is thus redeemed, with Salvage-Money to the other, that ſo endanger'd herſelf, in order to preſerve her: That Recompence being but in lieu of all Damages thereby ſuſtained, and for future Encouragement to others to fight in defence of thoſe that they ſee aſſailed hereafter. Upon the ſame Equity it is, that when a Ship is in danger of being caſt away through a raging Tempeſt, if, to lighten the Ship, ſome of the heavieſt Goods belonging to others be thrown over-board, and thereby the Ship and the reſt of the Goods come ſafe home, in this caſe the Loſs is made common and reparable by the whole. For it is moſt equitable, that their Wares ſhould contribute to make up that loſs, which was the only means whereby they were preſerved [f].

[d] D. 3. 5. 1.

[e] D. 29. 3. 7.

[f] D. 14. 2. 2.

In the like manner, though Goods taken at Sea by Pyrates from the true Owners, may be challenged and regained from any hands, wherever they ſhall be found and met with, (though 'tis otherwiſe in Goods taken by an Enemy in a juſt and open War;) yet if a Man ſhall expend his own Money in redeeming them out of the Pyrates Hands, not for his own Uſe, or to make a good Bargain for himſelf, but with an intent of bringing them home to the true Owner: In this Caſe, if the Owner will have them, he muſt firſt lay down the Purchaſe-Money, and then he ſhall receive his Goods [g]. Nay, ſometimes the Law will enjoin a Man to pay for that which

[g] D. 49. 15. 6. D. 14. 2. 2. 3.

which he had got before. For if three be taken Priſoners in War, and one of them be ſuffered to go home to procure Money in order to pay the Ranſoming of them all, and a Condition added, That if he that is let go does not return, the two that are left behind ſhall ſtand engaged for his Ranſom as well as for their own: In this caſe what Money ſoever they lay down for him, he is bound to repay them, though he had gotten his Liberty before [h]. For the Law will not ſuffer a Man to be damnify'd by any Act, which is uſefully done in Contemplation of another. And herein the Law does not ſo much look upon the Succeſs or Sequel, as on the Good-will and probable Undertaking. And, therefore, if I ſhould fence or caſt a Wall about another Man's Iſland to keep it from overflowing, and an Inundation happens notwithſtanding; or if I beſtow Pains and Coſt to cure another Man's Child or Servant, and he dies; yet the Law will ſee me ſatisfied: For it is ſufficient, that I did what was proper to be done, tho' the intended Effect did not enſue [i].

[h] D.3.5.21.

[i] D.3.5.10.

But here ſome Caution and Warineſs muſt be uſed. For he that thus acts for another, muſt be ſure that he does no more than he that acts for himſelf would have done for himſelf: Neither muſt he expend any more than is profitable and neceſſary, and he can bear [k]. Again, he muſt not act after any Countermand be once ſent him, or that he be once bidden to deſiſt [l]. For in neither of theſe Caſes will the Law help him. Farther, if a Perſon be a Father, or a very near Relation, that deals for the Benefit, or in the Concerns of ſuch a one, as the Law may poſſibly preſume he rather does it to teſtify his natural Affection towards him, than to demand any thing for the ſame: I ſay, if there be any ſuch Proximity or Relation, and yet an Eye had to future Satisfaction, he muſt proteſt and declare, that it is done with that Intent, and not out of a Mind to beſtow it freely, but to be allowed for the ſame, otherwiſe the Law will ſtrike it out on the ſcore of Affection and natural Obligation [m]. And ſo *Alexander Severus* declared to *Herennia*, who, when ſhe had fed and maintained her Children at her Table, and laid out Money beſides for their other Uſes, demanded Satisfaction of all of them, when they came of Age: But being denied, ſhe complained to the Emperor, who made her this Anſwer, *viz.* "Thou haſt no juſt Reaſon to demand Payment for that Alimony "and Suſtenance which thou affordeſt to thy Children, for natural Piety "or Affection required it of thee. But if thou haſt uſefully, and with a "probable View of improving their Fortunes, expended Money alſo about "their Buſineſs; if thou canſt make it appear, that thou didſt it not out of "a free Mind, nor meerly as a Mother, but with an Expectation of being "re-imburſed thereof by thy Children, the Law will compel them to re-"pay it again [n]." If a Husband through a marital Affection be at an Expence for the Cure of his Wife, he cannot recover ſuch Expences from his Wife's Father, nor ſhall they be reckoned into the Wife's Dower [o]. Thus, in the ſame manner, (according to *Bartolus* [p]) a Maſter is obliged to pay for the Cure of his menial Servant, if the Expences are ſmall and moderate. Laſtly, it is to be obſerved, that he who will voluntarily, and of his own accord, being not commiſſioned, act in another's Buſineſs, if he intends to ground any Demand thereon, muſt be ſure not only to intend a Benefit and Advantage to him whom he is about to ſerve, but it muſt be really ſuch. For let him think it never ſo beneficial, and wiſh it never ſo much; yet if it be not ſo indeed, the Loſs will be his; and he can demand no Satisfaction for what he does or expends. For though, ſays *Ulpian* [q], we value not the Succeſs; yet it is requiſite that it ſhould be evidently uſeful or neceſſary, when it is firſt undertaken. And a Buſineſs is ſaid to be *utiliter geſtum*, managed for another's Advantage, when the Perſon tranſacting takes the ſame Care in the Buſineſs, as the principal

[k] D.3.5.10.1.

[l] C.2.19.24.

[m] D.3.5.34. C.2.19.15.

[n] C.2.19.11.

[o] C.2.19.13. Dd. ibid.

[p] In l. 22. D.24.3.8.

[q] D.3.5.10.1.

Party would do himſelf. But it is otherwiſe, if he does not take the ſame care, but rather leaves it undone through Negligence, or not being equal to the Expence of it: For if he undertakes it without Fear or Wit, he ſhall not recover his Expences [r]. From what has been ſaid, an Action *for Buſineſs done* ariſes unto the Perſon tranſacting [f], *viz.* when any one does of his own accord, and without a Commiſſion from another, tranſact and manage another's Buſineſs to his advantage: For if a Mandate or Commiſſion intervenes, and the Perſon does another's Buſineſs at his Requeſt, then this Action does not lie, but an Action *ex Mandato* [s]. And it is the ſame thing, if a Perſon manages another's Buſineſs in the preſence of the principal Party: For then he ſeems to do it *ex Mandato* [t], *viz.* by his Order and Authority. Therefore, whenever a Perſon does another's Buſineſs in his Abſence without an Order and Commiſſion from him, in ſuch a manner that no Action will lie which has a ſpecial Name given it, ſo often may the Agent or Perſon have an Action *Negotiorum Geſtorum*, according to *Azo* [u], though the Concern or Buſineſs relates but to one ſingle Act. See the Gloſs on the Law here quoted [v]. And thus Words pronounced by the Law in the plural Number are verified in one Act alone, becauſe the plural Number (according to *Porcius* on the Inſtitutes [w]) *geminat ſuas ſingularitates*, as may be ſeen in a Statute that puniſhes a Producer of falſe Witneſſes, which has place in reſpect of a Perſon producing but one falſe Witneſs.

[r] D. 3.5.10.1. poſt pr.
[f] D. 3.5.t.t.
[s] D.17.1.20. fin.
[t] D.17.1.6.
[u] In. §. 1.I. 3. 28.
[v] In l. 3. D. 3.5. v. *negotiorum.*
[w] I. 3. 28. 1.

From this Contract, therefore, we have two Actions, *viz.* a *direct* and a *contrary* Action. See the Title of *Actions* in the ſecond Volume. But to the end that the Perſon tranſacting ſhould have an Action *for Buſineſs done*, it is neceſſary that ſuch Buſineſs ſhould be done for the advantage of the other Party, or (at leaſt) thus entred upon, as aforeſaid, tho' (perhaps) it has not its deſired Effect. As when a Phyſician cures the Son of an abſent Perſon, or (at leaſt) undertakes the Cure, and the Son (notwithſtanding) dies; yet the Phyſician ſhall have an Action againſt the Father for Buſineſs done [x]: For it is not always in the Phyſician's power to cure his Patient. But a Perſon that forbids another to do his Buſineſs for him ſhall not have this Action [y], unleſs the Perſon pays Money for him againſt his Will to preſerve his Life: For then the Agent may (notwithſtanding ſuch Prohibition) recover the Money thus diſburſed, becauſe it is the Intereſt of the State that Mens Lives ſhould be preſerved [z].

[x] D.3.5.10.1.
[y] C.2.19.24.
[z] D. 37.9.1. 15.

Buſineſs in *Latin* ſtiled *Negotium*, *quaſi negans otium*, according to *Baldus* [a], is, properly ſpeaking, when a Perſon is employ'd in the Concerns of another Man, though ſometimes the Word is apply'd to a Man that tranſacts his own Buſineſs, as to a Merchant who negotiates and buys a Thing to ſell again in groſs, or by wholeſale: But it is otherwiſe if he works it up, or caſts it into another Form; or if he ſells Wine, Grain, Oil, or the Fruits which he collects from his own Eſtate. A Man may be ſaid to do *Buſineſs* two ſeveral ways, *viz.* either when he really does it in his own Perſon; or elſe when another does it, and he has the Care and Inſpection over it. Yea, according to ſome of the Lawyers, Buſineſs may be ſaid to belong to us four ſeveral ways. As *firſt*, by the Neceſſity of ſome Obligation we put ourſelves under; as when it belongs to us *ipſo geſtu*, as the Lawyers phraſe it. *Secondly*, through a Neceſſity of the Thing itſelf, as when the Buſineſs really concerns ourſelves. *Thirdly*, through a Neceſſity of ſome Office we bear, wherein we have only the Care and Inſpection of it, and do not act ourſelves. And *fourthly*, Buſineſs may be ſaid to be done through the Will and Choice of the Perſon that undertakes it; as when you have redeemed my Goods from the Enemy without any Order of mine. In the firſt Caſe, a Perſon is not liable to an Action, if the Buſineſs be not done, as it ſhould be: nor is the Perſon that employs him, unleſs it be done in Contemplation of himſelf; and, therefore, the

[a] Conſ.101. lib. 4.

Plaintiff

Plaintiff ought to prove this. In the ſecond Caſe, when the Buſineſs really belongs to a Man himſelf; and then he is liable, if he either ordered or knew thereof; for the Buſineſs is done in Contemplation of him, and for his Advantage. *Thirdly*, when the Buſineſs belongs to a Man, as being the Perſon that is to ratify and confirm the Matter by virtue of his Office, it is clear that he is liable. But in the fourth Caſe he is not liable, becauſe it is a Matter of Will and Choice meerly in him, that he thus acted.

A Perſon deputed to tranſact and manage Buſineſs, is not only under an Obligation to him that deputed him, but, on the contrary, even unto others whoſe Buſineſs it was that he did, though they did not depute him, if the other Perſons had really a Concern and Intereſt in the Buſineſs, even though the Perſon deputed and employ'd knew nothing of it. But it is otherwiſe, if they who did not depute him have only the Ratification of ſuch Buſineſs; becauſe then if the Perſon thus deputed was ignorant thereof, he is not liable or obliged to thoſe others. It has been ſaid, that a *Negotiorum Geſtor* is he that has the Management of another's Buſineſs without an Order or Proxy from his Principal. And hence it is, ſay ſome, that ſuch an Agent acquires the Property of the Thing purchaſed unto himſelf, if he buys it in another's Name, until the Perſon for whom it was bought ratifies the Purchaſe: For the Property, according to them, is not in ſuſpence or hanging in the Air. But yet ſome will have it to be in the latter, till ſuch Ratification enſues; which (I think) is the moſt received Opinion.

It is a Rule in Law, that he who has the Management of Buſineſs, which is in common to many, has only an Action *ex mandato* againſt the Perſon that commiſſioned him as being deputed by one alone: But he is liable to an Action *for Buſineſs done* in reſpect to a third Perſon, if he knew the Buſineſs did belong to a third Perſon, or ought to have known it. But only the Perſon who commiſſions a Man to do Buſineſs is liable to an Action *ex mandato*, and not the others whoſe Buſineſs is done. Of which hereafter, under the Title *of Actions*, in our ſecond Volume. And thus I have done with the firſt *Species* of an *improper* Contract.

The ſecond *Species* of an *improper* Contract concerns Tutelage or Guardianſhip, where to the end that a Pupil and a Guardian ſhould be mutually obliged to each other touching the Adminiſtration of Guardianſhip, the Pupil's Conſent is not required, ſince a Guardian may be aſſigned unto a Pupil without his Privity, and againſt his Inclination [b]. Wherefore, they are ſaid to make an *improper* Contract, who thus oblige themſelves: And from hence there ariſes both a *direct* and a *contrary* Action of Tutelage. The firſt was heretofore given to the Pupil, after a Determination of Guardianſhip againſt his Tutor, in order to compel him to render an account of his Adminiſtration, and to reſtore thoſe Things which did belong to the Pupil, and which were in the Guardian's Hands [c]. By a Conſtitution of *Charles* the Vth, Emperor of *Germany*, it is enacted, That a Guardian ſhould every Year render this Account during the Time of his Guardianſhip. But a *contrary* Action lies for the Guardian againſt the Pupil to recover the Expences he has diſburſed and been at in the Management of his Pupil's Concerns. But of theſe Actions I ſhall more largely treat hereafter, under the Title *of Actions*. It has been objected indeed, that ſince a Pupil cannot be obliged by his expreſs Conſent in a *proper* Contract, he cannot *à fortiori* be obliged by an improper or *quaſi* Contract which ariſes from the Law. But to this it is anſwered, That though a Pupil cannot be obliged by his expreſs Conſent, yet he may by a *quaſi* Conſent, which ariſes from the Law [d], becauſe the Law has a compulſive Force. Both theſe Actions are founded upon Equity, by reaſon of the Care which is taken of the Pupil's Affairs [e]: And this Action in Equity is not only given

[b] D.26.5.6.

[c] C.5.51.

[d] D.27.4.1. pr.

[e] D.26.5.20. to D.27.4.1.2.

to a Tutor, but alſo to a Pro-tutor and a Curator againſt a Pupil and a Minor, when the Office of a Guardianſhip expires, to recover all the Expences they have been at in their Truſt [f]. It is given to Heirs and againſt Heirs, and is not barr'd by the Limitation of a Year, but may be brought at any time.

[f] D.27.4.1.1. 2, 3. &c.

A third *Species* of an *improper* Contract is what we call a *Communio Bonorum*; that is to ſay, when two or more Perſons have an Eſtate or Thing between them, not by way of Partnerſhip which is founded on an expreſs Conſent, and is a *proper* Contract, but by Accident, without the Purpoſe or View of either of the Tenants in common: So that here there is nothing done or covenanted between them. As when the ſame thing is given or bequeathed unto *Titius* and *Mævius* jointly, and *Titius* alone (perhaps) collects the Fruits of that Thing or Eſtate, or *Mævius* alone is at all the neceſſary Expences touching the ſaid Thing or Eſtate. In this caſe Equity declares, that *Titius* is bound unto *Mævius* either to divide the Eſtate or Thing which is in common, or elſe to divide the Fruits received from thence, and likewiſe to make a Refuſion of Expences according to his Share and Proportion in the ſaid Eſtate. And hence an Action ariſes, called *Communi dividundo* [g], which lies when this *Communio Bonorum* is *particular*, as between Legataries and others: For if it be *univerſal*, as between Heirs, then an Action *Familiæ erciſcundæ* lies, as I ſhall ſhew by and by. An Action *Communi dividundo* is an Action of a mixt Nature lying againſt the Eſtate and Perſon of a Man; and it is given to thoſe that either by Partnerſhip, or by any other Title, have Things in common [h], in order to compel them to divide ſuch Eſtates, or elſe to divide the Profits thereof [i]. By this Action each of theſe Tenants in common (as our *Engliſh* Laws ſtile them) ſhall be obliged to divide Share and Share alike, and to make Allowances for extraordinary Coſts or Recompence for Damages: or when each of us buy ſeparately from two Perſons two different Shares of the ſame Thing, and have different Titles, they are alſo ſtiled Tenants in common. If the Thing cannot be conveniently divided, the whole may be adjudged to one, and the ſame Perſon ordered to pay a Sum of Money to his Companion for his proportion [k]. But if they cannot agree upon the Diviſion, or upon the Price, it ought to be expoſed to Sale [l]. Or if a Diviſion may be made (as of Lands, *&c.*) the greater Share may be charged with a *Service* to the other [m]; as with a Paſſage to fetch Water from it, and the like. However, every Share muſt ſtand as a Warranty to the Title of the other Shares of courſe, without any ſpecial Agreement [n]; and if the Title of any Part is *evicted* or recovered, they muſt come to a new Diviſion, or make Recompence for the Loſs.

[g] I.4.6.20.
[h] D.10.3.2.
[i] I.4.6.2.
[k] I.4.17.4. & 5.
[l] C.3.37.1.
[m] D.10.2.22. 3.
[n] C.3.36.14.

As to the *Evidences* and Titles belonging to an Eſtate in *common*, the Judge may order them to be left with him that has the beſt Part of the Eſtate [o], and that the others ſhall have authentick Copies thereof, and a Covenant from him to produce the Original, whenever there is occaſion for it. If all have equal Intereſt in the Eſtate, and they cannot agree who ſhall have the Cuſtody of the Writings, the Controverſy may be decided by Lot, or a Friend may be choſen by the Majority of Votes, or nominated by the Judge to have the keeping of them [p], or elſe they may by a general Conſent lodge them in the Publick Archives or Muniment-Houſe.

[o] D.10.2.5.
[p] D.10.2.4. 5. & 6.

A *Communio Bonorum* does not neceſſarily imply a Contract of *Society* or Partnerſhip [q], becauſe it may happen to be ſo in *Fact* only, without Conſent or Agreement: As when an Eſtate deſcends among *Coheirs*, in the Laws of *England* called *Co-Parceners*. Here each will be bound to the other without any expreſs Conſent or Contract, by an Action *Familiæ erciſcundæ*, to divide the whole Inheritance, and to ſettle the Accounts which relate to it: or as when one particular Thing is given to two Perſons

[q] I.3.28.3. & 4.

by

by Legacy or otherwiſe; and theſe Perſons our *Engliſh* Law ſtiles *Joint-Tenants*. In which Caſe an Action *Communi dividundo* will alſo lie for the Purpoſes aforeſaid.

Now an Action *Familiæ erciſcundæ* is an Action *bonæ fidei* [r], of a [s] mixt and univerſal Nature, whereby Coheirs may implead each other touching the Diſtribution or Diviſion of the whole Inheritance, whether it devolves to them from the Father or the Mother [t]. This Action had its Riſe from a Law of the twelve Tables. For it ſeemed neceſſary to eſtabliſh and give ſome Action unto ſuch Coheirs as were willing to depart from a Tenancy in common, whereby they might divide the Effects of the Inheritance among them, leſt ſuch a Community of Goods ſhould beget Striſe and Diſcord. It is called an *univerſal* Action, becauſe it extends itſelf to the whole Inheritace. The word *Familia* in this place ſignifies an Inheritance [u]; and the old Verb *erciſco* denotes the ſame as to divide. But for the better Underſtanding hereof, it is to be obſerved;

[r] C. 3.36.9.
[s] D.10.2.22.4.
[t] C. 3.36.9.
[u] D. 50.16. 195.2.

That as often as two Perſons or more do become Heirs to any one, either by virtue of a Laſt Will and Teſtament, or by an inteſtate Succeſſion, they do *ipſo jure* by making themſelves Heirs, or (as we phraſe it) by making themſelves Executors or Adminiſtrators, become Proprietors and Owners of all the hereditary Goods and Eſtate, according to that part, whereby they are reſpectively Heirs or Coheirs; and therefore a Community of the whole Eſtate is veſted in them, and they are Tenants or Heirs in *common*: and of ſuch Inheritance they become individual Proprietors till ſuch time as they make a Diviſion by this Action *Familiæ erciſcundæ*. For by the Aid of this Action one of them may ſue out a Diviſion, though all the others ſhould diſſent thereunto [v], becauſe no one can be compelled to be a Poſſeſſor or Tenant in *common* [w], for the Reaſon already alledged. Yet ſuch a Diviſion ſhall not prejudice Perſons that are abſent and ignorant thereof [x]: And, therefore, this Action has the Nature of a *real* Action, ſince each Perſon ſues for his own Part in the Eſtate ſeverally. But as it is in another reſpect directed againſt the Perſon of the Heir, who by taking the Heirſhip on himſelf, is obliged to his Coheir, it may be called a *mixt* Action from a *quaſi* or an *improper* Contract [y]. Whence it appears, that this Action does not accrue to any others than the Coheirs [z], and to them only to whom the *Petitio Hæreditatis* accrues, as to the Children of the Man or Woman deceaſed: For it matters not, whether they ſucceed the Father or Mother, nor whether they are Males; nor does it import, whether they ſucceed by Laſt Will and Teſtament, or by inteſtate Succeſſion.

[v] C. 3.36.43.
[w] C. 3.37.5.
[x] C. 3.36.17.
[y] I.4.6.21.
[z] C. 3. 36.3. & 7.

This Action either lies againſt, or elſe it may be brought between the Perſons unto whom it accrues: and as the judicial Proceſs is two-fold, each of the Heirs ſuſtains the Parts both of a Plaintiff and Defendant; meaning, he repreſents both Parties, becauſe each of them demands his Share of the other. Yet for the ſake of regulating the judicial Proceſs, he is deemed to be Plaintiff, who firſt calls the other into Court: But if both Perſons ſummon each other, the Matter is wont to be determined by Lot or Ballotting. Therefore, this Action lies for this end, *viz.* for the Diviſion of the Inheritance, both moveable and immoveable, and alſo for the Diviſion of other Mens Goods and Eſtate, which the Perſon deceaſed was *bonâ fide* poſſeſſed of at the time of his Death by way of Pledge or Pawn, *&c.* and likewiſe for the Diviſion of ſuch Things, whereof he had only the Uſufruct or *Utile Dominium*, as Eſtates lett upon Ground-Rents, and Eſtates charged with Penſions. This Action alſo lies for the Diviſion of an Eſtate or Thing conditionally bequeathed, pending the Condition, if the Eſtate becomes part of the Inheritance; and likewiſe for the Diviſion of a Thing which is in the Poſſeſſion and Hands of the Enemy, if there be any Proſpect of a *Poſtliminy*, or its returning back into the Hands of its Owner [a]. But this Action does not accrue until ſuch time as the Perſon has accepted of the Heirſhip [b]; and it only laſts for thirty Years, it being barred by ſuch

[a] D.10.2.23.
[b] D.10.2.49. fin.

such a Limitation of Time [c]. It can only once be brought or commenced, becauſe it is an univerſal Action: And, therefore, if any Things ſhall remain undivided, the Perſons ſhall be driven to an Action *Communi dividundo* [d]. A Diviſion may be reverſed or reſcinded, if it be made with a putative Heir [e]; or if an Injury intervenes beyond a Moiety of the juſt Value of the Eſtate [f].

[c] C.7.40.1.

[d] D.10.2.20.4.

[e] D.10.2.36.

[f] C.3.38.3.

An Action *finium regundorum* will alſo create an Obligation without the Conſent of the Parties, where ſeveral Proprietors have their Eſtates ſo joined and ſituated, that each Perſon is forced to keep within his own Bounds. For great Care ought to be taken of the Boundaries in open Fields and Lands [g]. For in Buildings there is either a Wall belonging to one Neighbour only, or elſe common to both, which makes a viſible diſtinction. But touching this Action *finium regundorum*, or of dividing and ſettling the Boundaries of Lands, I ſhall have occaſion to ſpeak more largely hereafter under that Title.

[g] D.10.1.4.10.

A fourth *Species* of *improper* Contracts is the *Aditio Hæreditatis*, by which the Heir accepting of the Inheritance, is ſome way obliged to the Legataries by Will, though he never made any Contract with them [h]. But as to his Obligation to the Creditors of the Deceaſed, that is by the Contract of the Deceaſed transferred upon him. And this is alſo true in reſpect of the Adminiſtrators of the Deceaſed. And thus it is by our *Engliſh* Law, that the Heir is bound by the Obligation of his Anceſtor, if he be named in ſuch Obligation or Specialty, and he has a ſufficient Eſtate deſcended to him from his Anceſtor to diſcharge ſuch Obligation: But if the perſonal Eſtate be ſufficient to pay the Debt, and Executors are named in the Specialty, the Heir is exempted [i]. From this *Species* of an *improper* Contract, a Legatary has a perſonal Action by virtue of the Will againſt the Heir, to recover his Legacy or Legacies.

[h] I.3.28.5.

[i] Fitch. n. Br. fol. 120.

A fifth *Species* of an *improper* Contract is payment of that which is not due through Error and Miſtake, though the Perſon rather does it with a Deſign of diſſolving an Obligation, unto which he thinks himſelf ſubject, than with any purpoſe of obliging the other Party to whom he pays it [k]: But becauſe he is ſaid to do ſomething who receives it, he is bound to make Reſtitution of it, becauſe he has received that which is unduly paid; and hence ariſes an Action, which the *Civilians* call a *Condictio Indebiti*, of which I ſhall ſpeak immediately. A Thing may be ſaid to be an *Indebitum*, or not due, four ſeveral ways. *Firſt*, it may be *civilly* a Thing not due, or an *Indebitum*, but *naturally* a Debt, as an Obligation between Father and Son in reſpect of paternal and filial Duty, which is not a civil Debt, and yet it is a natural one. *Secondly*, we have another kind of Obligation, which is *civilly* a Debt, but *naturally* not ſo. *Thirdly*, there is another kind of Obligation, which is *civilly* and *naturally* a Debt; and the Reverſe is not ſo. And *fourthly*, there is one kind of *Indebitum* which becomes ſo by the Help of an Exception [l], as when a Man lends Money with a Pact or Covenant *de non petendo*, &c.

[k] I.3.28.6.

[l] D.12.6.26.3.

Here the Perſon receiving what is not due to him, is bound to Reſtitution, not from any real Contract or Agreement, but by a ſuppoſed or implied Contract, and as much as if he had actually borrowed the Money. For it has a great Affinity with a *Mutuum*, or the Semblance thereof. Two Things are required to create this Obligation. *Firſt*, the Money paid muſt not be due. And, *Secondly*, the Money paid muſt be paid through a miſtake, either of the Fact, or of the Law; for Ignorance of either is ſufficient in this Caſe. If Money not due be knowingly paid, it amounts to a Gift. If it was paid under doubt, it may be recalled; ſince Doubt and Error do admit of equal favour [m]. This may be extended to all Caſes where one Man has the Goods of another without a Title to them; as when the Goods of another

[m] D.2.14.27.

are

are loſt and found, the Finder is obliged to return them to the true Owner. So that this Obligation may happen where the Goods come to a Man's Poſſeſſion by chance, as well as when they are taken from him by ſome voluntary Act. Where a Payment is unlawful, it may be unlawful only on the account of the Perſon *paying*, or on the Part of the *Receiver*, or on the part of the Perſon paying, and the Receiver [n]. If the Fact is unlawful only on the part of him that *pays*, he that receives ſhall not regularly be forced to return it; as when one makes a Preſent to a vertuous Woman with a Deſign to debauch her [o]. If on the part of the *Receiver*, though the Gift or Payment is made, it may be recalled; as when Money is gotten by Threats or Extortion. If the Unlawfulneſs of it was on the part of the Perſon paying, and the Receiver, it ought not to be returned; as when a Woman bargains with a Man, that for a Sum of Money he ſhall have the Enjoyment of her Body, or when a Judge is bribed [p]. It matters not, whether the Condition be executed or no, for the Payment cannot be recovered.

[n] D.12.5.1.

[o] D.12.5.1.1. 2.3.& l.4.

[p] D.12.5.3.

It has been already hinted, that a Perſon who pays a Thing which is not due, may recover the ſame again by a perſonal Action called *Condictio indebiti*, if he did this ignorantly and through miſtake. Hence if a Surety pays a Debt, which is not due, the Debtor has an Action to recover the ſame again, if the Payment be made on his account: And ſo likewiſe may the Surety have an Action, if he has paid Money in his own proper Name [q]. If a Man by miſtake pays that which is not due, he ſhall recover the Thing itſelf, if it be extant or a *Species*: But if it be a Quantity or Sum of Money; that is to ſay, if it conſiſts in a *Mutuum*, then ſo much in Quantity or Value ſhall be recovered: For this *Condiction* is like unto a *Mutuum*. If two Perſons pay one and the ſame Debt, a *Condictio indebiti* lies for the laſt Perſon paying the ſame to recover his Money again. *Titius* having many Creditors (among whom was *Seius*) did privately by Bargain and Sale convey all his Goods unto *Mævius* to ſatisfy his Creditors. But *Mævius* paid a Sum unto *Seius* which had been paid before by *Titius*; and the Acquittance was afterwards found in the Poſſeſſion of *Titius*. And it was reſolved, that *Mævius* ſhould recover his Money.

[q] D.12.6.20.

It became a Queſtion, whether *Caius* appointed *Titius* to be his Proctor *ad Negotia*; who, out of *Caius*'s Subſtance, and in his Name, paid a certain Sum of Money which was not due, and as *Caius* did not ratify the ſaid Payment, his Proctor might thus recover the Money: But if he had paid a Sum of Money which was really due, he could not then recover the ſame. Nor was it neceſſary that *Titius* ſhould wait for *Caius*'s Ratification in this Caſe, becauſe *eo ipſo* that he conſtituted *Titius* to be his general Proctor by giving him the full Power and Adminiſtration of his Goods, *Caius* ſeems to have commiſſioned *Titius* to pay his Creditors. If a putative Heir or Poſſeſſor of Goods ſhall pay a Sum of Money unto an hereditary Creditor, he may recall the ſame. And it is the ſame Thing, if the true Heir ſhall pay more unto ſuch a Creditor than the Amount of the whole Inheritance; for in this Caſe he ſhall recover the Overplus [r]. If a Man ſhall pay Money pending the Condition of an Obligation, he may recall the ſame; but then he muſt do this before the Condition exiſts, or has force [s]. But if he ſhall pay that which is due *ſub incerto die*, he ſhall not recover the ſame, if the Days exiſt [t]. For if I ſhall promiſe to pay Money at the Day of my Death, and pay it before, I may not recover the ſame again as not due [u].

[r] D.12.6.31.

[s] D.12.6.16. pr.

[t] D.12.6.16.1.

[u] D.12.6.17.

If a Man ſhall in his Accounts omit a Deduction of thoſe Expences, which he has laid out on another's Houſe, or the like, he may recover the ſame by this Action, as if he had paid more than was due [w]; and ſo may an Heir recover that which he might have retained in his Hands, if

[w] D.12.6.40. 1.

he has paid the ſame. If an Heir ſhall ſell an Inheritance, and has not retained in his Hands a Debt which is due to him from the Deceaſed (though it be only naturally due,) yet he may recover the ſame from the Purchaſer, becauſe he has delivered to him more than is due [v]. But he who pays Legacies in the Name of an Heir, out of his Money as an Heir, when they are not due, cannot recall the ſame, becauſe he cannot be preſumed to be ignorant of paying the ſame out of his own Money [w]; and, therefore, in this Caſe he muſt prove his Ignorance of the whole Matter. If an alternative Debtor ſhall pay and ſatisfy each of the Alternatives, and one of the Alternatives ſhall periſh in the Hands of the Receiver, he ſhall not recover that which remains as not being due: For that which ſhall periſh, ſhall periſh at the Coſt of the Perſon paying it, and that which remains ſhall go to the Receiver, becauſe it was in his Election to pay either of the Alternatives, and needed not to have paid both [x]. If I ſhall build a Houſe upon your Land, and you get poſſeſſion of it, this Action will not lie for the Recovery of it, or for the Money laid out thereon; becauſe there was no Contract of Buſineſs between us [y]. For though I *bonâ fide* lay out Money, and am at Expences on another Man's Buſineſs without his Orders; yet I have no other Remedy to recover the ſame but that of Retention, unleſs it be (perchance) in Equity, as *Jaſon* obſerves. If a Judge erroneouſly acquits a Debtor by his Sentence, and the Perſon thus acquitted does of his own accord pay a Sum of Money as due, he cannot recover the ſame again [z]. Sometimes the Perſon of a Man gives room for the recalling of a Payment; as when a Pupil pays Money without the Authority of his Tutor, or a Madman, or a Prodigal, without the Conſent of their Curator. And in this Caſe, if the Money be extant and forthcoming, it ſhall be recovered by a real Action; but if it be ſpent, a perſonal Action lies [a].

[v] D.12.6.45.
[w] D.12.6.46.
[x] D.12.6.32.
[y] D.12.6.33.
[z] D.12.6.28.
[a] D.12.6.29.

Mævius made *Titius* his general Proctor *ad Negotia,* who paid a Sum of Money which was not due out of *Mævius*'s Caſh, and in his Name. In this Caſe, if *Mævius* does not ratify ſuch Payment, his Proctor may recover it again: but if ſuch Proctor ſhall pay a juſt Debt, he cannot recover it, and it is not neceſſary to expect the Ratification of *Mævius*; becauſe as *Mævius* made him his general Proctor, and gave him a full Power of acting, he ſeems to have ordered him to pay his Creditors [b]. If a Sum of Money be paid to a Proctor that has not a Mandate or Proxy to receive the ſame, ſuch Sum muſt be recovered from the Proctor himſelf, and not from his Principal or Client [c].

[b] D.12.6.6.
[c] D.12.6.57.1.

As this *Condiction* or perſonal Action is founded upon natural Equity [d], ſo the Fruits, and other natural Acceſſions of the Thing unduly paid, ſhall be recovered by it [e]. But to the end that this Action ſhould lie, it is neceſſary that there ſhould be ſome Buſineſs tranſacted between the Parties; becauſe *Condictions* are perſonal Actions which pre-ſuppoſe ſome Obligation between the Parties. It is a civil Action *ſtricti juris,* though it be founded upon Equity; and it deſcends and paſſes to the Heir [f]. As this *Condiction* is founded upon Equity, the Perſon that recovers the Thing and the Fruits thereof, ought to allow for the Expences of preſerving it [g]. I ſhall next proceed to ſpeak of ſuch *improper* Contracts as are founded upon *Accidents.* For,

[d] D.12.6.66.
[e] D.12.6.15.
[f] D.12.6.12.
[g] D.12.6.65.5.

Obligations may ariſe by *Accidents* without Conſent or Agreement of Parties. And this holds true, according to our *Engliſh* Laws, in reſpect of a Husband, whoſe Wife has contracted Debts before Marriage; for the Husband ſhall in this Caſe be liable to pay ſuch Debts [h]: And, on the other hand, the Husband has all his Wife's Goods bound unto him. But this is otherwiſe by the *Civil* Law, becauſe by that Law the Husband and Wife have ſeparate Eſtates. Fortuitous Caſes do ſometimes come within the Verge of *improper* Contracts by *Accident.* And theſe ſometimes happen by

[h] Fitch. n. Br. 121. C.

by the Fact of one Party only, as by Thieves and Robbers; ſometimes by the ordinary Courſe of Nature, where no Party is concerned, as from Lightnings, Inundations, Tempeſts, or from an Event partly from the Order of Nature, and partly from the Fact of Man, as from Fire kindled by Negligence. The Fact of Man being conſidered more generally, it includes thoſe Events which not only happen by the Fraud or Guilt of Man, (which are to be deſcribed hereafter) but thoſe Events which come to paſs *without* his Aſſiſtance: For *that* only is the Subject of this Place. For he that finds any Thing which is loſt, is bound as it were by Contract to enquire out the Owner, and to return it to him [i]. And this is a Command in Holy Scripture, as we may read in *Exodus* [k] and *Deuteronomy*, cap. 22. v. 1, 2, and 3. I do not reckon hidden Treaſures (which are diſcovered) amongſt the Things which are loſt and found.

[i] D.47.2.43.4.

[k] Cap. 23. v. 4.

If Goods are thrown over-board in a Storm to lighten a Ship, he that was the Owner of the Goods muſt be recompenced by a general Contribution of thoſe that are left [l]; for he threw them out for the general Safety. So if Proviſions fail in a Voyage, if any one has a private Reſerve, he ought to bring it into common [m]. If a Ship is redeemed from Pyrates, all that are concerned in the Cargo, muſt contribute to the Price of it [n]. But if the Pyrates had boarded the Ship, and plundered only ſome part of the Lading, the Owner of thoſe Goods muſt bear the Loſs, and cannot ſue for a Contribution of that which is left. All that is ſaved from a Ship by unloading the Veſſel muſt be eſtimated according to the *Value* of it, not according to its *Weight* or Burden; ſo Jewels, Pearls, Rings, and the Clothes on each Man's Back muſt be reckoned according to their Value, and the Proprietors muſt contribute a fourth, fifth, *&c.* in proportion with the reſt of the Crew, who had more weighty Goods [o]. For it is the Value and not the Weight that creates Care and Concern. If the Main-maſt is cut down to ſave the Ship in danger, there ought to be a Reparation from the Goods with which ſhe was laden [p]. But if the Ship be loſt, each Man may retain what he can ſave, and there ought not to be any Contribution for Goods loſt, or any Diviſion of thoſe Goods which are preſerved in that manner [q]. No, not if there are ſome Goods preſerved in the Long-Boat; for a Contribution is for thoſe Goods that are thrown over-board, and which ſaved the Ship itſelf [r]. If the Goods of one Merchant are caſt over to eaſe the Ship's Burden, and afterwards the Ship is caſt away in another Place, and ſome of the Goods are recovered by the Divers, thoſe muſt be divided to make amends for the Goods thrown over-board [s]; for the caſting of them away conduced to the Recovery of thoſe Goods, becauſe by that means they were brought to ſuch a Place where they might be recovered.

[l] D.14.2.1.

[m] D.14.2.2.2.

[n] D.14.2.2.3.

[o] D.14.2.2.2.

[p] D.14.2.3.

[q] D.14.2.7.

[r] D.14.2.4.

[s] D.14.2.4.1.

Frauds may alſo create Obligations where there is no direct Agreement. For if Debtors paſs away their Goods or Eſtates to defraud Creditors, he that receives them ſhall be forced to return them to the Creditors. And all Gifts, feigned Bargains and Sales, fraudulent Acquittances, and all Acts tending to that purpoſe, ſhall be void [t]. But what a Father gives in Portion with a Daughter is to be excepted, if the Husband was ignorant of the Fraud [u]; becauſe he received what he ought to receive. For if a Payment be made to one Creditor of his whole Debt, who knew the low Condition of his Debtor, and there remains nothing to pay others, this is not fraudulent; for the reſt of the Creditors may blame themſelves for not being more vigilant [w]. But if the Goods of the Debtor are ſeized by the Creditors by virtue of a judicial Proceſs, a Payment to one Creditor is void [x]; or if the Payment is made after the Debtor abſconds, it ſhall be returned and divided equally amongſt the reſt of the Creditors, for the Debtor ſeems by abſconding to have left his Eſtate equally amongſt them.

[t] D.42.8.1.1.

[u] D.42.8.25.1.

[w] D.42.8.6.6. & 7.

[x] D.42.8.10. 16.

[These Frauds were very common amongſt the *Romans*, becauſe they often contracted without writing [v], and even a Mortgage could be made by a verbal Agreement [w]. In *France*, all Agreements and Bargains which exceed a hundred Livres, ought to be in writing, and Mortgages are not valid unleſs paſſed before a Notary, or before a Judge, which makes Forgery almoſt impracticable. So by the Laws of *England*, an Alienation of Lands muſt be in writing, unleſs Copyhold or cuſtomary Eſtates, and all Contracts for the Sale of Goods, at ten Pounds and upwards, muſt be by Note in writing, except the Buyer receives part of them, or gives ſomething in earneſt [x].]

[v] I. 3. 16.
[w] D.20.1.4.
[x] 29 Car. 2. c. 3.

TIT. XXII.

Of Pacts *and* Covenants, *and how many kinds of them; how the Words* Pactum, Pactio, *and* Conventio *differ: Who may make Pacts or Covenants, and who do not prejudice others by making of them. The Effect of Pacts, and why an Action does not ariſe from a nude Pact. A Pact of* Addictio in diem *two-fold, and the Force thereof: Of the* Pactum legis Commiſſoriæ *in Bargain and Sale, and why diſallowed of in Pawns*, &c.

A *Pact* or *Covenant*, in *Latin* ſtiled *Pactum* and *Conventio*, are Terms of a general Signification, which have a reſpect unto all Matters, that are tranſacted and contracted between Perſons who do Buſineſs with each other, whereby their Conſent is ſhewn and made binding to them [y]. A *Convention* or *Covenant* is ſo called from the *Latin* Verb *convenio*, to come together: Becauſe as Men often come together from different Places, into one and the ſame Place; ſo do Perſons covenanting from different Inclinations of Mind hereby come together, and conſent unto one Thing by falling into the ſame Opinion [z]. Hence a Pact or Covenant may be defined to be the Conſent of two or more Perſons to the ſame Act or Deed [a]: And it is either a nude Pact or a *ſimple* Promiſe; or elſe a Contract, in *Latin* called *Pactum veſtitum*, *viz.* when it is founded upon a Conſideration [b]. A nude Pact is a Covenant which conſiſts (as we ſay) *in nudis placiti finibus*, *viz.* when there is not *quid pro quo*, or any Conſideration: And hence, according to the *Roman* Law, generally ſpeaking, no Action ariſes from thence [c], unleſs it be ſpecially confirmed by ſome Law, in which Caſe a perſonal Action founded on ſuch particular Law ariſes from thence [d]. Or, *Secondly*, unleſs ſuch nude Pact be incontinently added to ſome Buſineſs that carries an Equity along with it: In which Caſe the Pact added gives a competent Action from the Contract *bonæ fidei* unto which it is added.

[y] D.2.14.1.1.
[z] D. ut ſupr.
[a] D.2.14.1.2.
[b] D.2.14.7.pr. 1. & 2.
[c] D.2.14.7.4.
[d] D.2.14.16. D.13.2.1.

Now there is no Contract or Obligation, whether it be real or verbal, but what includes a Covenant: For even a Stipulation, which is a verbal or parol Agreement, includes a Covenant, and without Conſent of Parties, is null and void [e]. A Contract is a Covenant, which has ſome certain Name or Conſideration annexed to it, and from its own Nature it produces an Obligation effectual to found an Action thereon [f]: And it is either a *nominate* or an *innominate* Contract. A *nominate* Contract (as already related) is that which has a certain Name fix'd to it; and this Name is the Badge or Diſtinction of ſome certain Form and Action [g], as a Contract *ex empto*, *vendito*, *locato*, *conducto*, &c. An innominate has no certain Name given it, and therefore has no certain Form or Action; but yet, on the account of the Fact itſelf, it produces an effectual Obligation, from whence a general Action *præſcriptis verbis* ariſes [h], which lies from all *innominate* Contracts [i]. TheLawyers make a *Pact* and a *Covenant* to ſignify the ſelf-ſame

[e] D.2.14.1.1.
[f] D.2.14.7.1
[g] D.2.14.7.
[h] D.2.14.7.2.
[i] D.19.5.1. & 2.

ſelf-ſame thing in a large Acceptation of the Words: But in a ſtrict and proper Senſe of the Word, a *Pact* is a *Species* of a *Covenant* or Convention, and (according to the Criticks) derived from the word *Pax*, becauſe Peace is hereby made between two or more Perſons, a *Pact* being an Act of Peace and Concord. But the *Digeſts* will have the word *Pactum* to be derived from *Pactio*, and the word *Pax* to be taken from thence [k]: For the word *Pactio* denotes the Conſent and Agreement of two or more Perſons to one and the ſame thing. And hereby a *Pact* or *Covenant* differs from a *Pollicitation*, as a *Pollicitation* is the Promiſe of him only that offers to do a thing: And, therefore, it is not valid but in certain Caſes [l]. But a Promiſe has a reſpect unto a *Pollicitation*, and likewiſe to a *nude Pact*, and to a Pact made on a Conſideration [m], called *Pactum veſtitum*, as aforeſaid.

[k] D.2.14.1.pr.

[l] D.50.12.3.

[m] D.2.1.1.19.

Having thus defined and ſhewn what a *Pact* is, I ſhall next lay down the ſeveral Diviſions thereof, and in the Sequel of this Title explain the Validity of Pacts; and *laſtly*, diſcourſe of the Effect and Operation of them. Now *Pacts* admit of ſeveral Diviſions: For ſome are ſtiled *expreſs*, and others are called *tacit* Pacts [n]. Of the firſt I ſhall not here principally treat, but of the latter. Thoſe are called *tacit* Pacts, which happen from the Nature of the Thing itſelf, and from a tacit Conſent, and ſuch as we may collect from the Preamble of the Convention: As he who hires a Houſe and furniſhes it, is deemed to have made a *tacit* Pact with the Landlord, that the Furniture ſhould ſtand bound for the Rent [o]. And 'tis the ſame thing, if a Creditor delivers to his Debtor the Bond or Specialty of his Debt: For he is then preſumed to have made a *tacit* Pact *de non petendo*, or elſe the Debtor is deemed to be diſcharged from the Debt, unleſs it evidently appears by ſtrong Conjectures, that he gave him up the Specialty on ſome other account than on the ſcore of a Releaſe. As when the Debtor has ſuch Specialty lent him in order to defend himſelf againſt a third Perſon, or to exemplify the ſame. Wherefore, when a Merchant cancels or croſſes his Account-Books, becauſe he has made ſuch Book *de novo*, he does not by ſuch Act of cancelling diſcharge his Debtor, according to this Rule of Law, which ſays, That *whenever any other Conjecture appears than that of a Gift or Diſcharge, a Releaſe is never preſumed.* There are ſome Pacts or Covenants, that may be made even by abſent Perſons either by Letter or Meſſenger, provided this be afterwards ratify'd and confirmed by the principal Party; and ſuch is called an *expreſs* Pact or Covenant [p]. But a *tacit* Covenant muſt be made in the Parties, or (at leaſt) in the preſence of one of them tacitly conſenting, or doing ſomething that implies a tacit Conſent: As when a Man brings Goods in the Houſe which he rents of me, the Goods are *tacitly* impawn'd or mortgag'd for the Payment of the Rent [q], as already hinted.

[n] D.2.14.2.

[o] D.2.14.4.

[p] D.2.14.2.

[q] D.2.14.4.

There are three *Species* of Covenants or Conventions. The firſt are thoſe that are made on the account of the Publick: As when they are made between ſovereign Princes or States, or when any Thing is agreed between the Generals of an Army, and then it is called a publick Treaty or League. *Secondly*, there are others which are of a private Nature, as being ſuch which concern the Affairs of private Men; and theſe either depend on *natural* or *civil* Equity. Hence there are ſome that are founded on the Law of Nations: And others that are founded on the civil Law of this or that State [r]. All publick Pacts and Conventions have their Riſe, Force, and Effect from Equity, and the common Uſage of all civilized Nations [t]: But private Conventions borrow their Power of obliging from municipal Laws, and are confirm'd thereby [s], as a Pact of Dower, Mortgage, and the like. There are a third ſort of Pacts and Conventions, which the Lawyers ſtile *Sponſiones*, and theſe are often of a publick Nature, but they differ from Leagues and Alliances, becauſe Leagues and Alliances are only made *jure imperii*, and by a Commiſſion from the ſovereign Power; whereas a *Sponſio* is, when thoſe Perſons that have not a Commiſſion from the Sovereign, do promiſe any thing, which properly concerns the ſovereign

[r] D.2.14.5.

[t] D.2.14.7.

[s] D.2.14.6.

reign Power. A *Sponſio* was made by the Interpoſition of a Stipulation of a Penalty in a certain Sum of Money, which the Perſon who promiſed any thing [t]D.21.1.19. loſt, if he did not perform hisEngagement[t]: It was ſo called, becauſe *Sponte fit ab eo, qui promittit.*

Leagues and Alliances are *equal* and *unequal.* The firſt are thoſe which are obligatory on both ſides after the ſame manner. *Unequal* Leagues are thoſe wherein unequal Engagements are ſtipulated, either from the more worthy and honourable, or the leſs worthy and honourable Perſon. Leagues are made either for the ſake of Confederacy, Commerce, or the like. And ſuch may be entred into not only with thoſe of the true Religion, but even with thoſe of a falſe Religion, ſince neither the Law of God, nor the Law of Nature, forbids the ſame. If two Perſons are engaged in a War, and a Prince be in League or Alliance with each ſide, he ought to give his Aſſiſtance (if required) unto that ſide which has a juſt Cauſe. But if neither ſide have a juſt Cauſe, he is then to remain neuter in the Quarrel. If one Party ſhall violate a League, the Party may depart from it, becauſe every Head or Article of it has the Force of a Condition.

[u] Liv. Hiſt. Lib. 34. According to *Livy*[u], and *Cicero* in his firſt Book *de Oratore*, there are three ſorts of Leagues and Alliances, whereby States and Princes do by Covenant contract Friendſhip and Amity with each other. The firſt is, when the Conqueror gives Laws and Conditions of Peace unto Perſons vanquiſhed in War: For as all Things are by Right of Conqueſt given to him that is moſt powerful in War; ſo he may mulct and impoſe what Laws he thinks fit on the vanquiſh'd Party. The ſecond kind of Treaty or Alliance is, when Perſons that are upon an equal Foot in War do make Peace, and contract Friendſhip with each other upon equal Forms of Alliance: For all Things then taken in War are reſtored and recovered by Conventions, and if either of the Parties have been moleſted or put out of poſſeſſion, Matters are uſually adjuſted either according to the Rules of the ancient Law, or elſe as the advantage of each Party can be ſettled and agreed on. The third kind of Alliance is, when Perſons that have never been at Enmity with each other, or (at leaſt) are not Enemies at preſent, do by a ſocial League, or an Alliance of Confederacy, enter into mutual Friendſhip to defend and ſupport themſelves againſt others; and this is called a *defenſive* Alliance: And theſe Perſons do neither preſcribe nor accept of any other Law, than the Terms which reſpect an Act of ſocial Friendſhip: For to grant and accept of Terms of Accommodation, pro- [v] In l. 7. D. 49. 15. perly belongs to the Conqueror, and not the Conquer'd. See *Gothofred*'s Notes[v]. But I ſhall ſpeak more particularly here of Pacts and Conventions of a private Nature, having reſerved a ſpecial Title for the other, in the ſecond Volume of this Work.

[w] D.2.14.2. It has been ſaid, that Pacts are either *expreſs* or *tacit.* The firſt are ſuch as are made by Conſent expreſſed by Words or in Writing[w]. And *tacit* [x] D.2.14.57. Pacts are thoſe which we infer from the Preſumptive meaning of the Parties contracting[x]. Some of the Lawyers think, that an expreſs Conſent is neceſſary in a Pact: But I rather chuſe to follow the diſtinction of *Baldus,* and others, in this Matter, ſaying, That if there be any precedent Tokens or Indications of Conſent, beſides the preſence of the Party, added thereunto, it is a Pact, and the Gift or Grant is good and valid. But if there be no preceding Indications added thereunto, it is otherwiſe: For Preſence alone is not an Argument of tacit Conſent, ſince a ſilent Man ſeems to deliberate with himſelf in the *Interim* of his Silence, rather with ſome kind of Modeſty, than fully to give a Conſent.

[y] D.2.14.7.8. Pacts are alſo *real* and *perſonal*[y]. A perſonal Pact is that which only [z] D.2.14.27.4. extends to a Man's Perſon, with whom it is made, and dies with him[z]: which happens when a Pact is made, that ſuch a Thing ſhould not be demanded of *Titius*; and ſuch a Pact does not deſcend and paſs to another [a] D.2.14.25.1. Perſon[a]. A real Pact is that which is made *generally*, and it extends unto all

all Perſons: As *let it be demanded or ſued for*, and the like. Here the Demand is not confined to the Perſon of *Titius*, but extends to his Heirs and Succeſſors. There are other extrajudicial Pacts which do not produce an Action: And ſome judicial Pacts made in Judgment; and theſe are valid and effectual to produce an Action. But all Acts, generally ſpeaking, are either ſuch as induce an Obligation, and are ſtiled *obligatory*; and others that are made in diſcharge of an Obligation, in our Books called *Pacta Liberatoria* [b]. *Obligatory* Pacts are not perfected, unleſs they are accepted of by each Party: But Pacts made in diſcharge of an Obligation, or Pacts of *Releaſe*, are valid, tho' not made in the preſence of the Party, provided the other Perſon in his Name accepts thereof. And in all Things that are for a Man's Advantage, a Perſon abſent and ſilent is preſumed to accept [c].

[b] D. 2. 14. 17. 1.

[c] D. 2. 14. 4.

Pacts are introduced by the Conſent of the Perſons contracting; but then the Law muſt approve of ſuch Pacts. Wherefore, it is to be obſerved, that a Pact or Contract made about doing an unlawful Thing ought to be reſcinded: For ſuch a Pact or Contract induces no Obligation, becauſe every Man by the Law of Nature is obliged to refrain from the doing of an unlawful Thing or Act. But if the Pact or Contract to do an unlawful Act did induce an Obligation in reſpect of doing ſuch unlawful Action, the Party contracting would not be obliged from doing an unlawful Action, ſince ſuch a Contract implies an Obligation to ſomething that is baſe and unwarrantable, from which a Man ought to abſtain. But when a Promiſe is partly about a Thing that is lawful, and partly about a Thing that is unlawful, the Perſon promiſing is bound to fulfil that part which is lawful, though in no wiſe bound to fulfil the other. Thus a Perſon promiſing an Impoſſibility, though he be not obliged to fulfil his Promiſe, ſince no one is obliged to an Impoſſibility; yet when the Promiſe is partly about a Thing poſſible, and partly about a Thing impoſſible, he is obliged to perform the Thing, becauſe *utile per inutile non vitiatur*.

A Thing *poſſible* is generally ſaid to be that which may be done, and yet is not done: *Impoſſible* is that which is not, nor can it be done. *Metaphyſicks* divide Impoſſibility into three *Species*. *Firſt*, into that which they call an *abſolute* Impoſſibility. *Secondly*, into what they ſtile an Impoſſibility in *ſome certain reſpect*. And *thirdly*, into an Impoſſibility *ex Hypotheſi*, or upon a Suppoſition. We call that an *abſolute* Impoſſibility which carries along with it a full Contradiction, as a ſquare Circle, a Thing to be, and not to be at the ſame time, *&c.* A Thing is ſaid to be impoſſible in *ſome certain reſpect*, which does not contain a perfect Contradiction, but ſuch a Thing as cannot be done by human Power, as to extinguiſh the Sun, to bring the Earth nearer to, or to remove it further from the Sun, and the like. That is ſaid to be impoſſible *ex Hypotheſi*, which (we know) may be effected of its own Nature; but, adding a certain Condition to it, it cannot obtain its Event. In the *Civil* Law, there are four kinds of Impoſſibilities. The firſt we call a *natural* Impoſſibility, or an Impoſſibility according to Nature, being ſuch which cannot happen through the Nature of Things; as for a Man to touch the Heavens with his Finger, or that a Man ſhould bring forth a Child: and if there are any of the like kind, they are *natural* Impoſſibilities. *Secondly*, there is a *legal* Impoſſibility, *viz.* whatever is contrary to Good Manners, or has a Stain of Turpitude in it, or whatever departs from the known Rules of Honeſty, or whatever is done in oppoſition to ſome Law, or contrary to ſome Statute: And this is called an Impoſſibility *of Law*, becauſe the Law makes it impoſſible, eſpecially if it be contrary to Honeſty and Good Manners [d]. The third is ſtiled an Impoſſibility *ratione perplexi*, which truly in its own Nature is a Thing poſſible, but a Perplexity makes it impoſſible; as when you promiſe me ſuch an Eſtate, if you do not give it to *Titius*, or do not give it to *Sempronius*. This is an Impoſſibility through a Perplexity of

[d] D. 18. 7. 15.

Words. The fourth is an Impoſſibility *of Fact*: As when a Man promiſes to give a golden Mountain, and the like. But to return to Pacts.

A *temporary* Pact is, when it is agreed between the Parties, that if the Vendor or his Heirs ſhall, within a certain time, make a Tender of the Price given by the Buyer unto him, the Thing ſold ſhall be returned again by a *Jus Retractûs*: In which Caſe, if the Vendor ſhall make a Tender, and depoſit the Money, he ſhall recover the Thing of the Buyer even againſt his Will [e]. If a Man covenants or promiſes to pay a Debt for another, he binds himſelf and his Succeſſors, and this is not a *temporary*, but a *perpetual* Pact; and an Action *Conſtitutæ pecuniæ* lies not only againſt him, but alſo againſt his Heirs [f]. For a Pact made by the Deceaſed is extended to his Heirs, and he that has ſtipulated for ſuch a Perſon is preſumed to put in Caution for his Heirs alſo, becauſe the Heir is preſumed to be one and the ſame with the Perſon deceas'd. But a perſonal Pact, Privilege, or Uſufruct is not extended to Heirs, becauſe all Things are coherent to the Perſon: nor do ſuch perſonal Pacts belong to the Heirs of the Perſon making them. A Pact limited by Time does not extend its Force beyond that Time. *Sempronius* made *Titius* his Heir, on the Diſinheriſon of his Son, who on his Father's Death threatned to ſue a *Querela inofficioſi Teſtamenti*. The Heir compounded the Matter with him, and was to pay the Son ten Pounds during Life. After the Son's Death his Heir demanded the ten Pounds, pretending that the Obligation was perpetual, and did not expire with the Son's Life. And hereupon it was reſolved, that though the Obligation be good in point of Law, yet the Pact which is temporal ought to be obſerved beyond its Time.

*D.19.5.12.

[f] C.4.18.1.

All Perſons may make Pacts and Covenants, that are not forbidden by the Laws: For this is generally permitted. But Perſons under the Age of Puberty cannot do it, becauſe they are liable to be circumvented; and, therefore, thro' the Weakneſs of their Underſtanding they have no ſuch thing as Conſent to oblige themſelves by any Pact or Covenant, if they ſuffer thereby [g]; but they may by Pacts make their Condition better without the Authority of their Guardians [h]. And upon the ſame foot are Prodigals and Minors that have a Curator. There are ſome Perſons that are forbidden by Nature to make Pacts, becauſe they cannot give a Conſent, as Madmen, Ideots, Infants, Perſons deaf and dumb by *Nature* [i]: But Perſons deaf and dumb by *Accident* may do it by a Nod, Subſcription, and the like [k]. A Son under the Power of his Father might make a Pact with Strangers, but not to the Detriment of his Father [l]: Nor can a Bondman make a Pact to the prejudice of his Maſter. But by the *Civil* Law thoſe Perſons could not contract an Obligation with ſuch, in whoſe power they are, as with a Father or Maſter [m]: But this part of the Law is grown obſolete.

[g] D.4.4.1.

[h] D.2.14.28.

[i] D.44.7.1.

[k] D.2.14.4.

[l] D.44.7.48. D.2.14.23.

[m] D.18.1.2.

Though every one that is not forbidden to make Pacts, may covenant for himſelf, and his Heirs; yet he cannot bind another by his Pact or Covenant, unleſs he has a ſpecial Commiſſion ſo to do, and the Covenant be made in the other Perſon's Name [n]. Pacts may be made touching all Things, which either exiſt in Commerce at preſent, or may have ſuch an Exiſtence hereafter [o], provided they concern the Property of ſuch Perſons as enter into them: For tho' another Perſon's Goods may be ſold or lett to hire [p], yet another Man's Right or Goods cannot lawfully be deduced into a Pact, eſpecially a nude Pact; becauſe an Action does not lie thereupon. It is not lawful to make Pacts touching Things belonging to the Publick, unleſs it be done according to publick Authority, and in purſuance of the Laws which warrant the ſame: For thoſe Things, which are of a publick Right and Nature, cannot be changed by the Pacts of private Men [q].

[n] D.2.14.17.4.

[o] D.45.1.38.17. D.2.14.46.

[p] D.18.1.28.

[q] D.2.14.38. D.50.17.27.

Touching the Effect of Pacts, it is, moreover, to be remarked, that a Pact or Covenant, made contrary to the Subſtance of a Contract, is of no Validity. As for example, I lend you a Book by way of a *Precarium*, and covenant with you that you ſhall have the Poſſeſſion thereof till the Calends of *July*. I may in this Caſe demand the Book ſooner if I pleaſe, and ſuch Covenant is of no force, becauſe it is contrary to the Nature of a *Precarium* [r], and would otherwiſe

[r] D43.26.12.

I

wiſe deſtroy the ſame. For a *Precarium* is that which is granted at the Requeſt of the Perſon that makes uſe of it, to be retained as long as the Perſon that granted it, ſhall think fit [f]. A Pact or Stipulation, whereby a Perſon promiſes to make ſuch a one his Heir, and in conſequence hereof binds himſelf in a penal Sum to pay ſo much [g], in caſe he ſhall not make the ſaid Perſon his Heir, is not valid; becauſe that which is *purely* and *abſolutely* forbidden is never permitted to be done upon any Condition whatſoever [t]. By the *Civil* Law, it is lawful to make Pacts touching Thefts and Injuries [u], becauſe they are by that Law Crimes of a private Nature, tho' otherwiſe by the Laws of *England*, and moſt other States, in reſpect of Thefts at preſent.

[f] D.43.26.1. pr.
[g] C.8.39.4.
[t] D.35.2.27.
[u] D.2.14.27. 3.

Pacts do not conſiſt in any Order or Form of Words, but meerly depend on the Equity of the Convention: For if there be ſuch a Form of Words which induces a Stipulation, it ſeems rather to be a Stipulation contracted, than a Pact. Enunciative Words, as, *I acknowledge you are not bound*, are valid to diſcharge a Perſon [v], but not to oblige him who has not expreſſly conſented [w]. In Pacts and Conventions, general Words have a general Operation in Law, if the Matter will bear it; but if not, then they operate ſpecially. An *obſcure* Pact or Covenant is that, which cannot be underſtood by any means; but an *ambiguous* Pact is that which may be underſtood in two or three Senſes: For a Thing which is ambiguous, is one thing; and a Thing which is obſcure, is another. In a Matter that is ambiguous, we ought to conſider, whether the Thing be ſaid or not: But in an obſcure Thing we ought to conſider what is ſaid. So that tho' whatever is ambiguous, may alſo be ſaid to be obſcure; yet this does not hold *vice verſâ*. Obſcure or ambiguous Words always bind him, who might have declared himſelf more clearly.

[v] D.2.14.40.
[w] Dd. in l.4. C.2.3.

If a Creditor does thro' Error or Miſtake make a Pact with his Debtor *de non petendo*, not to ſue him, ſuch Debtor cannot afterwards repel his Creditor on an Action brought by him, by means of an Exception grounded on ſuch Pact or Covenant [x]. For an Exception of this kind cannot accrue, unleſs it be to him unto whom any Thing is knowingly remitted, and with whom a Perſon may have an Action: For an Exception is the barring of an Action. Therefore to the end that an Exception ſhould lie upon a Pact, it is neceſſary that ſomething ſhould be remitted by Pact, either in a gratuitous manner, or elſe on the account of ſome impulſive Cauſe or Motive, and that this Remiſſion ſhall bar an Action. If that is paid, which is remitted by a Pact, a perſonal Action lies to recover the ſame as being unduly paid [y].

[x] Arg. D.44.7.57.
[y] C.2.3.5. fin.

The Pact of a Proctor or Agent belongs to his Principal [z], of a Tutor or Guardian unto his Ward or Pupil [a], of a Magiſtrate or the Maſter of a College, to the Corporation of the City, or the Body Politick of a College [b], of the principal Debtor unto his Surety [c], if it be of any advantage unto theſe Perſons; but not always when it is to their prejudice [d]. Pacts entred into by Fraud or Fear [e], and ſuch as are repugnant unto Law, have no Operation in Law. General Pacts even appertain unto thoſe Things which are not ſpecially comprehended, or which were unknown, when it appears that there was ſomething in general deſigned touching theſe Matters, and probably tranſacted touching the ſame [f]. Otherwiſe Pacts and Tranſactions, eſpecially ſuch as are ſpecial, are not extended beyond their *Species*, touching which they are tranſacted [g].

[z] D.2.14.10.
[a] D.2.14.15.
[b] D.2.14.14.
[c] D.2.14.21.
[d] D.2.14.12. & 28.
[e] C.2.3.9.
[f] D.2.15.9.fin.
[g] D.2.14.27.

If the Subſtance of a Pact be not obſerved, whatever is done is reſcinded. And the Subſtance of a Pact is that whereon the Contract is founded, or which gives occaſion thereunto by inducing the ſame. For if that be not performed for which an Eſtate has been ſold, the Vendor may demand ſuch Eſtate to be reſtored to him, with the Fruits thereof received [h]. All Pacts ought to be ſtrictly obſerved, unleſs they are taken away by a contrary Pact [i]: For former Pacts may be annihilated by contrary Agreements ſubſequent thereunto [k]. Pacts and Covenants in general were a Contrivance of the Law of Nations, and invented in order to oblige one Man to perform and give ſomething unto another, or elſe not to do and perform ſuch a Thing; and they are Matters of ſtrict

[h] C.4.54.6.
[i] C.4.54.8.
[k] D.2.14.58.

Law

[1] D.2.14.7.5. Gloſſ. ib. Law in the Nature of them[1], unleſs they are apply'd to ſuch Contracts as are Contracts *bonæ fidei*, or founded on Equity: But becauſe a Thing may be tacitly implied in a Pact, therefore even thoſe Things are underſtood to be agreed on (as [m] D.45.1.134. in other Matters of a ſtrict Nature[m]) which are probably intended to be done.

1. D.45.1. 126. pen. Pacts have their force, if not fulfilled, either by an Action or an Exception, which do both of them ariſe from the four-fold Nature of Pacts and Covenants. For theſe Acts do either perempt or abate, or elſe do inform and produce Actions or Exceptions. They perempt an Action, when a Stop or Oppoſition is given to ſome precedent Covenant by the means of a juſt Exception: As when it is covenanted, that what is due in virtue of an Obligation, ſhould not be ſued for, according to what has been already hinted. For if it be ſued for *in Specie*, wherein it is covenanted, the Action may be abated by an Exception *Pacti Conventi*; becauſe it has only this Exception. Thus to abate an Action is not immediately to take it away by a Pact which reſpects the Fact, but by repelling the ſame to render it ineffectual. But Pacts perempt precedent Actions, when they do by their own force and *ipſo jure* deſtroy precedent Obligations: whereas by a Pact *de non petendo* the Obligation ſtill remains.

But tho' Pacts in general are founded on the Law of Nations, yet we have ſome Pacts that are wholly built on the *Civil* Law; as that of *Addictio in diem*, the Pact called *Pactum Legis Commiſſoriæ*, and the like. The firſt is an Agreement entred into between Buyer and Seller, when a Thing is ſold on this Condition, *viz.* That the Seller may contract with any other Perſon, who will give a better Price for the Thing expoſed to Sale, before ſuch a Day, as ſhall be agreed on between them; that is to ſay, unleſs another Perſon ſhall within [n] D.18.2.1. a certain time appointed make a better Condition[n]. For example, when *Titius* ſays unto *Sempronius*, *I will ſell ſuch an Eſtate for a thouſand Pounds*; or *Sempronius* ſays to *Titius*, *I will give a thouſand Pounds for an Eſtate, unleſs another Perſon ſhall before the Calends of* July *next give more for it*: and this Offer or Agreement being accepted by both Parties, the Eſtate hereby paſſes from *Titius* the Proprietor of it, and devolves to *Sempronius*, if no one bids more within that time. This is called *Addictio in diem* from the Law that warrants this kind of Sale, beginning with theſe Words, *viz. In diem addic-* [o] D.18.2.1. *tio, &c*[o]. This Condition may be made two ways, *namely*, That either the Purchaſer ſhall forego his Purchaſe, if better Terms are offered, it being thus a *conditional* Purchaſe; or elſe it may be made, that the Purchaſe ſhall be good and complete, unleſs a greater Price be offered, and then it is a *pure* and *abſolute* Purchaſe, which is reſolved into a Condition. The Advantage of this diſtinction conſiſts herein, *viz.* when the Sale is *pure* and *abſolute*, it hinders not the transferring of the Property on the Purchaſer himſelf, to whom the [p] D.18.2.1.2. & 4. Fruits and other Acceſſions after that time do belong[p], and ſo does the Hazard and Loſs thereof, if the Thing periſhes or decays. Better Terms are ſaid to be offered, either if any Addition be made to the Price, or if the Payment thereof [q] D.18.2.4. fin. & l. 5. ſhall be quicker, and the like[q]. This Pact is in every fiſcal Sale, tho' not expreſſed, ſo that the Exchequer may within a certain time offer better Terms, and take away the Thing from the former Buyer, unleſs he be ready to pay [r] D.49.14.4. as much[r]. The Purchaſer may have an Interdict or Injunction, *quod clam aut vi*, if no better Terms are offered within the Time prefix'd, for that the whole Profit and Loſs belong to him, even before the Sale is transferred and made good. But the Sale is conditional, becauſe it is imperfect till the Condition is fulfilled, and it hinders the Purchaſer from having the Fruits thereof: nor can he claim them by a *real* Action, nor acquire them by *Uſucapion*, as being not in poſſeſſion of the Thing; for Poſſeſſion is neceſſary unto [s] D.41.3.25. *Uſucapion*[s]. But tho' better Terms ſeem to be offered, if any other Purchaſer adds to the Price; yet it is not ſo, if ſuch Purchaſer be not in earneſt, but bids fraudulently, or in jeſt; becauſe a better Condition is not deemed to be offered, unleſs there be a true and real Purchaſer exiſting, and not a ſham Bargain made.

TIT.

TIT. XXIII.

Of Obligations *ariſing from Words; as verbal Promiſes, Stipulations, &c. what they are, and how they are fulfilled: And of Obligations ariſing from Writing.*

AN *Obligation* is not only contracted by ſomething done, and by Conſent alone, but it may alſo be contracted by Words alone, and alſo by Writing. Wherefore, having already, in ſeveral of the foregoing Titles, treated of Obligations founded upon Conſent alone, and on ſomething done; I ſhall here diſcourſe of Obligations collected from bare Words, and from Writing. Obligations ariſing from bare Words, are in our Books ſometimes call'd *Stipulations*, and ſometimes *naked* Promiſes. But before I proceed to ſpeak of a *Stipulation*, it will not be amiſs to enquire into the Etymology of the Word, and into the Definition and Diviſion of a *Stipulation:* Wherefore, I ſhall *Firſt* conſider from whence the Term had its Riſe and Derivation; what a *Stipulation* is; and how many fold it may be ſaid to be. *Secondly*, I ſhall ſhew after what Manner and in what Things it is contracted. And, *Laſtly*, I ſhall conſider in what Things a *Stipulation* cannot be contracted, and when it is null and ineffectual. And this laſt is beſt known *ex Contrario*, *viz.* by knowing what *Stipulations* are firm and valid.

Now a Stipulation is ſo call'd from the *Latin* Word *Stipulum* among the Antients, importing the ſame as *Firmum*, as being derived (perhaps) from the Word *Stips* [a]. Wherefore, a Stipulation is, as it were, a firm and valid Obligation. And from hence the Word *Stipulari* ſignifies the ſame as *Stipem*, or *Pecuniam Obligare*; that is to ſay, to bind a Thing under an Obligation of ſuch a Sum of Money, as we are frequently wont to do in Stipulations. And though a Stipulation was at firſt ſaid to be made by the Means of Money; yet it was afterwards, by a Metaphor, made uſe of to ſignify all verbal Obligations ſolemnly made. The *Gloſs*, on the Word *Firmum*, denotes, that it was uſual to give ſomething in Stipulation as a Sign or Token of an Obligation contracted; as, among us, we commonly give each other our Hand, in Confirmation of ſome Agreement among us, or (as we vulgarly ſay) *to bind the Bargain.* And thus much for the Curious: For I only uſe this Etymology to ſhew the Meaning of the Word, and to point out the Strength of the *Roman* Language.

[a] I. 3. 16. pr.

A *Stipulation* is defined to be a Nominate Contract conceived in a ſolemn Form of Words, whereby a Perſon, being asked the Queſtion, Whether he will grant or do ſuch a Thing; anſwers, That he will grant or do it. It was an Invention of the Civil Law [b], it being entirely unknown to the Law of Nations; and in this Senſe alone it is uſed in that Law, as a Creature of it: But now, in common Acceptation, it imports any Engagement or Promiſe made, whether by a ſolemn Form of Words, or not, by Writing, or without Writing. By the *Civil* Law, Intereſt or Uſury cannot accrue, unleſs a Stipulation intervenes. Moreover, this Stipulation is neceſſary on the ſcore of Sureties: For it is not ſufficient for Sureties to oblige themſelves by a Contract founded on the Law of Nations; and therefore a Stipulation is neceſſary, to the End that ſuch Sureties ſhould

[b] I. 3. 16. 1.

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bind themſelves by a ſolemn Promiſe [c], as every ancient Stipulation was. Perſons often made Pacts and Agreements by Words; one Perſon asking the Queſtion, and the other giving an Anſwer thereunto: But this was not immediately deemed a Stipulation, but only a kind of *nude* Promiſe. For a Stipulation was only then ſaid to be contracted, when the Words of the Queſtion and Anſwer thereunto were apply'd *Animo Stipulandi:* And hence it was, that an Obligation aroſe. And the Words muſt be ſuch as do not only import a Conſent, as ſuch as are uſed to ſtrengthen and conſtitute an Obligation ariſing from a Stipulation. Wherefore, this was one Reaſon of introducing a Stipulation, *viz.* That it might be diſcerned, whether the Promiſe was conceived and made on mature Advice, or not: For a Stipulation conceived in the old Form and Manner was not perfected without due Deliberation; and it is diſtinguiſhed from a *nude* Pact, wherein a Man's Conſent is often lightly interpoſed and had. Wherefore, though it be very juſt and fit that Pacts ſhould be obſerved; yet the *Civil* Law has (notwithſtanding) forbidden any Action to be granted on a *nude* Pact [d], leſt Men ſhould be too eaſily caught and circumvented by Words unadviſedly utter'd and ſpoken [e].

[c] C. 4. 32. 1. C. 8. 41. 12. C. 1. 3. 33.

[d] C. 8. 38. 5.

[e] D. 2. 14. 7. 1.

Heretofore, in a Contract of Stipulation, the Anſwer was to be given in the very ſame Words in which the Perſon was asked: As when the Stipulator ſaid thus, *viz. Do you promiſe?* and the Promiſer anſwers, *I do promiſe.* But if the Stipulator ſhall ſay, *Promittis?* and the Promiſer ſhall anſwer *Spondeo*; the Stipulation is not valid. Wherefore, it ought to be made in the like manner as this, according to the old Law, *viz. Spondes? Spondeo*; *Promittis? Promitto*; *Fide-jubes? Fide-jubeo*; and the like. But it matter'd not in what Language the Stipulation was conceived, whether it was in *Greek*, *Latin*, or any other Tongue [f], provided the Language was underſtood by both the Parties ſtipulating. Nor was it neceſſary that both the Parties ſhould expreſs themſelves in the ſame Language, but it was enough to make a ſuitable Anſwer to the Queſtion propoſed [g]. But this ſolemn Form of Words, anciently made uſe of, was afterwards taken away by a Conſtitution of the Emperor *Leo* [h]; and any Words of this kind were ſufficient, provided they expreſs'd the Senſe and Meaning of the Parties. The *Stipulator* was he who put the Queſtion, or to whom the Promiſe was made; and the Perſon who gave the Anſwer, or made the Promiſe, was ſtiled the *Promiſer.* But it is to be noted by the Bye, That though the Obſervation of this ſolemn Form among the Antients be now taken away; yet was it not vain and fruitleſs, becauſe it cut off all Occaſion of Diſpute about Words, and touching the Minds of the Parties ſtipulating: And now we find, that Judges ſpend ſeveral Years in the Cognizance of Stipulations, *viz.* in deciding whether any Thing was promiſed, or not: So that it were to be wiſh'd that this ancient Solemnity were reſtored again.

[f] D. 45. 1. 1. fin.

[g] I. 3. 16. 3.

[h] C. 1. 3. 50.

It has been obſerved, in our Definition of a *Stipulation*, That it was *a conceived Form of Words*; becauſe this Contract had its Riſe from a ſolemn Intervention of Words: And I have added the Words, *that he will give or do what is asked of him*; becauſe a Stipulation is properly contracted by Words of the future Tenſe, (as before hinted). For if it be contracted by Words of the preſent Tenſe, regularly ſpeaking, (according to ſome Mens Opinion) it is not valid: But I think this is an Error in the Main, even from the Words of the Text itſelf [i]. Some will have it, that the Anſwer ought immediately to follow the Queſtion put, *viz.* without any Act foreign thereunto intervening: For in this Contract (as already ſaid) a Queſtion ought to precede, and an Anſwer enſue thereupon; otherwiſe it was no Stipulation, by the old Law. And this was the chief Difference, that diſtinguiſh'd a Stipulation from other Contracts: It being the Nature of

[i] I. 3. 16. 1.

of other Contracts, that no Obligation can ariſe from them, unleſs either ſome Thing be done, ſome Writing made, or ſome Conſent had.

A Stipulation was heretofore neceſſary on *Acceptilation*, or a Civil Releaſe, and is ſo ſtill in ſome meaſure: For when we wou'd diſcharge a Debtor from any Contract, it was neceſſary to convert the Cauſe or Conſideration of the preceding Obligation into an *Aquilian* Stipulation. Hence it was, that if any one was Debtor to me by Virtue of a Contract of Bargain, of Hiring and Letting to Hire, and the like, I ought to convert the Cauſe of the foregoing Contract into a Stipulation, if I would diſcharge the Debtor by *Acceptilation*, or a Civil Releaſe. In a Word, a Stipulation was invented, for the Conveniency of human Dealing: For the Cauſes or Conſideration of an Obligation are more renew'd by Stipulation, than by any other Contracts [k]. Moreover, every Contract to which a Stipulation is added, is more firm, ſolid and binding, and has more Strength and Weight in it, by reaſon of the Stipulation; which is a great and ſignal Advantage to it. And though a Stipulation added thereunto does not extend the Contract, yet it makes it intenſe. To *extend* a Contract, is to explain and ſtretch it even to other Matters: For Things are ſaid to be extended, when they include more than otherwiſe would be included, in caſe they were not extended. As when a Bow is bent, it is ſtronger and firmer than otherwiſe it would be.

[k] I. 3. 30. 3.

Stipulations are either *pure* and *abſolute*, or elſe *conditional*, or elſe *in diem* [l]. A Stipulation is ſaid to be *purely* made, when the Queſtion is, *Do you promiſe to pay me ten Pounds?* and an Anſwer is inſtantly made, (for nothing ought to intervene) *I will pay you ten Pounds:* I ſay, this is call'd a *pure* Stipulation; and therefore, that which is ſtipulated, may be demanded and ſued for immediately [m]. But yet this Word *immediately*, ought not to be ſo ſtrictly taken, as that the Perſon ſhould come forthwith, prepared with a Bag or a Purſe, to receive the ſame [n].

[l] I. 3. 16. 2.

[m] I. 3. 16. 2.

[n] D. 46. 3. 105.

A *conditional* Stipulation is made, when the Obligation is deferr'd, and reſpects ſome future Event: As, *If* Titius *ſhall be made Conſul, do you promiſe ten Pounds?* Now if *Titius* be made Conſul, the Stipulation has its Effect. In a *conditional* Stipulation, Hope and Proſpect is in the Place of the Debt, 'till the Event happens; and this *Hope* we may tranſmit to our Heirs, if we chance to die before the Event happens [o]. Conditions, which reſpect the Time preſent or paſt, do either immediately toll an Obligation, or elſe do not defer it at all: As, *Do you promiſe to pay the ten Pounds, if* Titius *has been Conſul*, or, *if* Mævius *be now living?* For if theſe Things are not ſo, the Stipulation is worth nothing; but if the Things are ſo, the Stipulation is immediately valid. For thoſe Things which are certain, through the Nature of Things, do not retard an Obligation, though they are uncertain in reſpect of us [p]. Places are alſo wont to be inſerted in a Stipulation: As, *Do you promiſe to pay me at* Carthage? where a ſufficient Time muſt be allowed for the Journey [q]. This Stipulation, though it ſeems to be *pure* and *abſolute*, has yet really a Time added, which the Promiſer may make uſe of, to pay the Money at *Carthage*. And therefore, if a Perſon at *Rome* ſtipulates in this manner, *viz. Do you promiſe to pay me this Day at* Carthage? the Stipulation is invalid and ineffectual; becauſe it is impoſſible for the Promiſer to perform his Promiſe [r]. The Forfeiture of ſuch Stipulation is left to the Diſcretion of an upright Judge, who ought to conſider in what Time it is poſſible for the Promiſer to comply with his Word [s].

[o] I. 3. 16. 4.

[p] I. 3. 16. 6.

[q] I. 3. 16. 5.

[r] I. 3. 16. 5.

[s] D. 45. 1. 137. 2.

A Stipulation *in Diem*, is when the Stipulator ſays, *Do you promiſe to pay me ten Pounds on the Calends of* June? and the Promiſer anſwers, *I do promiſe it:* This is a Stipulation *in Diem*; and though that which is promiſed be immediately due as ſoon as the Stipulation is made, yet it cannot be

be demanded or ſued for before ſuch a Day ſhall come. And though ſuch Day ſhall come, and be ſtill ſubſiſting; yet the Thing promiſed, cannot be demanded and ſued for, unleſs the whole Day be paſt and gone [t]; becauſe we cannot *incommutably* ſay, that he has not paid it at his Day, or at the Day prefix'd and appointed, 'till the whole Day be elapſed; for that the whole Day ought to be at the Diſpoſal of him that pays it, whether he will pay it then, or not. For it is not certain that he will not pay it on the Day on which he promis'd it, until he has paſſed that Day by [u]. For *Ulpian* ſays, that the adding of a Day is in favour of the Promiſer, and not for the ſake of the Stipulator [x]. But if a Stipulation be made in this manner, *viz. Do you promiſe to pay me ten Pounds* per Ann. *during Life?* this is underſtood to be a *pure* Obligation; becauſe, in Virtue of ſuch Stipulation, it may be demanded the firſt Year, and the Obligation is perpetuated [y]. If the Anſwer in a Stipulation be not adapted to the Queſtion, it produces no Stipulation [z]: As when a Perſon ſtipulates, that you ſhall pay him ten Pounds, and you promiſe five; or *vice verſâ:* or if a Perſon ſtipulates *purely*, and you promiſe *conditionally*; or *è contra.*

[t] I. 3. 16. 2.
[u] I. 3. 16. 2.
[x] D. 45. 1. 56. fin.
[y] I. 3. 16. 3.
[z] I. 3. 16. 1.

Secondly, Stipulations are divided into *voluntary* or *conventional*, and into *neceſſary* Stipulations. The firſt are thoſe that are founded on the *Voluntary* Covenants or Conventions of the Parties [a]: And the ſecond are either *Judicial*, *Pretorian*, or *Common* [b]. *Judicial*, are ſuch as proceed from the meer Office of the Judge, even a *Judex Pedaneus*, or an inferior Judge [c]. But by the *Novels* (the Cuſtom of aſſigning a *Judex Pedaneus* being taken away) they interpoſe a Conteſtation of Suit: As Caution *de Dolo* in a real Action, or *Quod metûs cauſâ*, leſt a Thing ſhould become worſe; or Caution *de perſequendo ſervo*, who is run away; or for reſtoring the Value of a Thing, if (perchance) it periſhes [d]. *Pretorian* Stipulations, are thoſe that flow from the meer Office of the *Prætor* [e]. But, by the *Novels*, thoſe are order'd to be made before Conteſtation of Suit: As Caution *de damno infecto*, whereby the Proprietor of ruinous Houſes is to give Security to his Neighbour, to make good any future Damage not yet happen'd [f]. There is alſo another kind of *Pretorian* Stipulation, call'd *Cautio Legatorum:* For if any one ſhall, at the Time of his Death, appoint an Heir, and leave a Legacy to me on Condition, *viz.* If *Cæſar* ſhall come into *Germany*, *&c.* Becauſe I have no Action againſt you as Heir, pending the Condition, and I have a vehement Suſpicion that you will in the mean Time be reduced to Poverty, by ſpending your Subſtance, and by that Means you will render the Teſtator's Benefit to me vain and fruitleſs; the *Pretor* commands you the Heir to re-promiſe ſuch Legacy, and, before the Event of the Condition, to give Caution by Sureties, that you will pay the Legacy when the Condition ſhall have its Event: And if you the Heir will not do this, I may have an Action to be admitted into Poſſeſſion of the Thing bequeathed, or even into the Poſſeſſion of the whole Inheritance. There is a Third kind of *Pretorian* Stipulation, call'd *Stipulatio Ædilitia:* As when the Seller ought not only to give Notice beforehand, if there be any Fault in the Thing ſold, but ought likewiſe to give Caution on this Account [g]. For Example: When I ſell a Bondman, and promiſe to the Buyer, that if any ſecret Fault ſhall be found in ſuch Bondman ſold, I will repay two-fold; or if I ſell a Horſe, and give Caution *de Vitio*, viz. That he does not kick, or run away, and the like.

[a] I. 3. 19. 3.
[b] D. 45. 1. 5.
[c] I. 3. 19. 1.
[d] D. 4. 2. 9. 5. D. 6. 1. 20 & 45.
[e] I. 3. 19. 2. D. 45. 1. 5.
[f] D. 39. 2. 7.
[g] D. 21. 1. 28 & 32.

If a Perſon promiſes any Thing which concerns the Fact of another Man, he does nothing at all: For the Law ſays, that a Man can only promiſe in reſpect of himſelf; becauſe, in reſpect of the Perſon promiſing, it is impoſſible for him to make good the Act and Deed of another Man. Nor is *Raphael*'s Argument of any Weight with me, who ſays, that if this was ſo, a Penalty ſubject to a Stipulation for another is not valid: Which, I think,

is

is false. For hereunto I answer, That if the principal Obligation was, generally speaking, impossible, then a penal Obligation cannot be supported thereby. For another Person's Act and Deed is only impossible in respect of the Person promising; but it is not so in a general Sense; for that other Person may, if he pleases, do that which is promised in his Name. Hence, in such a Case, at least, the Penalty is valid, wherein the Act of the Person promising is put *dispositively*; but the Act of another is put *conditionally*.

When the Law says, there are some Stipulations which consist in *doing something*, and others in *giving*, it plainly intends hereby to speak of the Substance of such Stipulations; because the Verb *consist*, here, has no relation to the naked Figure of Words, but to the Substance of them. And therefore, the Opinion of the old Lawyers seems not true, who thought this to be an imperfect Distinction: For the Law says, there are some Stipulations of a mix'd Nature [h]; and of these we have an Instance in a Stipulation *reddendarum Rationum* [i], *viz.* of rendring an Account. And there are others, of which we have an Example in the Business of Services; where there is not only a *giving* to be performed, but even some *Fact* to be done. As a Stipulation consists in *giving* or *doing something* [k], we may also comprehend the *not doing of a thing*, under this Expression of *doing*: To which it would be convenient to add a Penalty, that the Creditor might not be obliged to prove his particular Damage. A Stipulation may be made from two to one [l], as in other Contracts, and a Payment from one is sufficient; and two or more may be engaged as Debtors to one: And though each is engaged for the Whole, yet all are obliged but to one Payment [m]; but every one is not engaged for the Whole, unless it be so expressed.

[h] C. 8. 38. 13.
[i] D. 35. 1. 82.
[k] I. 3. 16. 7.
[l] I. 3. 17. pr
[m] I. 3. 17. 1.

There are some Stipulations said to be *ineffectual*, and of no Avail in Law, as having no Interest nor Validity in them; because they are not conformable to the Rules of Law: And this may be discover'd several ways, as will evidently appear from the Context of the Law in the *Institutes* [n]; *viz.* either from the Thing which is stipulated, or from some Fact on the Account of the Person who stipulates or promises, or from the Act of him on whom an Obligation is conferr'd [o]; or, lastly, from the Form of the Stipulation itself. For the Thing stipulated ought to be such as may be in the Property of him who stipulates [p]; or else in the Property of him to whom it is stipulated; and it ought to be in that Condition at the Time when made. The Fact ought to be possible [q]. The Person of him who stipulates or promises, ought to be an idoneous Person, well qualify'd to acquire the Thing either to himself, or to another's Use, and likewise able to oblige himself or another. *Lastly*, The Form of a Stipulation ought to be conceived in proper Terms, to shew the Agreement of the Parties in respect of the Thing stipulated; the Manner of Stipulating, and the Quality of the Stipulation ought to be suitable to Law; the Condition ought to be possible [r]; and the Stipulation ought to be made in the Presence of the Parties, so that the Parties hear and understand each other [s]. Hence a Person who is entirely deaf and dumb by Nature, cannot promise any thing by way of Stipulation [t]; because he who stipulates ought to hear and understand the Words of him who promises: And so likewise ought he who promises to understand and hear the Words of him who stipulates. Nor can a Madman contract a Stipulation or verbal Obligation [u]; for a Madman cannot do any Business, whereby he may oblige himself, because he understands not what he does. And 'tis the same thing in a Prodigal that has the Administration of his Goods interdicted him, as being like unto a Madman. The same may also be said of a Fool or an Idiot.

[n] I. 3. 20.
[o] I. 3. 20. 4.
[p] I. 3. 20. pr.
[q] I. 3. 20. 1.
[r] I. 3. 20. 11.
[s] I. 3. 20. 12.
[t] I. 3. 20. 7.
[u] I. 3. 20. 8.

A *Promiſe* is a Term of a larger Signification than a *Stipulation:* For it denotes a Pact, Pollicitation, and every other Kind of Covenant, as well as a Stipulation [x]: And it may be called an unſolemn Stipulation. Therefore the Word *Promiſe* is ſometimes predicated of a Pact, ſometimes of a Stipulation, and ſometimes of any other Kind of Contract; and is to be interpreted according to the Subject Matter [y]. Some Perſons make a *Promiſe* to differ from a *Stipulation*, for that the former only conſiſts in a written Deed or Inſtrument, whereas a Stipulation is always made *ore tenus*, and with a previous Queſtion put, and an Anſwer thereunto, as before related: But a Promiſe is reduced into Writing [z]. The Promiſer is the principal Party, and the *Expromiſſor* is his Surety. *Titius* and *Seius* ſtipulated with *Sempronius* to pay them Two Hundred Crowns. *Sempronius* paid the whole Sum to one of them, and this was adjudged to be a good Diſcharge from the other: For when two Perſons have ſtipulated or promiſed the ſame Sum of Money, it is due in *Solidum* to each of them *ipſo Jure*, as before hinted, and each Perſon promiſing is a Debtor *in Solidum:* And, conſequently, the entire Obligation is diſſolved by the Demand or Releaſe of each of them [a]. And as two Perſons may ſtipulate or promiſe the Payment of the ſame Sum of Money; ſo two Perſons may ſtipulate or promiſe to do the ſame Work; as to build a Houſe, or paint a Hall [b]. *Flaccus* promis'd to build me a Houſe, and to finiſh it before the End of the Year, under the Penalty of One Hundred Crowns. I, out of my own Choice, was content that *Flaccus* ſhould prolong the Time to a Year and a Half, or for two Years. And the Queſtion was, Whether the Penalty of the Stipulation was forfeited, ſince the Houſe was not built before the End of the Year? Herein we ought to diſtinguiſh in this Manner, *viz.* I either prolonged this Time unto *Flaccus*, when we were ſo near the End of the Year, that there was no Hope of having the Houſe compleated before the End of the Year, and then the Penalty is forfeited. Or elſe there was ſo much Time to come, that *Flaccus* might have perfected the Houſe: Yet I, that the Houſe might be finiſh'd with more Eaſe, gave him a longer Time, and then the Penalty is not forfeited [c].

In Alternatives, regularly ſpeaking, the Debtor has his Choice, which of the Alternatives he will perform or comply with [d], unleſs the Perſon to whom the Stipulation is made, ſhall add a Clauſe in Favour of himſelf: For if a Man ſhall ſtipulate or promiſe to give unto *Titius* a Horſe, or to pay him Ten Pounds, the Debtor may perform which of the Alternatives he pleaſes; unleſs he ſhall ſay, That *Titius* ſhall have his Choice herein. For when a Man ſtipulates either *this* or *that* Thing, he is underſtood to render the Stipulation uncertain and alternative. He who promiſes the ſame Thing twice, is not obliged by his ſecond Promiſe, but the Perſon is diſcharged by performing his Promiſe once [e]. For Example, *Titius* this Day promis'd to give me his Servant *Pamphilus*, and to Morrow he comes and promiſes me the ſame *Pamphilus*. Now herein he can only diſcharge his Promiſe but once, by giving me the ſame *Pamphilus*.

Titius and *Caius* were at *Rome* together. *Titius* wanted Money, and coming to *Caius* deſired him to lend him a certain Sum of Money upon Intereſt, which he promis'd to pay unto *Caius* after three Months Time at *Paris*, and he paid a certain Part of the Intereſt. Some few Days after *Titius* came unto *Caius*, and tender'd him the Money which he had borrowed of him, deducting the Sum which he paid for Intereſt. *Caius* refus'd to receive it. After this, when they came to *Paris*, *Caius* would ſue *Titius* there. And it was reſolved that he might, though *Titius* tender'd the Money at *Rome*; becauſe if a Time be added for the ſake of the Creditor, or both Parties, Payment may not be made before the Time [f]; but it is otherwiſe if it be added for the Debtor's Advantage only. He that

[x] D. 50. 12. 3. D. 2. 14. 40.
[y] D. 17. 1. 45. fin.
[z] D. 45. 1. 13. 2.
[a] D. 45. 2. 2.
[b] D. 45. 2. 5.
[c] D. 45. 1. 113.
[d] D. 23. 3. 10. fin.
[e] D. 41. 1. 18.
[f] D. 41. 1. 122. pr.

that is put to receive a Payment, cannot prorogue or adjourn the Time, unleſs the Time and Place are at his Diſpoſal [g]. A Promiſe made upon a diſhoneſt Account or Conſideration, is null and void *ipſo Jure*, whether it be *de præterito*, or *de futuro* [h]. *Erotes* promis'd unto *Caſſius* One Hundred Pounds, to commit Murder or Plagiary on ſuch a Day to come, or if he had done it: This Stipulation was adjudged void, eſpecially in reſpect of the Crime to be committed hereafter [i].

[g] D. 41. 1. 122. 1.

[h] I. 3. 20. 24.

[i] D. 41. 1. 123.

Titius ſold me an Eſtate, and promis'd to give me Sureties on the Account of Eviction. He alſo promis'd to diſcharge the Mortgage, under which Incumbrance it lay. I deſired *Titius* to keep his Promiſe, which he refuſed to do, but was and is in Delay. In this Caſe I may have an Action of Damage, to recover my Intereſt which *Titius* promis'd me [k]. Though a Right naturally ariſes from all Promiſes, becauſe there is nothing more agreeable to human Faith than the Obſervance of thoſe Things which are ſtipulated among Men; yet it has been a Doubt, whether a Promiſe made, even upon Oath, ought to be kept with Pyrates; becauſe, by interrupting Commerce, and plundering Men of their Goods, they infringe the great Law of human Society, as *Florus* expreſſes himſelf, touching thoſe Peſts among Mankind. But of this hereafter, under the Title *Of Pyrates*.

[k] D. 41. 1. 123, 1.

Though in an Alternative or Disjunctive Promiſe, *viz.* when two or more Things are promis'd under a Disjunction, the Nature of ſuch Promiſe is, that each of the Parts is under an Obligation, yet the whole Obligation is taken away by a Performance of one of the Parts bound, it being made by the Debtor bound. In Alternative Promiſes, we ought to diſtinguiſh, whether ſuch Promiſe be made touching the Place where ſuch Payment is to be perform'd, or about the Thing which is to be paid or done. For though it be a Maxim in Law, that in all Alternative Promiſes, the Perſon promiſing has his Election where he will perform his Promiſe [l]; yet this Rule is not always true: For it is only true in reſpect of the Thing to be paid or done, and not in reſpect of the Place where Payment is to be made; becauſe if Payment were to be made at the Will and Pleaſure of the Debtor, in reſpect of the Place, he might ſometimes chuſe one Place and ſometimes another, and by this Means defeat his Creditor. If a Perſon promiſes to pay Ten Pounds unto me, and Ten Pounds unto *Titius*, he is underſtood to promiſe Ten Pounds unto each ſeverally, becauſe the Copulative *and* is wont to be placed between Things different: For if he had promis'd the ſame Sum jointly to us both, he ought to have ſaid *the ſame* Ten Pounds [m], or to have ſaid, That he *promis'd to pay unto me and* Titius *Ten Pounds*, and thus only to have mention'd the Sum but once. *Seius* promis'd to pay me One Hundred Pounds, or to write a Book by *Eaſter* following, and unleſs he paid the Money or wrote the Book, he promis'd to pay the Sum, by way of Penalty. When *Eaſter* came, he had not perform'd his Promiſe. In this caſe he incurs the Penalty, and cannot excuſe himſelf by a Plea of no Demand made, becauſe the Time appointed is a Demand in Law [n].

[l] D. 23. 3. 10. fin.

[m] I. 3. 17. pr.

[n] C. 8. 38. 12.

It has been remarked, That by the *Civil* Law, ſtrictly ſo called, a Perſon who promiſes for another's Fact, *viz.* That he ſhall pay or do ſomething, is not thereby obliged, unleſs he promiſes a Penalty [o]; as when *Titius* promiſes that *Seius* ſhall pay Five Pounds unto *Sempronius*: But if he promiſes that he will ſee that *Seius* pays this Money, he puts himſelf under an Obligation [p]. But as by the *Prætorian* Law, in ſome particular Caſes [q], ſo by a *Canonical* Equity, this ſcrupulous Nicety of Words is entirely laid aſide and not regarded. For, by the *Canon* Law, if any one ſhall promiſe for another's Fact, he is tacitly underſtood, by an Implication of Law, to have promis'd, that he will take Care and ſee that another does it: And therefore he is obliged. And this is agreeable to the Law of *England*, and alſo

[o] I. 3. 20. 21.

[p] I. 3. 20. 1.

[q] D. 13. 5. 14. 1. D. 46. 8. t. t.

to

to that of other Countries, that are in other reſpects govern'd by the *Civil* Law.

A Thing that is by Nature impoſſible, cannot be the Subject of a Promiſe; as when a Man promiſes that ſuch a one ſhall have his Servant *Pamphilus*, that will never die: But the Value of a dead Bondman may be promis'd, becauſe ſuch a Promiſe may be fulfilled [r]. For here are two Things promis'd, *viz.* a Servant, and a Servant that will never die. The firſt may be made good, but not the latter: And, conſequently, the Promiſer is not bound in the laſt Caſe. A Perſon, that is obliged to do any Act by Promiſe, is obliged *ad Intereſſe*, or to pay Damages, if he does not perform the ſame [s]. Thus a Perſon, who promiſes to build a Houſe, or Iſle, or to do any Thing elſe, is, by Interpretation of Law, deemed to promiſe ſo much Money as the Perſon's Intereſt amounts to, in caſe this be not done: And the Law ſays, that Damage is couched under ſuch a Stipulation or Promiſe. And when the Promiſer is in Delay, the Eſtimation of Damage is immediately due. Though a Perſon be not bound by a Nude Promiſe or Pollicitation; yet if he promiſes in this Manner, *viz.* That he will pay a Penalty, unleſs he does ſuch an Act, he forfeits the Penalty ſo far as the Thing promis'd extends itſelf in Value, if he does not perform his Promiſe [t]. A Stipulation or Promiſe, (for ſo the Word *Stipulation* ſometimes ſignifies, even in our Books [u],) conceived in any Terms whatſoever, though it be not in direct and ſolemn Words, is valid, according to the *Code* [x], if thoſe Words do infer the Conſent of the Parties contracting, and are known to the Laws.

[r] C. 8. 38. 8.
[s] D. 45. 1. 84.
[t] C. 8. 38. 5.
[u] D. 12. 6. 26. 13.
[x] C. 8. 38. 10.

The Word *Promitto*, whether it be uſed in a publick or private Inſtrument, is underſtood by Stipulation [y]; and this is by a Preſumption of Law. In a Promiſe, the *Reus Credendi* or *Stipulandi*, is the Creditor, or Perſon to whom a Promiſe is made; and the *Reus Debendi* or *Promittendi*, is the Debtor, or Perſon promiſing [z]: For the *Res* or Affair of both is tranſacted, though now of late only the Defendant is called *Reus*. The Creditor as well as the Debtor in a Promiſe was ſtiled *Reus*, *a Re quæ in Stipulationem deducitur*, and not from the Word *Reatus*, ſignifying Guilt. But others will have it to be *a Re*, *viz.* from the Contract whereby the Perſon is bound. Others will have it *a Re*, which here denotes Firmneſs, becauſe the Perſon is firmly bound: And thus *Virgil*, *Voti Reus*, becauſe he was firmly bound by his Vow. But theſe are the Strictures of Grammarians.

[y] D. 45. 1. 30. C. 8. 38. 1.
[z] D. 45. 2. 1.

I have ſaid before, that he who promiſes the ſame twice, is not obliged by his ſecond Promiſe, as being vain and idle, if made to the ſame Perſon; and if it be made to different Perſons, he is bound by his former Promiſe or Stipulation, and not by his ſecond, unleſs the former be an ineffectual Promiſe. *Marcus* promiſed *Pamphilus* Ten Pounds on ſome Conſideration or other. *Pamphilus*, to be the better aſſur'd of it, after ſome Days ſtipulated with *Marcus* for the ſaid Ten Pounds, which he promis'd him again, which is often done; it being a daily Practice to repeat Promiſes on certain Conſiderations. *Pamphilus* was afterwards willing to bring an Action againſt *Marcus* for the firſt and ſecond Promiſe, and by this Means obtain Twenty Pounds. But the Law ſays, that *Marcus* is only once bound by his Promiſe, *viz.* only by one Promiſe, but it does not declare, whether it be by the firſt or ſecond Promiſe. In relation to Promiſes, we ought to conſider the Cauſes on which Account they are made: For if a Man plays at a forbidden Game, and promiſes the Payment of ſuch a Sum of Money to the Winner, ſuch Promiſe is not valid [a]. And the ſame may be ſaid of all other Covenants, when they are made upon a diſhoneſt Account: As when I promiſe you Ten Pounds to kidnap another's Servant, *&c.*

[a] D. 11. 5. 3.

In a Disjunctive Promiſe, that has a reſpect unto Time or Quantity, that Thing only is underſtood to be promis'd, or deduced in ſuch Obligation or

or Promiſe, which is the leſſer Thing promis'd: And the Reaſon of this is, becauſe it is the Nature of a Disjunctive Stipulation, that when a Thing is *disjunctively* promis'd, though each Part of the Disjunctive be bound [b], yet this is not *ſimply*, but only *conditionally* true, *viz.* That if one Thing be not given, the other Thing muſt be paid or given [c]. Wherefore, if a Man promiſes to give a Horſe or Ten Pounds, and he makes a Tender of the Ten Pounds, he ſeems *à Principio*, only to have owed the Ten Pounds; for in Contracts of this Kind, the Condition has a Retroſpect [d]: And if he ſhall by Miſtake pay any other *Species*, he may recover the ſame again [e]. Therefore, he who promiſes Ten or Fifteen Pounds, does the ſame Thing, as if he had ſaid, *If I ſhall not pay you Ten*, I will *pay you Fifteen Pounds*; and ſo *vice verſâ*. And hence, as a leſſer is always included in a greater Sum, it is the ſame Thing as if he had ſimply promiſed a leſſer: For it is not probable, that a Debtor will pay a greater, when he can pay a leſſer Sum [f].

[b] D. 33. 5. 9. pr.
[c] D. 45. 1.
[d] D. 18. 6. 8. pr.
[e] D. 12. 6. 32. 3.
[f] D. 31. 1. 43. 3.

A Promiſe is proved by an Extrajudicial Confeſſion of the Party promiſing, and with the Help of one Witneſs alone, who depoſes touching ſuch Promiſe: For here two half Proofs are join'd to make a full Proof, as may be done in many Caſes, though not in all. Thus a Promiſe is proved by an Extrajudicial Confeſſion in a Cauſe of *Dower*, when a Perſon, out of Court, confeſſes that he promis'd One Hundred Pounds to *Titius* on the Account of his Daughter's Dowry. If Witneſſes ſay, That *Titius* promis'd *Seius* One Hundred Pounds, becauſe they were preſent and heard him, it is full Proof, for ſo the Depoſition ought to be. A Promiſe is alſo proved by a fulfilling of that which is promis'd.

Though it is the ſame Thing, whether I ſtipulate to pay a Sum of Money on or before the Calends of ſuch a Month [g]; yet, according to Propriety of Speech, it is otherwiſe. For he who promiſes a Sum of Money on the Calends, ſpeaks only of the very Day of the Calends, as *Sulpitius Apollinaris* obſerves in *Aul. Gellius* [h]; though by Interpretation of Law, he may pay it even before the Day of the Calends, becauſe the Law judges that Day to be added in his Favour [i]. But if it appears to have been added in Favour of the Creditor, it would be otherwiſe. But he who indiſtinctly promiſes to pay it before the Calends, though it ſhould ſeem to be done in Favour of the Creditor, yet he may pay it before the Calends come, and that by reaſon of the Propriety of the Words, which, when they are clear, decide the Diſpute, as *Jaſon* [k] here notes. Again, he who promiſes to pay before the Calends, is deemed, in Propriety of Speech, to have promis'd within the very Day which begins the Calends: And therefore, what he has promis'd ſeems to be due that very Moment on which the Calends begin, though, by a certain Tenderneſs of Law, he has the whole Day granted him to pay it. I ſhall end this Title with *Pollicitations*.

[g] D. 45. 1. 13.
[h] Lib. 12. c. 13.
[i] D. 45. 1. 38. 16.
[k] In L. 56. D. 45. 1.

Now a Promiſe may be made four ſeveral ways in Law, *viz.* either by Pact, Stipulation, Pollicitation, or by a *Conſtitutum*, as the *Civilians* call it. A *Pact*, as before noted, is the Conſent of two or more Perſons to one and the ſame Thing [l]. But a *Pollicitation* is the Nude and Spontaneous Promiſe of one Perſon alone, who, out of a Benignity of Temper, offers or promiſes to do ſomething for the State [m]: And therefore it differs from a Pact and a Contract, which is founded on the Conſent and Agreement of two or more Perſons. And ſuch Pollicitation may be made either by Man or Woman, provided ſuch Promiſe be made on a juſt Account, as on the Score of ſome Honour decreed, or to be decreed them [n]. But a Pollicitation has Place very ſeldom; becauſe it is made to a Perſon preſent; and as it reſpects his Advantage, the Perſon preſent is looked upon as conſenting [o], which makes it a Nude-Pact. And hence, by reaſon of

[l] D. 2. 14. 1.
[m] D. 50. 12. 3.
[n] D. 50. 12. 6, 7 & 9.
[o] D. 17. 1. 18. D. 17. 1. 6. 2.

of a mutual Conſent, which is expreſs'd in the Perſon promiſing, and a tacit Conſent in the other, ſuch Contract comes under the Name of a *Pact*, according to *Alexander*, *Imola*, and others [p]: But *Decius* and *Aretinus* think otherwiſe; becauſe they will have an *expreſs* Conſent to be neceſſary to a *Pact*. *Baldus* ſays, That, in a large Senſe, a Nude-Pact comes under the Appellation of a Pollicitation, if ſuch Word be found in a Deed or Inſtrument, to the End that ſuch Deed ſhould have ſome Operation in Law. But *Alciatus* will not allow of this Doctrine; becauſe, in a Diſpoſition when the Matter is doubtful, we ought not to recede from the Propriety of a Word. If a Pollicitation be made by an Epiſtle, and the Party accepts of the Thing offer'd, he ſeems to conſent thereunto by his Acceptance.

[p] In L. 1. D. 2. 14.

Regularly ſpeaking, a Perſon is not bound by a Pollicitation, unleſs it be made to the State, on the Account of ſome Honours conferr'd; or unleſs it be veſted with the Coherence of a Contract: For a Pollicitation made to a private Man does not produce an Obligation, though there be, or may be, a juſt Cauſe of making it. The Obligation of a Pollicitation paſſes to a Man's Heirs, though ſometimes ſuch Obligation may be diminiſh'd [q]: But yet it does not paſs to the Heir, if a Man has promis'd Money on the Score of ſome Honour decreed him, and ſhall die before he has enter'd on the Magiſtracy [r]. Touching Pollicitations that are made in Cities, the Judges in ſuch Cities have Cognizance of them [s], who ought to ſee that the Form added to ſuch Pollicitation be obſerv'd [t], unleſs the Utility of the State requires otherwiſe. But the ſubtle Diſtinction of *Pollicitations* and *Nude-Pacts*, according to the *Roman* Law, is now taken away in *Holland* by Cuſtom, as *Groenwegen* aſſures us [u]. For not only an Exception, but even an Action, ariſes there from a Nude-Pact: And ſo likewiſe a Salary, founded upon an uncertain Promiſe or Pollicitation, may be ſued for, and taxed, according to the Quality of the Perſon, and the Nature of the Thing he is employed on. A Pollicitation made unto God, is called a Vow, and is binding: But then, if the Perſon that makes it be a Bondman, or Son under the Power of a Father, he ought to have his Maſter or Father's Conſent [x]. The Thing which is vowed becomes ſacred, when it is paid: But it does not become ſo by the Promiſe of ſuch a Vow alone.

[q] D. 50. 12. 6 & 9.

[r] D. 50. 12. 11.

[s] D. 50. 12. 8.

[t] D. 50. 12. 10.

[u] De LL. Abr. in C. 3. 34. 10.

[x] D. 50. 12. 2.

[Though the *Roman* Law made a Diſtinction between ſolemn and unſolemn Promiſes, yet this is not according to the Law of Nations, which directs all Promiſes to be underſtood according to Equity and good Conſcience. Nor is this Difference made by the Laws of *England*, between a Promiſe, Stipulation, or Nude-Pact; only a Nude-Pact, is, where a Man makes a Gift, Bargain, or Sale of his Goods or Lands, without a certain Conſideration paid, or recoverable by Action, for them. See *Doctor and Student* [*]. But if he to whom a Promiſe of Recompence is made, undergoes any Charge or Buſineſs, and has perform'd it by reaſon of ſuch Promiſe, he has his Action; for then it is not a *Nude* Covenant [†]. A Bond or Obligation is good without a Conſideration; but a ſimple Note in Writing is not good.]

[*] Lib. 2. c. 24.

[†] Ibid.

TIT. XXIV.

Of Sureties, *and the ſeveral Diſtinctions thereof; why taken, and in what Obligations, and in what Sum the Surety is bound. Of the Sureties of Heirs, and what if there are ſeveral Sureties. Of the Benefit of* Excuſſion, Diviſion, *and of the Aſſignment of Actions in regard to Sureties, and what they are,* &c. *and of the Surety's Action againſt the principal Party,* &c.

THAT a *Stipulation* and Promiſes may be more certain, Caution and *Sureties* may be added to them: So that there is one kind of Stipulation, which is *principal*; and another, which is *acceſſory*, as that of *Sureties*. Wherefore, I ſhall here conſider what a *Surety* is, and how he differs from others that are bound beſides the principal Debtor. *Secondly*, I ſhall ſhew unto what Obligation he may accede. *Thirdly*, unto what Action he is liable. And, *Fourthly*, what Benefits of Law he enjoys.

A *Surety*, in *Latin* call'd the *Fidejuſſor* and *Adpromiſſor* [y], is he that binds himſelf for another in the ſame Contract, by way of Stipulation with the Principal, for the greater Security of the Creditor or Stipulator [z]. This is done without *Novation* or Renewing the Obligation: And therefore a Surety differs from an *Expromiſſor*, who, by *Novation*, wholly takes the Obligation of another Perſon on himſelf, and diſcharges the Principal [a]. Or, an *Expromiſſor* is he that principally obliges himſelf for a Perſon that is not bound by any Obligation; as a Servant or Bondman is not, according to the *Roman* Law. And as a *Conſtitutor* is he that obliges himſelf by a *nude* Pact or ſimple Promiſe; ſo a *Sponſor* is he that does of his own Accord, without being requeſted, intercede in an Obligation for another. And, *Laſtly*, a *Mandator* is he who asks and commiſſions another to be a Surety for him. Theſe are the ſeveral Diſtinctions we meet with in our Books.

A *Surety* may be added unto every Obligation, whether it be Civil or Natural [b], Principal or Acceſſory [c], whether it ariſes from a Contract or a Treſpaſs, provided the Action be brought for a Pecuniary Penalty: For where Corporal Puniſhment is ſued for, a Surety is not admitted, unleſs it be for the Perſon's Appearance in Court [d]. Though Sureties are not obliged, unleſs it be by way of Stipulation, wherein the Party ought to be firſt interrogated, Whether he be willing to ſtand bound, or not? and hereupon an Anſwer ought to enſue: Yet if a Perſon be preſent at the Acts of Court, and ſuffers himſelf to be ſet down as a Surety, ſuch Sufferance (according to *Bartolus* [e]) has the Force of Stipulation; for an Act done in Court is of greater Force than an Act done extrajudicially. All Sureties are bound as Acceſſories, as they accede to the Obligation of another Perſon. I ſay, a Surety cannot be obliged without Words; and therefore, in all Suretiſhips Stipulations are neceſſary: Nor can a Surety be obliged before his Principal; nor is a Surety obliged, when the Obligation of the Principal is not valid. Thus a Surety accepted of on the Account of a Contract, which the Law diſallows of, is not bound thereby [f]:

[y] D. 46. 3. 65. 4.
[z] I. 3. 21. pr. & 1.
[a] D. 12. 4. 4.
[b] I. 3. 21. 1.
[c] D. 46. 1. 8.
[d] D. 48. 3. 2 & 3.
[e] In L. 4. D. 27. 7.
[f] D. 46. 1. 46.

thereby: But in every Contract a Surety is bound to ſhew himſelf an honeſt Man, and to perform what he has promiſed.

All Perſons may become Sureties, who may be obliged, unleſs they are
[g] D. 16.1.t.t. ſpecially forbidden; as Women [g], Soldiers [h], Pupils and Minors without
[h] C 4.65.31. the Authority of their Tutors and Curators [i], and Bondmen without the
[i] D. 46.1.48. Privity of their Lord [k]. But though Pupils and Minors may bind them-
[k] D.46.1.19. ſelves, with the Authority of their Tutors and Curators, yet they may be reſtored *in Integrum.* If Minors have no Curators aſſigned them, they
[l] D.45.1.101. may bind themſelves, and ſuch Obligation ſhall ſtand good againſt them [l]: And it is the ſame thing, if they knaviſhly impoſe upon the adverſe Party,
[m] C. 2.43.t.t. by pretending themſelves to be of full Age [m]. A Surety may be given either for a preſent or future Obligation, provided it be certain that ſuch
[n] D.46.1.37.3. principal Obligation will enſue [n]: But yet he cannot be convened, before
[o] D. 46.1.57. the Principal is bound [o]; nor is obliged to any other Thing than that very
[p] D.46.1.8. 7 & 8. Matter which is comprehended in the principal Obligation [p]. But a Surety may promiſe a Penalty, wherein the Principal is not bound, and ſuch Surety ſhall be obliged to undergo and ſuffer ſuch Penalty; yet Sureties are bound no further than they have promiſed. A Surety, that is bound for ſeveral Perſons, may pay for which of them he pleaſes; but in a doubtful Caſe, he ſeems to have paid for him for whom he was firſt
[q] D.46.3.24. bound [q].

A Perſon bound to give Caution by Sureties, is diſcharged by giving the ſame by Pawns and Pledges, even contrary to the Will of the Creditor: For a Perſon bound to find Sureties, may give Pignoratory Caution, if he pleaſes. A Perſon alſo obliged to give Caution by Sureties, is, in Judicial Matters, remitted to his Juratory Caution, if he cannot find Sureties, provided he makes Oath, that, upon his beſt Endeavours, he cannot find Sureties, and that he will perform and do what he has given Caution to do; and the Impotency of finding Sureties, is proved by the Oath of the Party alone. A Surety that is bound for the principal Sum, is alſo bound for Uſe and Intereſt, unleſs he only promis'd
[r] D.46.1.68.1. ſpecifically, and for a certain Sum alone [r]. A Perſon is not ſaid to be an idoneous Surety from the Richneſs of his Subſtance, but likewiſe from the Facility of Convening him: For, to what End is he a Surety, if he cannot be convened in Judgment? And therefore, he who gives a Perſon for his Surety, who cannot be convened or impleaded in Law, or of whom there is no Hope that he can be an idoneous Surety upon changing his State and Condition, ſeems to give no Surety or Caution at
[s] D. 46.1.3. all [s]: For a Perſon ought to give ſuch a Surety in Judgment, as may be convened and obliged by the Caution given. For the giving of Sureties, was invented to render Creditors more ſecure of their Debts, and the like; and this is the only End and Uſe of Suretiſhip: And, for this Reaſon, it is a received Doctrine, That he who is obliged to give a Surety, is not thereby diſcharged, if he gives ſuch a Perſon for his Surety, who is in ſuch a ſtrong Place of Defence, that the publick Executioners of the Law
[t] D. 2.8.1. Gloſſ. ibid. cannnot come at him [t]; or if he gives him for a Surety, who, by reaſon of ſome Privilege, cannot eaſily be convened; or if he gives a cavillous
[u] In L. 2. D. 2.8. Lawyer for his Surety, (according to *Bartolus* [u]); or a Perſon who is
[x] Nov. 53. not in Poſſeſſion of a real and immoveable Eſtate [x]; or ſuch a Perſon as is of a different Juriſdiction, unleſs he waves the Privilege of his Juriſ-
[y] In c. 34. X. 1.29. diction, (as *Baldus* obſerves [y]): For a Perſon who is of an exempt or privileged Juriſdiction, is not deemed an idoneous Surety *de Judicio*
[z] D. 2.8.7. *ſiſtendo*, unleſs he waves his Privilege of Court [z]. If Caution by Sureties be neceſſary, and a Perſon cannot eaſily give ſuch Caution in the Place, he ſhall be heard, if he be ready to give ſuch Caution, in ſome other
[a] D. 2.8.7.2. City of the ſame Province [a]. And neceſſary Caution is ſuch, unto

which a Perſon is obliged by Law, though his Cauſe be a voluntary Cauſe [b]. [b] D. 2. 8. 8. 6.

Though it was formerly lawful, by a Law in the *Code*, for the Creditor to chuſe which of the Perſons he would ſue, *viz.* either the principal Debtor, or his Surety [c], unleſs it was otherwiſe agreed upon between the Perſons contracting; yet at this Day, by a *novel* Conſtitution, the Principal, otherwiſe the *preſent* Debtor, ought to be convened before the Surety or Perſon bound for him [d], if both Parties are preſent and forthcoming; then, after this, he may convene the Surety, and, laſtly, the Poſſeſſor of the Debtor's Goods. And this Order ought to be obſerved in the convening of a Surety, unleſs the Surety has, by the Interpoſition of an Oath (according to the *Canon* Law) promis'd Payment of the Money unto the Creditor himſelf [e]. But if the Debtor ſhall (pending Suit with his Creditor) ſell or alienate the Thing engaged to him, then the Creditor may, in this Caſe, convene the Purchaſer, even without excuſſing the principal Debtor [f]. But if it be certain that the principal Debtor is inſolvent, the Creditor may alſo then ſue the Surety or the Poſſeſſor of the Goods thus engaged [g], if the Surety or Poſſeſſor does not object to him an Exception of *Excuſſion*, as he may do, (according to *Bartolus* [h], and the *Gloſs* [i].) A Surety is not added, unleſs it be to a perſonal Obligation; and he may be added not only to the Obligation of one who is to give or pay a Thing, but alſo to the Obligation of one who is to perform a Thing.

[c] C. 8. 41. 5.
[d] Nov. 4. c. 1.
[e] X. 2. 24. 9.
[f] C. 8. 14. 14.
[g] D. 45. 1. 116.
[h] In L. 34. D. 21. 2.
[i] In L. 14. D. 12 1.

The Obligation of a Surety is a tranſitory Thing, (for it deſcends to, and obliges his Heirs): But a Surety in a doubtful Caſe or Matter is not obliged, unleſs it be to perform that which his Principal is enjoin'd by Law to do; for the Obligation whereby a Surety is bound ſhall become null and void, if the Obligation whereby the Principal is bound is null and void. For as a Surety cannot be added to a Contract impugn'd by Law; ſo neither can he be added where there is no Natural or Civil Obligation. Sureties are received and made uſe of; becauſe that which cannot be recover'd (perhaps) of the Principal, may be recover'd of them. The principal Debtor is ſometimes releaſed or exempted from an Obligation, and yet his Surety remains bound at the ſame time; ſo that he may be convened, though the principal Debtor may not: As when he is exempted by a Condemnation or Confiſcation of his Goods [k]; or when the Debtor dies without an Heir; or when the principal Debtor ſurrenders up all his Goods unto his Creditors by way of *Ceſſion*; or is reſtored *in Integrum* on the Account of Nonage [l]. If the principal Party ſhall undergo a civil or natural Death before he has been guilty of any Delay, his Surety *de Judicio ſiſtendo* is diſcharged: But 'tis otherwiſe, if the Principal dies after he has incurr'd a Delay in his Appearance [m]. *Titius* was Bail or Surety for *Sempronius*, *de Judicio ſiſtendo*; and, on the Death of *Sempronius* the Principal, the Judge order'd *Titius* to appear in Court, whereas the Principal was now dead. In this Caſe the Judge's Precept is not valid; nor is *Titius* liable for not exhibiting the Principal. And it is the ſame thing, if he died after the Judge's Order, and before the Day of Exhibiting; for in this Caſe he is not liable. But if *Titius* had delay'd to bring him into Judgment, and he had died after ſuch Delay, *Titius* would have been liable.

[k] D. 46. 1. 60 & 47.
[l] D. 4. 4. 14. pr.
[m] D. 2. 8. 4.

An Action *ex Mandato* accrues to a Surety, againſt the principal Debtor, or his Heir, without aſſigning the ſame over to him [n]: But an *Hypothecarious* Action does not lie for him without ſuch Aſſignment [o]. An Action *ex Mandato* is an Action which ariſes from ſome Order or Requeſt made by one Perſon unto another: And an *Hypothecarious* Action is an Action which flows from a Man's plighting his Goods unto another. The Pact or Covenant of one Surety does not hinder a Creditor from bringing

[n] D. 17. 1. 36. 3.
[o] D. ut ſupra.

his Action againſt another Surety, where two are bound to him for the
[p] D.46.1.16.2. ſame Debt [p]. For Example: I lent unto *Titius* twenty Pounds; for the Payment of which, he gave me Caution by two Sureties, *Seius* and *Mævius*. *Seius* came to me, and ſaid, *Becauſe you convene me in twenty Pounds, I will give you five Pounds not to convene me.* Whereupon, I the Creditor was contented: And the Queſtion was, Whether, by reaſon of this Pact made with *Seius*, *Mævius* the other Surety be diſcharged? And it was held, that he was not, and that I might demand the other fifteen Pounds from the other Surety; nor can he object any Exception unto me. But if I would demand the other five Pounds, he may repel me with an Exception *of Deceit*. A Surety may object an Exception in the Behalf of
[q] D.46.1.16.1. the principal Debtor and Defendant, even againſt his Will [q]; becauſe it is much ſafer not to pay a Thing which is not due, than afterwards to endeavour the Recovery of it when it is paid.

A *feigned* Payment made by a Surety, gives him an Action againſt the principal Debtor. As for Example: *Titius* was indebted to me in the Sum of an hundred Pounds; for the Payment of which he gave me a Surety or Perſon for him. This Surety, *animo novandi*, delegated or aſſigned his Debtor for the Payment of the hundred Pounds, which he call'd a *feigned* Payment in Law. In this Caſe the Surety may have an Action againſt the principal Debtor. If a Debtor has given ſeveral Sureties for one and the ſame Sum, they were all and each of them bound *in Solidum*, how many ſoever they were in Number, and whether this
[r] D. 46. 1. 26. C. 8. 41. 23. Matter were expreſly agreed upon, or not [r], and the Creditor might chuſe which of them he would ſue *in Solidum*, without convening the principal Debtor; and if the Perſon whom he choſe to ſue did not ſatisfy the Debt, he might have recourſe to another; the other Sureties not being diſ-
[s] C. 8. 41. 23. charged by his Election [s]. But the Caſe was different, if the Suretiſhip was conceived and drawn in this manner, *viz. Solidum aut partes viriles fide tuâ ſpondes?* that is to ſay, Do you promiſe to become bound in the Whole, or only according to your Rate and Proportion? For then the Creditor was obliged to ſummon each of them *pro parte virili* in the firſt Place; and this was the ancient Law.

But afterwards the Emperor *Adrian*, a Friend to Equity and good Conſcience, granted the *Beneficium Diviſionis*, where the Debtor has many Sureties for the ſame Debt, whereby each of them is obliged *pro parte*
[t] I. 3. 21 4. *virili*, and not for the whole Debt [t], as formerly. As when three Sureties have given Caution in the Sum of fifteen Pounds, each of them ſhall only be liable in the Sum of five Pounds. But this Benefit or Indulgence
[u] D. 46. 1. 26. does not give Right [u], but only an Exception unto the Sureties from the Time of conteſting of Suit, provided all the Sureties are ſolvent at ſuch
[x] I. 3. 21. 4. Time [x], and are of the ſame Juriſdiction. So that this Grant of *Adrian* did not toll the ancient Law, but leaves it as it was before, and only gives an Exception; and after ſuch Exception the Damage belongs to the
[y] D.46.1.51.4. Creditor *y*. But if either of the Sureties be inſolvent at that Time, that
[z] I. 3. 21. 4. Grant onerates all the reſt [z]. And if the Creditor ſhall recover his whole Debt of one of the Sureties, the Damage ſhall fall upon him alone, if the Perſon for whom he ſtood Surety be inſolvent; and he muſt impute it to himſelf, ſince he might have relieved himſelf by the Benefit of *Diviſion*,
[a] I. 3. 21. 4. or *Adrian*'s Grant [a]; nor can he convene another of the Sureties, unleſs
[b] D.46.1.39. the Creditor aſſigns the Action over to him [b].

I have hinted, that if one of the Sureties be convened for the whole Debt, he may object this Exception or Grant of *Adrian*'s, provided the other Sureties are ſolvent: And if it be a Doubt, whether they are ſolvent or not; yet the Perſon that deſires this Benefit of *Diviſion*, ſhall be heard, if he will either at his Coſt prove them ſolvent, or if he offers to convene his

his Fellow-Sureties, at his own Charges, for the Payment of their Shares c. But if either of the Sureties becomes inſolvent after the Diviſion made, the Creditor ſhall not burden the others any farther, but ſhall take the Damage to himſelf. The Time of conteſting Suit, is the Time wherein we ought to conſider whether they are Solvent, or not [d]. And herein this Benefit differs from that which accrues to ſeveral Tutors and Guardians: For in the laſt Caſe we have a reſpect, when the Guardianſhip is ended, and then conſider whether they are ſolvent, or not [e]. For if the other Sureties are ſolvent at the Time of conteſting Suit, it is enough, though they ſhould afterwards ceaſe to be ſo [f]. The Surety convened *in Solidum* ought to pray the Benefit of this Grant: For *Adrian*'s Grant is not *ipſo Jure* divided among the Sureties, but ſuch Exception ought to be expreſly objected unto the Plaintiff. Hence it is, that if a Surety, omitting ſuch Exception, ſhall pay the whole Debt, he ſhall not afterwards recover any Thing [g]. But *Martianus* ſeems to be of a different Opinion, ſaying, That he who is defended by a perpetual and favourable Exception (as this is) may recover [h]: But yet in this Caſe of a Surety, this laſt Opinion is not entirely Law.

[a] D. 46. 1. 10. pr.

[d] I. 3. 21. 4.

[e] C. 5. 52. 1. C. 4. 19. 3.

[f] D. 46. 1. 51 4.

[g] D 46. 1. 49. 1.

[h] D. 12. 6. 40.

There are many Caſes in Law, wherein a Surety may be convened before the principal Debtor, (notwithſtanding the *Novel* Conſtitution,) and he ſhall not have the Benefit of *Excuſſion*. As, *Firſt*, When a Banker, Merchant, or the like Perſons, become Sureties for any one, they may be convened before the principal Debtor, and ſhall not have the Benefit of *Excuſſion*, but ought to pay the Debt, by reaſon of the great Credit which is given to them: For otherwiſe (perhaps) the Creditor would not have lent his Money. *Secondly*, If the Creditor has at the Time of the Obligation or Contract enter'd into, renounced the Benefit of *Excuſſion*: For, in this Caſe, he may be convened before the principal Debtor. *Thirdly*, A Surety may be convened before the principal Debtor, though he has not renounced the Benefit of *Excuſſion*, *viz.* when he has ſworn at the Time of the Contract or Obligation enter'd into, to pay the Debt: For, in this Caſe, he has, by his own Oath, excluded himſelf from the Benefit of *Excuſſion*, according to *Baldus* [i]. *Fourthly*, A Surety has not the Benefit of *Excuſſion*, when the Creditor is in ſome other reſpect a Debtor unto the Surety, and is willing to quit Scores, or compenſate the Debt: For, in this Caſe, the Creditor may compel the Surety to come to a Compenſation with him, without any *Excuſſion* of the principal Debtor. *Fifthly*, A Surety has not the Benefit of *Excuſſion*, if he hinders an Execution which was made againſt the principal Debtor, but ſhall be obliged to pay the Debt. *Sixthly*, A Surety may be impleaded before the principal Debtor, if the principal Debtor be abſent from the Place or Juriſdiction wherein he became a Surety for him. *Seventhly*, A Surety has not the Benefit of *Excuſſion*, where the Proceſs is according to the Form of ſome Statute had in a ſummary Manner, and *de plano & ſine ſtrepitu Judicii* [k]. *Eighthly*, A Surety loſes the Benefit of *Excuſſion*, when he denies himſelf to have been a Surety, and it be afterwards proved upon him that he was a Surety. *Ninthly*, A Surety binds himſelf as the principal Debtor, if he ſucceeds ſuch Principal in his Eſtate. *Laſtly*, The Surety of a Tyrant may be obliged to anſwer, without excuſſing the principal Debtor. By a *Tyrant*, I here mean, a Perſon in great Power, and, as it were, above the Reach of the ordinary Forms of Juſtice. And,

[i] In c. 9. X. 2. 24.

[k] Socin. Conſ. 24.

Thus *Excuſſion*, in other Terms, in *Latin* called *Beneficium Ordinis*, is a Right, whereby the Surety may, by an Exception, force a Creditor to ſue the principal Debtor, before he ſhall recover againſt him as Surety [l]. And in order to excuſs or enquire into the Eſtate of the principal Debtor, a general Citation, *viz.* either by Beat of Drum, or Sound of Trumpet, is ſuffi-

[l] Nov. 4. c. 1.

[m] DD. in L. 116. D. 45. 1. v. *Excuſſum.*

ſufficient [m], whereby the Sureties, and all the Poſſeſſors of any of the Debtor's Effects, are bound to appear and diſcover the ſame: And the principal Debtor is ſaid to undergo a ſufficient *Excuſſion*, if no one appears to the Citation made touching him, or if no one objects to the Defence he makes of himſelf [n]. But *Excuſſion* ought not to be made on ſuch Effects of the Principal as are become Litigious, or are in Controverſy, nor on ſuch as are confiſcated on the Score of Rebellion [o]. But what if Execution has been made againſt a Surety, and it afterwards appears *de novo*, that the principal Debtor was ſolvent, ſhall the Creditor be driven to a ſecond *Excuſſion*? And it is held, according to *Jaſon* [p] and the Text [q], that he ſhall not. By a Placaert of the States of *Holland*, *February* 1564, this *Novel* Conſtitution touching *Excuſſion*, does not obtain there: But in *France* it is obſerved, unleſs it be in certain Caſes, cited by *Bugnion* in his Book *de Legibus Abrogatis* [r]. Yet, according to *Rebuffus* and others, this Benefit does not accrue to Sureties given *de Judicatum Solvendo*, as it has been adjudged in *France*. For if Bail, or a Judicial Surety, has been given in a Cauſe depending, the Proceſs ought even to go out againſt the Surety, ſince Execution ought not to be deferred.

[n] Jaſ. in L. 24. D. 24. 3.

[o] Abb. Conſ. 29. Vol. 2.

[p] In L. 24. D. 24. 3.

[q] D. 12. 1. 42.

[r] Lib. 2. § 178.

What the Law ſays, touching the principal Debtor's being excuſed before any Proceſs is iſſued out againſt his Surety, is, when it is not certain *a Principio*, that the principal Debtor is inſolvent: But it is otherwiſe, if it be entirely certain that he is inſolvent. And a Notoriety touching ſuch Inſolvency of the principal Debtor, may appear to the Judge *per Librum Æſtimi*, by the Valuation or Ceſs-Book of Mens Eſtates: For in many States and Cities, it is uſual to keep ſuch a Book or Regiſter, that the State and Condition of every Man's Subſtance may be the more eaſily known: And ſuch was our *Doomeſday-Book* formerly here in *England*. If the Surety produces the Valuation-Book, whereby it appears that the principal Debtor is worth ſo much, he ought to be excuſſed: But if the principal Debtor, by ſhewing the Valuation-Book, ſays, That he is only worth ſo much in Stock, the contrary Proof reſts on the Surety [s]. A Surety cannot accede to an Alternative Obligation; nor can he be bound in a harder Condition than the principal Debtor, but he may in an eaſier.

[s] D. 22. 3. 17. Gloſ. ib.

[Him whom the *Civil* Law ſtiles a *Fidejuſſor* or Surety, the Common Law of *England* calls a *Pledge*: Therefore, when Credit is given to any Perſon, it is often wont to be given under the Security of Pledges. In which Caſe, if the principal Debtor ſhall be ſo deficient, that he has not wherewithal to make Payment, Recourſe ſhall then be had to his Pledges [t], and not before [u]. See *Fitzherbert's Natura Brev.* 137. E. But with us, if there are more Pledges than one, they are each of them bound in the Whole, unleſs it be otherwiſe agreed when they become Pledges thereupon, and may be compelled, either jointly or ſeverally, to ſatisfy the ſame. So that if there are ſeveral Pledges given, and ſome or one of them be inſolvent, it belongs to the reſt to diſcharge the Incumbrance, even in the Whole, if ſued [x]. But if Pledges are only given for certain Parts of the Whole, the reſt ſhall not be obliged to anſwer any further than their own Parts, if one of the Pledges ſhall fail on his Part [y]. If Pledges are convened on a Failure of the principal Debtor, and be driven to pay the Money promis'd, they have an Action againſt him, according to *Fleta* [z], and the *New Book of Entries*, Tit. *Pledges*.]

[t] Glanv. L. 10. c. 3.

[u] Brit. c. 28.

[x] Glanv. L. 10. c. 5.

[y] Glanv. ut ſupra.

[z] Lib. 2. c. 63.

According to the *Gloſs* [a], if a Man accepts of an inſufficient Security through Ignorance, when he thought it to be a good one, he may pray to have Caution given *de Novo*. But *Alexander* is of a contrary Opinion [b]; becauſe, he that accepts of ſuch a Surety, is preſumed to be acquainted with the Condition of the Man: For he who contracts with any one, is preſumed to know, or ought (at leaſt) to know his Condition [c]. But, I think, that a Perſon who ignorantly accepts of an inſufficient Surety, and deſires that his Debtor may give him new Security, ought to prove, that ſuch inſufficient Surety was, in the common Opinion of all Men, reputed to be a wealthy Perſon, and a Perſon ſolvent, *ad hoc*; otherwiſe, the Perſon accepting of him muſt blame himſelf, and is inexcuſable [d]; or elſe the Creditor ought to prove that the Debtor deceived him by his Averment of

[a] In L. 112. D. 45. 1. 1.

[b] Conſ. 60. Vol. 5.

[c] D. 50. 17. 19.

[d] D. 14. 6. 3.

of his Solvency. And this is the Opinion of *Paulus de Caſtro* [e], ſaying, That if a Perſon admits of an inſufficient Surety (ignorantly) in Point of Circumſtances, he ſhall not, on this Account, demand a more ſufficient Surety, or have Damage given him againſt the Debtor; unleſs the Debtor has uſed Deceit in giving ſuch Surety, by averring the Fitneſs of the Perſon; or unleſs the Creditor that admits him, was impoſed upon by the common Opinion of all that knew him, believing him to be a rich Perſon. And this is daily obſerved in Point of Practice. If a Debtor has given a ſufficient Surety unto his Creditor, and ſuch Surety preſently afterwards runs away, he ſhall be obliged to give another Surety: For it is a ſtrong Preſumption from ſuch a ſmall Interval of Time, that the Debtor was conſcious to himſelf of his Surety's running away; and therefore he ſhall be obliged to give another ſufficient Surety.

[e] In L. 3. D. 46. 1.

There is one Caſe, which I had almoſt forgotten, wherein a Surety cannot be convened before the principal Debtor, though he has renounced the Benefit given to Sureties by *Excuſſion*, and the like, *viz.* when a Surety has an Indemnity or a harmleſs Bond given him, as we call it: For then, of neceſſity, the principal Debtor ought to be firſt convened, and not the Surety, tho' the Surety (as I have ſaid) has renounced the Benefit of *Excuſſion* given to Sureties. And this proceeds, becauſe the Nature of the Thing, and the Promiſe alſo, according to *Bartolus* [f], ſeems to import it. The Act and Deed of the principal Debtor, affects and prejudices the Surety, when he conſents to ſuch an Act of the principal Debtor: But the Contumacy of the principal Debtor does not increaſe the Obligation of his Surety.

[f] In L. 1. C. 10. 2.

TIT. XXV.

By what Methods *Obligations are diſſolved and releaſed; and,* firſt, *by* real Payment; *what it is, and how made, and to whom it may be made;* pure *or* conditional, *in what Place*, &c.

AN Obligation is diſſolved either *ipſo Jure*, or elſe by the Help of an Exception. To the firſt Method of Diſſolving an Obligation, we may refer a *real* and a *feigned* Payment, *Novation*, *Compenſation*, *Confuſion*, a *contrary Conſent*, a *lawful Tender*, the Concurrence of two *Lucrative Cauſes* [g], Loſs of the Thing without the Fault of the Debtor [h], *&c.* I ſhall begin with that of *real* Payment, which is nothing elſe, but when the Debtor, or ſome other Perſon in his Name and Stead, makes an actual Satisfaction to the proper Creditor, on the Score of ſome Debt contracted, or ſomething due to him. Which Definition (I think) contains all Things neceſſary to a juſt Payment. For, *firſt*, it is neceſſary, that the Perſon who makes the Payment, ſhould be a fit and proper Perſon; becauſe a Pupil, Madman, or Prodigal, though they are Debtors, yet cannot make a right and proper Payment, without the Authority of their Tutors or Curators. *Secondly*, The Reader may learn from hence, that another Perſon may make a Payment in the Name of a Debtor: For Tutors and Curators may pay Debts in the Place of Pupils or adult Perſons; and, in ſhort, every qualify'd Perſon may make a Payment for another. Beſides, it is neceſſary, that ſuch Payment ſhould be made to a fit and proper Creditor: For a Payment ought not to be made to a Pupil, Madman, and the like, but to thoſe under

[g] I. 2. 20. 6.

[h] D. 45. 1. 21.

whoſe Tuition ſuch Perſons are. *Finally*, It is neceſſary, that ſuch Payment, on Account of incorporeal Things, ſhould be an *actual Satisfaction*: For as thoſe Things cannot be deliver'd, ſo neither can Payment be made by them.

The *Latin* Word *Solutio*, whereby we denote *Payment*, is a Diſcharge of
[i] D.50.16.176. an Obligation in a perſonal Action [i]: For in a real Action a Payment or Solution is not properly made, but the *Species* or Thing itſelf in demand is reſtored. And thus the Word *Solutio* ſignifies, to ſet a Man free that is bound: And from hence, he who pays that which he owes, is ſaid *ſolviſſe Debitum*, and to have releaſed himſelf from the Tie of his Obligation. And in this Acceptation the Words *Solutio* and *Liberatio* have the
[k] D.46.3.54. ſame Signification [k]. For whether a Debtor has ſatisfy'd a Debt by *actual* Payment of it, or be diſcharged by *Acceptilation*, he is ſaid to be a *Debito Solutus*. But if the Law does not *ſimply* ſpeak of *Solution*, but requires
[l] D.46.3.49. Money to be paid, then *Acceptilation* is not ſufficient [l]: For in *Acceptilation* Money does not intervene, *Acceptilation* being only a feigned Payment. Hence the Words *Solvere* and *Numerare Pecuniam* differ: For the laſt requires that Money ſhould be paid in Tale, and the like; but the Word *Solvere* extends to any kind of Payment, whether *real* or *feigned*. For the Word *Solutio*, in Propriety of Speech, imports a true and real Payment; yet any Satisfaction is a true Payment, if the Creditor be pleaſed to think it ſo. Thus, as Payment diſſolves an Obligation, the *Latin* Word *Solutio* is diametrically oppoſite to an Obligation: And the *Latin* Word *Liberatio* has the ſame Effect and Force as *Solutio*. For we ſay, that he makes a good Solution or Payment, who performs that which he ought to do. The Lawyer *Paulus* ſays, The Word *Solutio* reſpects every Kind of Diſcharge, howſoever effected; referring rather to the Subſtance of an Obligation, than to the Payment of Money in Tale or *Specie*: And in this Senſe Satisfaction, the giving of Sureties, and the plighting of a Pawn or Pledge, is taken for a Solution in reſpect of a Releaſe, though they differ in other Points. Wherefore *Juſtinian* lays down this general Rule, *viz.* That every Obligation is diſſolved, by a Solution of that which is due: And as there are divers Ways and Methods of Binding, ſo there are divers Ways and Methods of Releaſing; and every Contract is diſſolved after the ſame
[m] D.50.17.35. Manner it was made [m]. For Example: When a Man has made a real Contract, the Sum ought to be diſſolv'd by ſomething done: And it is the ſame, when a Contract has been made by Word of Mouth, or by Writing, it may and ought to be diſſolved in the ſame Manner.

Whenever the Law orders a Payment to be made in Money, it ought not to be underſtood of any other Satisfaction. Thus, if a Proctor or an Attorney be order'd to receive a Payment of Money, and he receives a *Delegation*, or ſome other Satisfaction, the Debtor is not, in this Caſe, diſcharged thereby. For though the Word *Solutio* comprehends all manner of Satisfaction; yet, as one Thing cannot be paid for another againſt the Will of the Creditor, he who orders a Payment to be received, is underſtood to have order'd ſuch Payment to be received in a due *Species*: And therefore,
[n] Alex. Conſ. 95. vol. 5. without the Conſent of his Client, the Proctor cannot diſcharge the Debtor [n]. A Payment cannot rightly be made to a Proctor *ad Litem*, unleſs he be ſpecially aſſign'd to this End and Purpoſe: For it is abſurd, that Payment ſhould be made to him *ante Rem Judicatam*, to whom an Action *ex Judicato* does not lie. But if he has an expreſs Proxy for this End, Payment may be made to him, and the Party ſhall be releaſed on ſuch Payment
[o] D.46.3.86 made [o]. A general Proctor *ad Negotia* may pay the Creditors of his Principal without any ſpecial Order; nor is a ſubſequent Ratification of his
[p] D.46.3.87. Principal neceſſary, for his general Proxy juſtifies him [p].

An

An Obligation and an Action may ſometimes ariſe before the Day of Payment, *viz.* when ſuch a Day is fix'd and aſcertain'd by Man, and no Exception can accrue to the Defendant [q]: As in the Caſe of *Sempronius*, who ſold unto *Roſcius* a certain Parcel of Wooll for the Sum of forty Pounds, and the ſaid *Roſcius* covenanted to pay him the ſaid Sum by the Month of *March*, and *Caius* became Surety for the Payment thereof. But before the ſaid Time came, his Surety broke, and became a Bankrupt. Whereupon *Sempronius* brought his Action againſt *Roſcius*, and it was adjudged that the Action lay. A Day, indeed, is added in every Obligation in favour of the Defendant: For if a Day be not added for the Performance of a Thing, it is due the preſent Day, unleſs a Place be added which induces an Interval of Time [r]. But in this Caſe Credit was given to *Caius* the Surety, who being inſolvent, there was Danger in Delay, and the principal Debtor muſt anſwer immediately, to ſecure the Creditor.

[q] D. 50. 16. 213.

[r] D. 45. 1. 41. 1.

That which is due at a Day expreſs'd or imply'd, and alſo that which is due under a Condition, ought to be perform'd and paid at the Time when the Day of the Obligation comes, *viz.* as *Bartolus* phraſes it, *Tempore Moræ*, when a Man may be ſaid to be in Delay. For the Thing or Matter due, ought to be rated according to the Fault of the Perſon in Delay, it being valued *Quanti plurimi*, from the Time of the Delay, to the Time of Payment [s]. A leſſer Sum cannot be pleaded in Payment or Satisfaction of a greater, after the Day of Payment is incurr'd. If Money be paid down to a Creditor, or to another by his Conſent, this is *properly* and *naturally* ſtiled a Payment of Money. But there are ſome Things virtually and in effect equal unto Payment, as being in the Place thereof, as a lawful Tender made, by laying down and telling out the Money; for ſuch a Tender produces a Releaſe or Diſcharge to the Debtor, if the Money be ſealed up and lodged with the Court, or Forthcoming [t], in our Books call'd *Obſignation* [u]. And *Confuſion* does the ſame Thing, *viz.* when the Debtor becomes Heir to the Creditor, or (as we ſay) when the Creditor makes his Debtor his Executor; or, *vice verſâ*, when the Creditor becomes Heir or Executor to his Debtor [x]: For then the Obligation is diſcharged by Confuſion of Actions, either in the Whole, if the Succeſſion be to the whole Right; or elſe in Part, if he be only Heir in Part [y]. But of this hereafter, under the Title *Of Novation*.

[s] D. 25. 2. 29.

[t] C. 4. 32. 6 & 19.

[u] C. 8. 43. 9.

[x] D. 46. 3. 95. 2.

[y] D. 46. 1. 24 & 50.

It has been ſaid, That Things are diſcharged, after the ſame manner as they are drawn into an Obligation. For Example: I lend you an hundred Crowns upon a Specialty in Writing: You ought to repay me ſo many Crowns in *Specie*, or the Value thereof in Money, and a Diſcharge thereof ought to be given in Writing, or (at leaſt) the aforeſaid Specialty in Writing ought to be cancell'd [z]: I ſay, in *Specie*, if the Word *Crowns* be mention'd in the Writing or Obligation; the ſame Things being to be done in the Diſcharging of an Obligation, as are ſpecify'd in the Obligation. So that if the Value of the Crowns ſhall increaſe or decreaſe, ſo many of them in Number ought only to be demanded and repaid as amount to the Sum expreſſed in the Obligation. For a Creditor cannot be compelled to receive Money in any other Form than promis'd and agreed on, if he may probably ſuffer Damage from thence: Becauſe the Nature of a Loan, is, that it ſhall be repaid in the ſame *Species* or Kind, and alſo in the ſame Plight and Goodneſs: And this upon another Account; ſince the Danger of a Decreaſe of the Value of Money belongs to the Creditor, if the Value of Money ſhall be diminiſh'd at the Time when the Payment thereof ought to be made.

[z] D. 46. 3. 99.

A Payment of Money ought not to be made in the Night-time; and if the ſame be tender'd, the Party is not then obliged to accept of Payment, as he is in the Day-time; becauſe it ſeems to have been tacitly agreed upon before,

before, that Payment ſhould be made at a proper and ſeaſonable Time. After Payment of a Debt, the Creditor is bound to deliver up to the Debtor the Specialty, or (as the *Civilians* call it) the *Inſtrument of Credit*. Debtors paying Money to a falſe Adminiſtrator or Proctor, are releas'd, if he acted as a true one in the Creditor's Affairs: For Debtors, by paying Money thus unto him who acts as a Guardian, are diſcharged, if the Money came unto the Pupil's Uſe [a]. A Perſon paying Money unto a Perſon who had once the Power of receiving Money, though the ſame be now taken away, is diſcharged, if he did not know that ſuch Power was taken away from the Perſon receiving it. Thus, if a Man pays Money unto a Proctor, who had a Proxy to receive it, he ſhall not be liable, if ſuch Proxy be revoked, and he be not acquainted with ſuch Revocation [b]. If a Man through Ignorance pays a Sum of Money which is not due, he may recover the ſame by a perſonal Action, call'd *Condictio Indebiti*: But if he pays it knowing himſelf not to owe the ſame, he ſhall not recover it, unleſs he be a Perſon under the Age of Puberty, who knows nothing at all of Matters. The Payment of a Thing made worſe by the Act of the Debtor himſelf, does not diſcharge ſuch Debtor, but that he ſhall make good the Damage [c].

[a] D. 46. 3. 28.

[b] D. 46. 3. 32.

[c] D. 46. 3. 33. 2.

The Payment of a Debt, according to *Bartolus* [d], may be proved by the Inſtrument or Specialty of ſuch Debt being found cancell'd in the Hands of the Debtor; nay, though it be not found cancell'd, provided it be found in the Debtor's Cuſtody; for then, it is preſumed that the Creditor has return'd it to the Debtor, with an Intent of Releaſing him from the Obligation. But if the Debtor has the Specialty in his Hands, and ſays that he is diſcharged by Virtue of a Pact or Agreement between them, he is not then preſumed to be releaſed, unleſs he proves ſuch Specialty was return'd by his Creditor [e]; becauſe a Pact *de Non Petendo* has the Force of a Gift or Donation, which a Perſon is not preſumed to make in a doubtful Caſe [f]. The Return of a Specialty ought to be proved by five Witneſſes, according to the *Gloſs* [g] on the *Civil Law*: But it is otherwiſe, if the Debtor pleads Payment of the Debt; becauſe, in that Caſe, when the Specialty is in the Debtor's Cuſtody, the Debt is preſumed to be paid. A Debt is preſumed to be paid, when the Specialty is found croſſed, or drawn with a Blot, in the Hands of the Notary that made it. When a Debt is contracted by Writing, the Payment thereof is proved by Writing, or by five Witneſſes, who ought to depoſe how they were preſent at the Payment thereof: But if the Writing be loſt, and this Caſe be proved, then two Witneſſes depoſing touching the true Payment of it are ſufficient, according to *Baldus* [h].

[d] In L. 27. D. 47 2.

[e] D. 2. 14. 2.

[f] D. 22. 3. 25.

[g] In L. 1. C. 7. 6.

[h] In L. 14. C. 4. 21.

Though a Perſon, that makes a Payment for another, ſhould not have an Action *ex Mandato*; yet, ſurely, he has an Action *for Buſineſs done*, ſtiled *Actio Negotiorum Geſtorum*. It matters not whether a Creditor be paid by the Command or Order of his Debtor, or by any other Perſon's Order, provided the Debt be ſatisfy'd; nor does it in the leaſt ſignify whether the Money be paid to the Creditor, or to ſome other Perſon by the Creditor's Order. Nor is the Debtor obliged *ad Intereſſe*, before ſome Declaration be made unto whom it ought to be paid, if the Debtor, through the Creditor's Order, becomes doubtful unto whom the Debt ought to be paid, provided he makes a general Tender or Payment unto him to whom of Right it does belong to receive the ſame. He that makes a Payment, is, in a doubtful Caſe, preſumed to do it out of his own Money. He who ſays, That he has paid that which is not due, ſeems to bind himſelf to the Proof thereof, ſince no one is preſumed to have made ſuch a Payment. A Payment in a doubtful Caſe, is preſumed to be made upon ſome good Cauſe or Conſideration; and a Perſon making ſuch a Payment, is preſumed

to do it out of his proper Money, as juſt now ſaid. A Perſon that pays a Sum of Money in virtue of a Contract, confirms and ratifies that Contract. For every Payment is underſtood to be made on the Account of ſome Contract or Obligation; and it may alſo be made on the Account of a future Obligation. But a Perſon making a Payment *ſimply*, is preſumed to make ſuch a Payment on the ſcore of ſome precedent Obligation: And ſuch a Payment *ſimply* made, ought to be apply'd to the Uſe of ſuch a Caſe as the Perſon paying the ſame ſhall make choice of.

If a Perſon converts a Debt into an Exchange by Bills of Exchange, and ſuch Bills of Exchange are not paid, the Perſon writing ſuch Bills of Exchange becomes liable to pay the Sum of Money contained in ſuch Letters or Bills of Exchange. A Proteſtation made on the Accepting of Bills of Exchange, ought to be repeated on the Payment thereof, according to the Stile and Practice of Merchants: But a Proteſtation made on Accepting of Bills of Exchange has no Operation in Payment, if ſuch Payment be *ſimply* made. A Perſon that pays Bills of Exchange, though they are not directed to him, acquires an Action againſt the Perſon who drew up or wrote the ſame: And it is the ſame thing, if a Man pays Bills of Exchange that are directed to him, with a Proteſt. But of this Matter ſee before, under the Title of *Bankers, and Exchange of Money*, pag. 405.

He who makes a Payment before or after the Day of Payment, is ſaid to pay more or leſs, according to ſuch Payment. The Effect of Payment, is, that not only the principal Debtor himſelf is diſcharged, but likewiſe all Perſons and Things that do accede unto an Obligation of Debt, as Sureties, Pawns, Mortgages, and the like [i]. And the Perſon of him who makes a Payment ought to be favour'd more in Law, than the Perſon of the Creditor, by reaſon of the Neceſſity impoſed on the Debtor or Perſon making Payment, and not on the Creditor or Perſon lending. When the Time of Payment is mention'd and expreſs'd in an Obligation, and added thereunto for Certainty-ſake, the Payment cannot be demanded of the Debtor 'till ſuch Time is gone and paſt. Perſons deputed to pay Stipends ought to pay them with their own Hands, and not by a Deputy or Subſtitute. The Time of four Months is given for the Payment of that which is adjudged by a Sentence: But yet, pending theſe four Months, the Perſons condemned may be arreſted, unleſs they give Security for complying with the Sentence, when the Time of Payment comes. A Man, that promiſes the Payment of a Sum of Money on the Advent, or coming of ſuch a Day, is adjudged to be in Delay, if he does not pay it on the very Day. Though Money diſallow'd of by Law, does not diſcharge the Perſon who pays or makes a Tender thereof, from the Obligation of his Debt; yet it ought to be reſtor'd to him, otherwiſe the Debtor ſhall not be compelled to make his Payment in good and lawful Money [k]. If a Perſon be ſolvent for Part, and not for the Whole, he is eſteemed in Law as a Perſon inſolvent.

[i] D. 46. 3. 43.

[k] D. 13. 7. 24. 1.

He who owes Money, or is a Debtor on ſeveral Conſiderations, as upon Bond, and for Goods bought, *&c.* may declare which Debt he chuſes to exonerate himſelf from [l]: But if he ſhall not make a Declaration, it ſhall be in the Power of the Creditor to chuſe which Debt he would have firſt diſcharged, if all the ſeveral Conſiderations are not ſatisfy'd at the ſame Time. But then (I think) all the Cauſes of Debt ought to ſtand upon the ſame or an equal Footing: For a Debt, which carries Intereſt along with it, is, in a doubtful Caſe, deemed to be firſt paid off, as being the moſt grievous and heavy to the Debtor [m]. *Note*, That a Debtor, who makes ſuch a Declaration, as is before mention'd, ought to do it immediately, upon Payment of the Debt: For if he does it after ſome Interval of Time, ſuch Declaration comes too late, and the Creditor ſhall have

[l] D. 46. 3. 1 & 101.

[m] D. 46. 3. 1, 2, 3, 4, &c.

[n] D. 46. 3. 1, 2, 3, 4, &c. his Option [n]. If all the Debts ſtand upon an equal Footing, and it does not appear which is moſt grievous and irkſome, they ſhall all be [o] D. 46. 3. 8. deemed to be paid *pro Rata* [o]. A Man paying a Sum of Money by way of Reſidue or Remainder, is underſtood, in Law, to have paid the whole Debt.

A Man that makes a Payment unto a Minor, is obliged to prove, that the Money was converted to the Behoof of ſuch Minor; and this ought to be done, in order to exclude and bar ſuch Minor from ſuing for the ſame again, when he comes to be of full Age. Upon Payment of a Debt, the [p] In L. 84. DD. 30. 1. Creditor is, according to *Bartolus* [p], obliged, at the Requeſt of the Debtor, to give him an Acquittance or full Diſcharge of the Debt; and it is far better to have ſuch an evident Diſcharge of the Debt by way of an Acquittance, than to have the Specialty deliver'd up, if we may believe the [q] C. 8. 43. 14. *Code* [q], though (I think) both ought to be done: And the Reaſon which the *Code* aſſigns, is, becauſe a Declaration of a Debt received being made in Writing, is ſtronger Evidence thereof, than if the Specialty be deliver'd up; for it argues a real Payment. This Acquittance was formerly atteſted [r] D. 12. 1. 42. by three Witneſſes [r], but now two are ſufficient, and one, according to the Laws of *England*, if the Debt be under the Sum of Ten Pounds. As the full Payment of a Bond-Debt or upon a Note of Hand-writing, may be proved by proper Witneſſes, ſo likewiſe may any Part of Payment be proved in reſpect of ſuch Bond or Note: But then the Witneſſes ought to be preſent at the Time when Payment was made to the Creditor, or at the Time when the Creditor acknowledged himſelf to have been ſatisfy'd. If an Acquittance in Writing, or any other written Acknowledgment of the Creditor's receiving of a Debt, be given unto the Debtor, and ſuch Acquittance be loſt by Chance or Accident, as by Fire, and the like, the Debtor may by two Witneſſes prove that ſuch Acquittance was loſt by Chance or Accident, as before hinted. A Perſon paying a Sum of Money to a lawful Proctor, is immediately diſcharged, even before ſuch Proctor carries the Money to his Client or Principal.

TIT. XXVI.

Of Acceptilation, *or a feigned Payment. The Second Way of diſſolving an Obligation; and what it is, and by what Words it is perfected; and of the* Aquilian *Stipulation*, &c.

ACCEPTILATION is the Second Way of diſſolving an Obligation. Now the Original Word is borrow'd from the *Latin* Phraſe *Acceptum ferre*, which the *Latins* uſually wrote on their Bills of Receipt, or on that Side of their Account-Books where they placed their Receipts: As if a Creditor ſhould ſay, *Habeo pro accepto & fateor me accepiſſe abs te, quod mihi debebas*; or in *Engliſh* thus, *viz.* "I have received and do acknowledge "the Receipt of that which you owed me:" Whereas in Truth and Reality I have not received it, there being no Intervention of Payment made. On a Queſtion put by the Debtor, this formal Anſwer of the Creditor diſcharges the Debt: So that *Acceptilation* is a Civil Way of tolling an Obligation, as Payment or Satisfaction is a Natural Way. Indeed, the actual

actual Payment of a Debt is the more plain and ſimple way of diſcharging an Obligation, and is that which is known and common to all Nations: But *Acceptilation* is the more exact and ſubtle Manner of doing the ſame, which was invented by the *Roman* Legiſlators.

The Lawyers define or deſcribe *Acceptilation* to be a kind of a Releaſe or Diſcharge of an Obligation, which is made after the Manner of a Stipulation, by an Interrogation or Queſtion put on the Part of the Debtor, and an Anſwer given to the ſame by the Creditor, whereby the Bond of that Obligation, which was verbally made between theſe Parties, is in other and by contrary Words diſſolved [s]. In this Definition or Deſcription, in the firſt Place, I call it a *Releaſe* or *Diſcharge*, to diſtinguiſh it from a *Stipulation*, which is alſo made by a Queſtion: But a Queſtion and Anſwer herein tend to bind the Parties, whereas in Acceptilation they tend to releaſe the Parties. I have alſo herein added, *after the Manner of Stipulation*, in order to exclude *Acceptilation* from a Nude-Pact *de non petendo*; whereby not only a Natural Obligation, but a Civil Obligation ſtill remains entire: And we are diſcharged from this alſo by the Aid of Exception. *Thirdly*, I have ſubjoined theſe Words, *viz. by an Interrogation or Queſtion put by the Debtor, &c.* becauſe, in ſuch a kind of Diſcharge as this, the Debtor interrogates the Creditor, Whether he has received his Debt from him? And the Creditor anſwers, (as aforeſaid,) that he has received it, though, in Truth, there is nothing paid. And, *Laſtly*, I have added, *viz. by which the Bond of that Obligation, which was verbally made between theſe Parties, is in other and by contrary Words diſſolved*; or, which is the ſame Thing, whereby the Debtor is diſcharged from a Natural and Civil Obligation. Theſe Words (I ſay) are added to ſhew, that *Acceptilation* is properly an imaginary Payment [t]. And as every Obligation is taken away by a true and real Payment; ſo is a Stipulation or Obligation contracted by Words, diſſolved by this imaginary kind of Payment. And thus again the Reader has a Difference between a real Payment and Acceptilation, inaſmuch as the firſt diſſolves every Obligation, but the laſt (according to Strictneſs of Law) only diſſolves an Obligation contracted by Words; for an Obligation contracted by Words, may be diſſolved even by Words. And,

[s] D. 46. 4. 1. DD. ib.

[t] I. 3. 30. 1.

This is ſtiled *ſimple* Acceptilation, only taking ſo much away as Stipulation has introduced. And as this kind of *Acceptilation* is equivalent to real Payment; ſo an Exception *non numeratæ pecuniæ* cannot be propounded againſt it: Becauſe, by the Conſent of the Creditor, and the Artifice of the Law, it has the ſame Effect to perempt an Obligation, as a real Payment has in Operation of Law [u]. And as a true and real Payment is that, when a Thing is really paid, which is due; ſo this being a feign'd and imaginary Payment, requires no Money to give it a Being or Exiſtence: And therefore, the aforeſaid Exception does not lie, unleſs the Party giving this Diſcharge ſhall prove, that he has only thus diſcharged his Debtor, on the Hopes and with a Proſpect of a future Payment in Money. But there is another kind of *Acceptilation*, which is made by *Aquilian* Stipulation, being of a larger Extent than the former: Which I ſhall treat of by and by.

[u] D. 46. 4. 19. 1.

The Form of Words, whereby *Acceptilation* is effected, is not ſolemn and certain, as it is in a regular Stipulation: But it may be made by any Form, provided there be a proper and pertinent Queſtion put by the Debtor, and a direct and ſuitable Anſwer made by the Creditor. As for Example, in ſuch Words as theſe, *viz. Have you received that which I promiſed you?* ſays the Debtor. And the Creditor makes Anſwer, *I have received it.* Now Acceptilation may be made in *Latin*, *Greek*, or any other Language, provided the Parties do either by themſelves, or by an Interpreter, underſtand what is ſaid [x]. As in *Latin*, *Acceptos habes tot denarios*,

[x] D. 46. 4. 19.

denarios? ſays the Debtor. Then the Creditor anſwers, *Acceptos habeo*, &c. *Acceptilation* can only be made *purely*, and not under an expreſs
[y] D. 46. 4. 4. Condition, though it may under a tacit one [y]; nor can it be made *in Diem*;
[z] D. 46. 4. 12. nor can it be made by a Proctor, nor in the Name of another [z]: But it ought to be made to the Debtor, and his Heir, and by way of Stipula-
[a] D. 46. 4. 13. 10. tion [a]. Nor is it of any Import, whether it be made touching a certain Sum, or touching a certain Contract; or whether this Releaſe be of all
[b] D. 46. 4. 18. Cauſes and Things in general [b]. Not only the whole Thing due, but alſo a Part thereof, may be releaſed by Acceptilation, provided the Thing admits of a Diviſion: For if the Thing be an Individual, as Service is, Accepti-
[c] D. 46. 4. 13. 1. lation made in reſpect of Part, is of no Moment [c].

That kind of *Acceptilation* which is made by *Aquilian* Stipulation, obtains and has Room in all Obligations, which are derived from Contracts introduced by the Law of Nations: For theſe Obligations are firſt tranſpoſed and turned into an *Aquilian* Stipulation, and into an Obligation made by Words; and by this Means they aſſume the Nature of this kind of Obligation: So that they are or may be laid aſleep and adjuſted hereby. As for Example: If *Titius* owes me One Hundred Pounds on the Score of Money lent him, and is alſo bound to me on the Score of ſome Purchaſe made; theſe Obligations cannot be taken away by the Means of *Acceptilation*, becauſe they are contracted by Conſent, and ſomething done: Yet if I ſtipulate with my Debtor *Titius* thus, *viz. Do you promiſe me*, Titius, *by way of Stipulation, all that in which you are bound to me upon all and every Account whatſoever?* If *Titius* promiſes, then all thoſe Obligations, whereby *Titius* was bound to me, are deduced and changed into an *Aquilian* Stipulation, they having been contracted by Conſent, or ſomething done: So that they are no longer to be taken for Obligations contracted by Conſent, or ſomething done, but for a verbal Obligation. Now after this Obligation is tranſacted, *Titius* the Debtor interrogates me his Creditor in this Manner, *viz. Have you received that which I this Day promis'd you by* Aquilian *Stipulation?* And if the Anſwer was, that *I have received it*, my Debtor *Titius* is hereby diſcharged immediately from the Whole: For the Obligations are changed into an *Aquilian* Stipulation: But an Obligation ariſing from this kind of Stipulation, is diſſolved by contrary Words, *viz.* by *Acceptilation.* What an *Aquilian* Stipulation is, and whence it is derived, ſee at large under the Title of *Stipulation.* The Forms of *Acceptilation* being now grown obſolete, *Acceptilation* may only be made at this Day under a Condition, and by way of Gift; the Subtlety of this Part of the *Roman* Law being in ſome meaſure now exploded.

TIT. XXVII.

Of Compenſation, *the Third Way of diſcharging an Obligation; and what it is, and when, and between what Perſons, and in what Caſes it is made, and the like.*

THE Buſineſs of *Compenſation* being a Matter of great Difficulty and Subtlety in Law, I ſhall here, for a more clear and evident Knowledge thereof, *Firſt*, conſider what it is, according to the common Definition of it: And, *Secondly*, examine when and wherein it obtains, and between

between what Perſons it has Place. Now *Compenſation*, according to the Definition of it, is a Reckoning between Debtor and Creditor, touching what is due unto each other [d]; or when ſomething thereupon ceaſes to be due from the Debtor, which the Creditor demanded of him, becauſe the Creditor owes the Debtor a Thing of the ſame Kind and Value. In *Latin* it is defined to be *Contributio ſeu collatio Debiti & Crediti inter ſe* [e], a mutual throwing of the Debt and Credit together. For *Debitum & Creditum contribuere* is here ſo to mix and blend the Debt and Credit together, in ſuch a manner that both are in ſome meaſure confounded and deſtroy'd; meaning, that the Obligations are on both Sides taken away [f]. It muſt be of the ſame Kind and Quality, as Money for Money, Oil for Oil, *&c.* For one Thing ought not to be paid for another, without the Conſent of the Creditor [g]. As for Inſtance: You owe me One Hundred Pounds, which you borrow'd of me, and I on the other hand owe you as much, on the Account of Goods which I have bought of you: You bring an Action againſt me for the One Hundred Pounds, and ſue me for the Money which I owe you on the Score of Goods purchaſed of you; and I, on the other hand, pray that a *Compenſation* may be made of that Money which I owe you for Goods, with that Money which you owe me on the Account lent you: This Reckoning, or Throwing of Accounts together, is called Compenſation; and if the Accounts are equal on both Sides, it may be ſtiled a *quitting of Scores.* For it is not always neceſſary, that the Debt ſhould be equal on both Sides. For if you only owe me Sixty Pounds, and I owe you One Hundred Pounds, Compenſation ſhall be made in reſpect of the concurrent Sum due: So that you can only demand or recover of me the Reſidue of Forty Pounds, and I am diſcharged (as it were) in the other Sum of Sixty Pounds [h]. And if you refuſe to accept of the remaining Sum of Forty Pounds, which I now tender you, I may make a Conſignation thereof; and depoſit it in publick Hands, as in the Court, and the like: Which it is adviſeable to do in ſuch a Caſe. So that it appears from the Premiſes, that Compenſations, or what (we in *Engliſh*) call Croſs-Reckonings, were at firſt found out to prevent long and expenſive Law-Suits, as it is obſerved in many other Caſes, *Nè fiat per plura, quod fieri poteſt per Pauciora.* And becauſe it is moſt agreeable to Equity, that a Perſon ſhould make uſe of that Law or Right againſt another, which he would have another put in Practice towards himſelf, and likewiſe becauſe he who deſires another Perſon ſhould pay him, ſhould in the ſame manner make Satisfaction unto ſuch other Perſon.

[d] D. 16. 2. 1.

[e] D. ut ſupra.

[f] D. 12. 1. 2. 1.

[g] D. ibid.

[h] C. 4. 31. 4.

I have before hinted, That Compenſation ſhould or ought to be in reſpect of the ſame Kind or Quality on both Sides. For that Opinion is entirely true, which is commonly received, *viz.* That a *Species* due to the Defendant cannot be compenſated by Money demanded of him, nor can Money due be compenſated by a Demand of a *Species*, as Corn for Money, *&c.* See the *Gloſs* and Doctors on the Law here cited [i]. As for Example: *Titius* owes me Twenty Pounds in Money upon a Loan, and I owe him a Bag of Wooll, or a Hogſhead of Wine, and the like: In this Caſe Compenſation is not admitted, becauſe one Thing may not be paid for another without the Creditor's Conſent, as aforeſaid. But yet Compenſation may be rightly made in reſpect of Quantity for Quantity, or in reſpect of a *Species* with a *Species*, when the ſame *Genus* or Kind is due, as a Buſhel of Wheat for a Buſhel of Wheat, and the like. See *Paulus*'s *ſecond Book of Sentences* [k].

[i] D. 16. 2. 1.

[k] Cap. 5.

Compenſation is admitted both in real and perſonal Actions. In *real* Actions thus, *viz.* If you have poſſeſſed your ſelf of my Horſe, and it dies or is loſt by your Fault, you are anſwerable to me for the Value of it, which ſuppoſe to be Thirty Pounds, and I am a Debtor to you in the Sum of Thirty Pounds, which I borrow'd of you: In this Caſe Compenſation

may be made *hinc inde*, or on both Sides; for, according to a Law in the [l] C. 4. 31. 4 & 5. *Code* [l], Compenſation may be made in reſpect of Value for Value in ſuch Caſe at this Day. In *perſonal* Actions thus, *viz.* If you owe me Ten Pounds on the Account of a Loan, and I owe you Ten Pounds on the Score of a perſonal Contract, Compenſation may be made, if the Debt be liquid on both Sides: But if it be obſcure and doubtful on one Side, there is no Room for Compenſation, but Cognizance ſhall be had of the Cauſe.

As a *Condiction* or perſonal Action does not lie *ex Cauſâ Judicati*; ſo a Compenſation thereof is not admitted. As for Inſtance; you ſue me for Ten Pounds, and I am condemned to you therein. I paid you the Debt on the Account of this Judgment: *Quære*, Whether I may object Compenſation to you for the Ten Pounds, which I paid to you as being not due? And it is held, that I cannot: But if I have not paid it on the Account of the ſaid Judgment given, a Compenſation may well enough be [m] C. 4. 31. 2. admitted, if you owed me any Sum of Money of the like Value [m]. If Compenſation be objected by the Buyer, and admitted by the Judge, it cannot be ſaid, that the Buyer has not paid the Purchaſe-Money; for he who makes Compenſation of a Debt, is ſaid to pay the ſame, eſpecially when Compenſation is objected by the Defendant, and admitted by the Judge: But an *illiquid* Compenſation cannot be objected. A Perſon that objects Compenſation, ſeems to confeſs the Plaintiff's Libel or Intention.

Though Compenſation be a lawful Exception, yet it is not admitted in a *Depoſitum*: And this Privilege in reſpect of a *Depoſitum* was introduced, leſt Compenſation ſhould be admitted by way of Fraud, for the Sake and with an Intent of deferring the Reſtitution of a *Depoſitum*; and by this Means a Contract of *Depoſitum*, which much depends on Fair-dealing, ſhould redound to Perfidy. But Compenſation is admitted in all *Fungible* Things, *viz.* when one Thing may *ex toto* perform the Office and Function of another; and theſe Things commonly conſiſt in Weight, Number, and Meaſure. But Compenſation ought to be a good Exception in Things not of a *Fungible* Nature. For Example: If you are bound to me in the Sum of fifty Pounds on a Loan, and I am engaged to you in the Affair of a Horſe, the Plea of Compenſation is not admitted; becauſe the Intereſt and Affection which I have to the Horſe, may be more than what I have to the Money: But this is otherwiſe, when I can pretend no Intereſt; as when you have lent me Money, or any Thing of the like Nature. There are ſeveral other Caſes, wherein Compenſation ceaſes in Effect *ipſo Jure:* As, *Firſt*, If I am a Debtor to the State *in Calendis*, or by way of Intereſt. *Secondly*, If I owe Corn or any Tax unto the State, or Alimony unto any Perſon that is a Servant unto the State; or if I owe a *ſimple* Legacy or a *Fidei-Commiſſum* unto him as a private Man, and the State owes ſomething [n] C. 4. 31. 3. to me: In all theſe Caſes Compenſation is not admitted [n].

By the ancient Law of the *Digeſts* there was a Difference between the Actions *Bonæ Fidei*, and Actions *Stricti Juris*, in reſpect to Compenſation. [o] D. 16. 2. 11. For in Actions *Bonæ Fidei* Compenſation was admitted *ipſo Jure* [o], namely, as ſoon as the Judge found there was Room for Compenſation: For an Action did immediately ariſe *ipſo Jure*, without the Act of Man to leſſen the Sum of the Plaintiff's Debt demanded; and the Judge might, by Virtue of his Office, repel the Plaintiff, without an Exception on the Defendant's Side, and abſolve the Defendant convened, though he made no Demand on the Plaintiff. And moreover, though the Judge had condemned the Defendant in the whole Sum, and he had paid the ſame; yet the Defendant might recover the Debt which was liable to Compenſation, or what was due to him on Compenſation, as Money unduly paid, and the Proceſs againſt the Defendant ſhall be null. But in Actions or Proſecutions *Stricti Juris* a Compenſation was not admitted, even though the Judge knew the Debt

Debt to be liable to Compenſation, unleſs the Defendant convened had objected unto his Adverſary an Exception *of Deceipt* [p], ſaying, *You are guilty of Fraud or Deceit, becauſe you ſue for that which you muſt reſtore again.* But at this Day, according to *Cujacius*, there is no Diſtinction between Actions *Bonæ Fidei* and *Stricti Juris*, in reſpect of Compenſation *ipſo Jure*. But, according to the old Law, if this Exception was omitted, the Proceſs was not annulled or made void, though the Defendant was condemn'd in the whole Sum of the Debt. But *Juſtinian*, by a Conſtitution of his [q], took away this Diſtinction of the old Law; enacting, That Compenſation ſhould ſubſiſt *ipſo Jure*, both in Actions *Bonæ Fidei* and *Stricti Juris*. So that in neither ſhould there be any Occaſion of an Exception of *Deceipt* to ouſt the Plaintiff of his Action, but that the Debt ſhould be *ipſo Jure* diminiſh'd, by whatever Means it appears to the Judge, the Debt is liable to Compenſation; and the Plaintiff's Right is thereby perempted as to the concurrent Sum due to him from the Defendant. But Compenſations are not made *ipſo Jure*, unleſs the Defendant be prepared to make them, and propounds his Exception [r]: For the Judge may diſallow of Compenſation.

[p] C. 2. 4. 5 & 6.

[q] C. 4. 31. 14.

[r] C. 4. 31. 14.

In all Caſes of Compenſation the Debt ought to be *pure* [s] and *liquid*, and to have a real Exiſtence either by the *Civil* Law, or the Law of Nations, or elſe in virtue of natural Equity [t]. For if the Obligation be not founded on natural Equity, but may be perempted by an Exception, it does not admit of Compenſation [u]. Whenever Compenſation is made and allow'd, it hinders the Courſe of Running of Intereſt in reſpect of the concurrent Sum [x]. If that be demanded which is not due, an Exception, ſtiled *Exceptio Intentionis*, may be objected: But if that be demanded which is due, then an Exception of Compenſation lies [y]. No Man is obliged to pay a Debt, when Compenſation may be objected; and therefore Compenſation may be call'd a Stoppage of Payment. A Surety may, by way of Compenſation, object that which is due unto the principal Debtor and himſelf [z]. But a Perſon may not before the Day object Compenſation in reſpect of a Debt which is due at ſuch a Day; becauſe the Debt cannot be demanded or ſued for before the Day comes, though it be due [a]. In all Caſes where Compenſation cannot be made, there Reconvention has Place and obtains. Compenſation is admitted in Treſpaſſes and Offences, according to that vulgar Saying, *viz. Paria delicta mutuâ compenſatione tolluntur* [b]: Which is true, when the Action is brought for a pecuniary Penalty on the account of Treſpaſs; but it is otherwiſe if the Action be criminally commenced; for Crimes ought not to go unpuniſh'd [c]. Hence it is, that Deceit is compenſated with Deceit [d]: As when we change our Books, and you have knowingly given me an imperfect Book, and I, on the other hand, have given you an imperfect Book: In this Caſe neither of us can be charged with Fraud. And this is a daily Practice in the Exchange of Horſes, where a lame Horſe is exchanged for a blind one. *Laſtly*, It is to be noted, That Compenſation is not admitted in alternative Obligations, when the Election is in him to whom Compenſation is objected: For Example; if I owe you a Horſe, or ten Pounds, and it is in my choice either to pay you ten Pounds, or to give you the Horſe.

[s] D. 16. 2. 7.

[t] D. 16. 2. 6.

[u] D. 16. 2. 14.

[x] C. 4. 31. 4.

[y] C. 4. 31. 6.

[z] D. 16. 2. 4 & 5.

[a] D. 16. 2. 7.

[b] D. 24. 3. 39.

[c] D. 9. 2. 51.

[d] D. 4. 3. 3. 36.

TIT.

TIT. XXVIII.

Of Novation, *the Fourth way of Releasing Obligations, and the Definition of it,* voluntary *and* necessary: *And, lastly, of the Delegation of a Debt, what it is, and the like.*

NOVATION is another Method, whereby an Obligation is ended and determined *ipso Jure*, by being transmuted into a later or another Obligation [e]: As when I owe you a Sum of Money upon a Book-debt, and I afterwards change it into a Debt upon Bond or Specialty. It is commonly divided into what we call *voluntary* and *necessary* Novation [f]. A *necessary* Novation is either made by a Contestation of Suit, or else by a Condemnation of the Debtor. By Contestation of Suit; because the Action, which would otherwise perish, through a Limitation of Time, is made lasting and perpetual, if Suit has been once contested, by joining of Issue in the Cause [g]. And I say, by a Condemnation of the Debtor; because the old Action is, by a Sentence pronounced, transferr'd or changed into an Action *ex Judicato*: And if the Payment be not made within four Months from thence, Interest or Usury shall run against the Debtor at the Rate of Five *per Cent.* on the Judgment given [h]. *Voluntary* Novation is made, either by changing of the Creditor or Debtor, or both of them, or else by changing of the Cause or Consideration of the Debt: As when I owe you Money for Goods bought, and this Obligation or Debt is changed into a Bond-debt. The Creditor is changed, when it is agreed, that my Debtor should not pay the Debt to me, but to my Creditor *Euripilus*. The Debtor is changed, when I substitute *Titius*, who owes me so much Money, in my Place, for the Payment of such a Debt which I owe to *Marcellus*, and such Debtor is accepted: And both Debtor and Creditor are changed, when I substitute my Debtor, in my Place, in order to pay neither me nor my Creditor, but him unto whom my Creditor owes so much as my Debtor owes me. And the Cause or Consideration of the Debt is changed, when it is agreed, that That which you owe me *ex Causâ Depositi*, you should, for the future, owe me *ex Causâ Mandati* [i], or, *for Business done*, and the like; or, by changing of a Debt on Bargain and Sale, into a Bond-debt, as aforesaid.

That kind of *Novation* which happens by changing of the Debtor, is in our Books likewise stiled *Delegation* [k]. And touching this kind of *Novation*, it is to be observed, That it happens as soon as I have assigned the Action over to my Creditor [l]. For the Obligation is immediately extinguish'd whereby I was bound to him; it was transferr'd on the Debtor, whom, henceforward, he has a Power of Suing or Convening [m]. But the Person whose Name or Debt I have assign'd over, is not entirely releas'd by me [n], unless he shall promise Payment to him unto whom I have assigned the Debt [o]. Nor is the Person who assigns over the Debt abridged or repelled from bringing his Action; unless the Cessionary or Assignee has commenced his Action, and contested Suit; or unless he has already received the Debt, or some Part of it; or unless he has signify'd unto the Debtor that he should not pay the same [p].

[e] D.46.2.1. pr.
[f] D.46.2.11.1.
[g] 50.17.29 & 139.
[h] D.42.1.4. pr. & 1.
[i] D.46.2.1.3.
[k] D.46.2.11, 12 & 13.
[l] D.46.2.11.
[m] D.46.2.1.3.
[n] C.8.42.3.
[o] D.46.2.11. pr. & 1.
[p] C.8.42.3.

A Con-

A Conditional Obligation does not admit of a *Novation* before the Condition is extant, and has its Event; nor does a future Obligation admit of a *Novation* before there be a ſufficient *Conſtat* of the Obligation itſelf [q]. A *Novation* may either be *Purely*, or elſe *in Diem*, or, thirdly, *ſub Conditione*; but yet in ſuch a manner, that it is not underſtood to be perfect before the Event of the Condition, or before the Day comes [r]. Every Obligation is ſubject unto a Novation, and ſo are Debts; yea, ſeveral Obligations may be couched under one Stipulation. But if the Term of Payment be prorogued or adjourned, it is not underſtood to be a *Novation* [s]; nor are the Sureties diſcharged. But when a *Novation* is made, the former Obligation, together with all its Acceſſories, as Pledges and Suretiſhip, are perempted [t]; and he that has made ſuch Novation is bound by a ſecond Obligation.

[q] D. 46. 2. 8. 1.
[r] D. 46. 2. 14 & 31.
[s] Jaſ. in L. 1. D. 46. 2.
[t] D. 46. 2. 18.

Delegation is either of an Action which is aſſigned over; or elſe of a Debt or Debtor, as when one Debtor is ſubſtituted and ſet up in the Place of another Debtor for Payment of a Debt: Thus when *Titius* is a Debtor unto *Caius*, and *Titius* orders or appoints *Sempronius*, who is his Debtor, to pay *Caius* the Debt which *Titius* owes him; which Thing is frequent among Bankers, whoſe Bills or Promiſſory Notes, paſs as Ready Money. *Delegation* is made by the Conſent alone of the Perſon delegating, and of him to whom ſuch Delegation is made: But this alſo requires the Conſent of the Perſon delegated, becauſe no one is obliged againſt his Will. All Creditors that may change a Debt by *Novation*, may alſo delegate the ſame [u]. Debtors are delegated by their Conſent, but not againſt their Will; and he that is delegated, ought to make a Promiſe of Payment unto the Perſon to whom he is delegated: and therefore the Buſineſs is perfected by the Conſent of each Party [x]. A *Delegation* is made by any kind of Conſent, even without Stipulation [y]: But as *Novation* ought to be made by Stipulation, it is neceſſary that the Creditor ſhould ſtipulate with the Debtor delegated to pay him, or that Suit ſhould be conteſted againſt him [z]. A Stipulation is made in this Caſe, when my Debtor promiſes my Creditor, or any other Perſon, according to my Order, to perform or do a Thing for me. If *Delegation* be rightly made, a former Contract vaniſhes, by Right of *Novation*, and the Perſon delegating is diſcharged from the Debt [a]. An Exception which may be objected to the Perſon delegating, cannot be objected to him unto whom ſuch Delegation is made, unleſs there be the ſame Reaſon [b].

[u] D. 46. 2. 20 & 130.
[x] C. 8. 42. 1.
[y] D. 46. 2. 17.
[z] C. 8. 42. 3.
[a] C. 8. 42. 2 & 3.
[b] D. 46. 2. 19.

Obligations enter'd into by Conſent alone, may be taken away by a contrary Conſent, if nothing be done in the Matter [c]. For it is agreeable to Nature, that every Thing ſhould be diſſolved by the ſame Means as it was firſt bound together [d]. For though a Pact does not toll an Obligation *ipſo Jure*, but only produces an Exception; yet this is otherwiſe in natural Obligations, and ſuch as are founded upon Conſent, which depend on the meer Law of Nations [e], and alſo in an Obligation of Theft and Injury [f].

[c] I. 3. 30. 4.
[d] D. 50. 17. 35.
[e] I. 3. 30. 4.
[f] D. 14. 2. 7. 1.

And as an Obligation is taken away by contrary Conſent, ſo it is likewiſe diſſolved by *Confuſion*, *viz.* when the Creditor becomes Heir unto the Debtor, or *vice verſâ*, or when one Perſon is Heir to both [g]. And it is the ſame thing, when the Goods of each Perſon are forfeited, or fall unto the Exchequer [h]; for then the Debt is ſaid to merged. If a Perſon that has accepted of an Heirſhip, being asked to reſtore the ſame, and, before he has reſtored it, he ſhall become Heir unto the hereditary Debtor, either in Part, or in the Whole, the Obligation is then taken away, by Right of *Confuſion*, ſo far as he ſucceeds the Deceaſed [i].

[g] D. 46 3. 95. 2.
[h] D. 46. 1. 71.
[i] C. 3. 32. 14.

TIT. XXIX.

Of a real Tender, *by way of Payment*; *another way of Ending an Obligation*; *and what is deemed a lawful Tender.*

ANOTHER way of Diſcharging a Debtor from an Obligation, is by a *real* Tender; which is, when the Debtor, or Some-body in his Behalf, comes and offers the Creditor what is due to him, by laying down the Sum in Money told out; and it ought to be made at a proper Time, and in a convenient Place [k], otherwiſe it may be call'd a Delay. There is alſo what we call a *verbal* Tender of a Thing; and as this is not preſent in Hand or laid down, it has no Operation in Law; becauſe a Tender ought to be *real*, in order to purge away a Delay [l]: For Words alone are not ſufficient, when ſome Fact is neceſſarily requir'd. But a *verbal* Tender is at all Times ſufficient, when the Debt or Credit is intricate and not thoroughly clear; meaning, that the Debtor will pay or ſatisfy the Debt, or is ready ſo to do, whenever the Debt becomes liquid, and as ſoon as it certainly appears what is due. If a Tender be made on a conditional Debt, and the Perſon to whom the Debt ought to be paid has refuſed to receive the ſame, the Condition is look'd upon as fulfill'd [m]; and he unto whom the Debt or Money ought to be paid, has no Action at Law [n].

[k] D. 22. 1. 32.

[l] D. 40. 7. 34.

[m] D. 35. 1. 24.

[n] D. 50. 17. 161. D. 49. 4. 8.

[A Tender and Refuſal, according to the Common Law of *England*, is equal unto a Payment.]

It is not ſufficient to make a Tender of Money, unleſs ſuch Tender be made *in Pecuniis numeratis*, *viz.* in Caſh told out [o]. If a Thing be perempted or periſhes after a lawful Tender made thereof, a Debtor *Speciei* is diſcharged *ipſo Jure*, and a Debtor *Generis* is diſcharged by the Help of an Exception. See the Title *Of Debtor and Creditor* before. But if Money happens to be loſt after a Tender made thereof, it ſhall not be at the Coſt of the Creditor, if the Creditor, by ſuch Tender made, was not in Delay or Fault [p]. An Obligation is diſſolved by a Tender, Conſignation, and Depoſiting of the Thing due, in ſuch a manner that the Debtor is fully diſcharged, and the Loſs of the Thing belongs to the Creditor [q]. And this is call'd a Tender made according to Law, or a lawful Tender. And if ſuch a Tender be made, the Debtor is diſcharged by ſuch a Payment, whether the Creditor will, or not [r]: For a Tender and a Depoſiting of the Money, even by an extraneous Perſon, diſcharges him *ipſo Jure* [s], without the Aid of an Exception, if the Money be conſigned to the Creditor's Uſe. But a Thing pawned is not diſcharged *à Nexu Pignoris* by Virtue of a Tender alone: Nor is a Debtor releaſed from a perſonal Obligation, unleſs the Money tender'd be loſt by a ſubſequent Misfortune, notwithſtanding what has been ſaid before. But 'tis otherwiſe, if Conſignation follows ſuch Tender, or if the Money be depoſited as it ought to be; for then every Obligation ceaſes, in the ſame manner as if the Tender was made in Court.

[o] D. 35. 1. 82

[p] D. 46. 3. 102.

[q] C. 8. 43. 9. C. 4. 32. 19.

[r] C. 4. 32. 19.

[s] I. 3. 30. pr.

A *real*

A *real* Tender is wont to be made in a threefold Manner. Sometimes *Extrajudicially* in the Preſence of a Notary and Witneſſes: And by ſuch a Tender, a Delay committed before a judicial Proceſs commenced, is purged and done away; but it is otherwiſe, if it be made after Conteſtation of Suit [t]. And ſuch a Tender makes the Perſon to be in Delay unto whom it is made, if he does not accept of the Money; becauſe *ultima Mora Nocet* [u]. And ſuch a Tender likewiſe ſtops the Courſe of Intereſt, if Intereſt has not yet begun to be due or run; otherwiſe ſuch Tender is not ſufficient [x]. *Secondly*, Such a *real* Tender is ſometimes made in a Court; and then, whether it be made before Conteſtation of Suit, or afterwards in the Preſence of an ordinary Judge, it has all the Effects as an Extrajudicial Tender has. And from ſuch a Tender a *direct Pignoratitious* Action accrues to the Debtor, to recover a Pawn againſt a Creditor [y]. And, *Thirdly*, Such a *real* Tender is made with Conſignation, and by depoſiting of the Money or Thing, *viz.* when a moveable Thing that is tendred, is conſigned in the Preſence of Witneſſes, and is by the Authority of the Judge depoſited in ſome publick Place [z]. Beſides the aforeſaid Effects, ſuch a Tender has the Force of a full and total Diſcharge, in ſuch a Manner that it not only ſtops the Courſe of Intereſt, but it frees the Debtor from the Danger of a fortuitous Caſe, and diſſolves the Obligation of all Pawns and Mortgages.

[t] DD. in L. 84. D. 45. 1.
[u] D. 18. 6. 17.
[x] DD. in L. 19. C. 4. 32.
[y] D. 13. 7. 9. fin.
[z] C. 4. 32. 19.

But to the End that ſuch a Tender ſhould produce its Effects, it is neceſſary, *Firſt*, That it ſhould be made in due Time and Place [a]. *Secondly*, That it ſhould be made *purely*, and without any Condition foreign thereunto: And when in depoſiting ſomething is requir'd to be done by the adverſe Party, unto which the Party is not obliged by Law, as *Baldus* [b] obſerves. *Thirdly*, Such a Tender ought to be made of the whole Debt, otherwiſe the Tender is ineffectual [c]. And, *Fourthly*, The Thing thus depoſited ought to be conſign'd over to the Cuſtody of the Depoſitary: Becauſe, if it be revoked, and the Debtor receives it again, it is deemed as a Thing never depoſited or conſign'd over [d].

[a] C. 8. 43. 9.
[b] In L. 19. C. 4. 32.
[c] D. 22. 1. 41.
[d] DD. in L. 19. C. 4. 32.

As a *real* Tender is, when the Money or Thing that is offer'd is preſent in Hand: So a *verbal* Tender is, when the Debtor has not the Money or Thing thus preſent, but only in Words offers himſelf ready to pay it. And it is a Rule in Law, that ſuch a Tender is not ſufficient to toll an Obligation, nor to ſtop the Courſe of Intereſt, as being in no wiſe relevant, generally ſpeaking. See *Bartolus* and the Doctors on the Law here quoted [e]. But this Rule admits of a Limitation. As when a *verbal* Tender is made of an immoveable Thing, as an Eſtate in Land, a Houſe: For as it is impoſſible to make a manual Tender of ſuch a Thing, a *verbal* Tender is ſufficient. A Tender is not ſufficient, unleſs the Money be laid down, and told out, becauſe ſome bad Money may be amongſt it, if offer'd in a Lump, or the whole Sum may not be tender'd, nor can a Notary make an Inſtrument of Payment thereon: But if the Debtor makes ſuch a Tender, it ought to be return'd him again, otherwiſe (according to ſome Opinions) he ſhall not be obliged to another Payment in a better Coin. Others will have it, that the Creditor is not bound to reſtore ſuch baſe Money; becauſe, if the Debtor attempts to make a Payment in adulterated Coin, knowing it to be ſuch, he ſeems to make a Gift thereof: But this latter Opinion is not according to Law, becauſe here is another Conſideration than that of a Gift, *viz.* a true and real Debt, from which the Debtor is preſumed to have a Deſire of being diſcharged; and therefore he fully tenders it with a Deſign of Payment, and not *animo donandi*. For this Intent of Giving is never preſumed, when any other Conſideration exiſts, or may exiſt. The bare Tender of a Debt not only hinders the Courſe of future Uſe or Intereſt, but it likewiſe prevents the Forfeiture of a Pe-

[e] In L. 19. C. 4. 32.

[f] C. 4. 32. 9. a Penalty, where a penal Sum is added to an Obligation [f]; and it inhibits the Sale of a Pawn, when a Tender is made in Court.

TIT. XXX.

Of Obligations ariſing from private Treſpaſſes and Offences.

HAVING already treated of Obligations which ariſe from a Contract, and of Actions and their Qualities which flow from thence, I ſhall next diſcourſe of ſuch Obligations as ariſe from a Treſpaſs or Miſdemeanor: For Obligations may flow from Offences, as well as from *proper* and *improper* Contracts; and theſe are ſtiled either *proper* or *improper* Offences. But the Difference herein is, that in Contracts Men do uſually in a voluntary Manner bind themſelves by ſome lawful Act done: Whereas in Offences they are bound againſt their Will by ſome unlawful Act which they commit. For a *Delictum*, or an Offence properly taken, is an unlawful Act committed by the Perſon with an evil Purpoſe of Mind, for which he [g] D. 47. 1. Rub deſerves Puniſhment. And it is divided into a *publick* and *private* Offence [g]. A publick Offence or Miſdemeanor, (which is moſt commonly called a *Crime*,) is that which directly tends to the Hurt and Damage of the State; [h] I. 4. 18. 1. D. 47. 1. 1. and every one may impeach ſuch a Crime [h]; and it is puniſh'd by Law in a publick manner of Proceeding. But a private Offence, known with us by the Name of a *Treſpaſs*, is that which more directly tends to the Injury and Diſadvantage of a private Man: And therefore, this is not avenged by any publick Law or Puniſhment; nor can any one of the People (at Pleaſure) appeach the ſame, but only ſuch as have an Intereſt, or are damaged, may bring a private Action. Theſe private Offences in our Books are frequently called *Delicta*, as the other are often ſtiled *Maleficia*.

They are ſubdivided into *ordinary* and *extraordinary* Offences. In the firſt, the Perſon injured brings his Action *civilly*, either to recover the [i] I. 4. 4. 12. Thing, or a Penalty in the Place of it [i]. But for ſuch as are ſtiled *extra-* [k] D. 47. 11. 9. *ordinary*, the Proceſs is made in a *criminal* Manner [k]. But when a private Injury may have an indirect Influence or Tendency to the Prejudice of the Publick, it is granted to the Perſon injured, after he has ſued the Treſpaſſer in a Civil Action, to bring a Criminal Accuſation to inflict a Fine or [l] D. 47. 1. 3. Corporal Puniſhment on the Offender [l]. But by the Law both theſe [m] D. 47. 1. 2. Actions cannot be commenced together at the ſame Time [m]. A Treſpaſs or Miſdemeanor may be committed, 1*ſt*, either by ſome Act done; or, 2*dly*, by ſome Words utter'd; or, 3*dly*, by Writing; and, 4*thly*, by Counſel given. And theſe four Kinds are diſtinguiſhed ſeveral Ways, *viz.* [n] D. 48. 19. 16. By the Cauſe, Perſon, Place, Time, Quality [n], Event, *&c.* which are the Circumſtances of a Treſpaſs or Miſdemeanor. By the *Civil* Law, *ordinary* private Offences are four in Number, *viz.* *Theft*, *Rapine*, *Injury*, and *Da-* [o] I. 4. 18. pr. *mage* [o]; and all theſe conſiſt in doing ſome unlawful Act [p], and are ſtiled [p] D. 48. 19. 18. *proper* Offences. I ſhall ſpeak firſt of Theft, and afterwards of the other three. But it is to be noted, that, regularly ſpeaking, every Offence is [q] D. 47. 15. 3. fin. deemed to be a private Offence, unleſs the Law has declared it otherwiſe [q].

TIT. XXXI.

Of Theft, *what it is, and how many Kinds thereof: Of Theft* conceived, offer'd, prohibited *and not* exhibited, *and what thoſe are: How it is committed, and of the Intent of Stealing; what Things may be ſtollen, and who are liable for Theft: Of* Domeſtick *Theft, and who are liable to this Action, and what is included therein; and of the Puniſhment of Theft, &c.*

THE Lawyer *Paulus* defines *Theft*, (which by the *Roman* Law is an Offence of a private Nature,) to be a fraudulent purloining or taking away of that which belongs to another Perſon, with a Deſign of making ſome Advantage thereof [r]: And this extends not only to the Thing itſelf, but alſo to the Uſe and Poſſeſſion of it [s]. It is in our Books called *Rei Contrectatio* as well as *Amotio*, or a Taking away; becauſe, though that which belongs to another be not taken away or removed, yet it may be termed *Theft*: As when the *Depoſitary* or *Commodatary* makes uſe of a Thing depoſited or lent as a *Commodatum* againſt the Will of the Owner [t]. And it is here ſaid to be a *fraudulent* purloining or meddling with the Thing; becauſe, in order to ſubſtantiate Theft, it is neceſſary there ſhould be this Contrectation made with Fraud and a bad Intent, whether it be expreſly or tacitly done againſt the Owner's Conſent. For he who fraudulently meddles with what belongs to another, is underſtood to do it againſt the Will of the Owner; and, the Words in the Law, *viz. invito Domino*, need not to have been added to the Definition.

[r] D.47. 2. 1.
[s] I.4. 1. 1.
[t] I.4. 1. 2.

Theft is in *Latin*, according to *Labeo*, ſtiled *Furtum*, from the Word *Furvum*, (as *Aul. Gellius* obſerves [u],) ſignifying the ſame as *Nigrum*, becauſe it is done privately, and very often in the Night-time; or elſe (as others ſay) from the *Greek* Word Φῶρας, denoting *Thieves*, from the *Greek* Verb Φέρειν [x], from taking away. Hence the bare Thought of committing Theft does not make it ſuch, ſince there muſt be an Overt Act by taking away, *&c.* Thus he who denies himſelf to have received a *Depoſitum*, is not immediately liable to an Action of Theft, but is only ſo far liable, as when he conceals it for the ſake of converting it to his own Behoof. Theft muſt be of a Thing moveable and corporeal [y]; and there muſt be a fraudulent taking away againſt the Will of the Proprietor, with an Intent of concealing the Thing. And, laſtly, according to the Text [z], it muſt be committed for the ſake of making ſome Gain thereby: But, I think, it may be committed without any ſuch Proſpect of Gain.

[u] Lib. 1. c. 18.
[x] I.4. 1. 2.
[y] I.4. 1. 1.
[z] Ibid.

The Lawyer *Paulus*, in the *ſeventh Book of his Sentences*, reckons up four kinds of Theft, *viz.* Theft *conceived*, Theft *offered*, Theft *prohibited*, and Theft *exhibited:* But *Juſtinian* has reduced theſe to two *Species*, though at this Day theſe two *Species* are not regarded, but the ſame Reſpect is had to Theft by what Means ſoever it be committed. Now the two *Species* of Theft, mention'd in our Books as eſtabliſh'd by *Juſtinian*, are, *viz. Firſt*, *Manifeſt* Theft; and, *Secondly*, Theft *not Manifeſt* [a]. *Manifeſt* Theft is that, when the Thief is taken *in ipſo Facto*, or with the Thing ſtollen in his Hand; and thus a *Manifeſt* Thief is he whom the *Greeks* call Αὐτόφωρα: And it matters not by whom he is deprehended, whether by him whoſe

[a] D.47.2. 2.

Goods he ſteals, or elſe by another Perſon; provided he be taken before he can get to the Place where he deſigned to ſtay that Day on which he committed the Theft; nor whether he be taken in a publick or private Place [b]. Thus, if a Man commits a Theft in a Houſe, and be deprehended before he can get out of the Door or Gate, he is ſaid to be a *Manifeſt* Thief, or a Perſon taken *in ipſo Facto*, which our common Lawyers call *in the Manner*, with the Thing in his Hand. Or if a Man commits a Theft in a Vineyard, or the like, and be taken before he can get out of the Vineyard, it is the ſame Thing. But if the Perſon carries off the Goods to the Place deſign'd, he ſhall not be deemed a *Manifeſt* Thief, though he be taken with the ſtollen Goods in his Poſſeſſion [c]. A Thief not *Manifeſt* is known *è contrario*, *viz.* when the Theft is not ſo manifeſt and evident in reſpect of the Perſon.

[b] D. 47. 2, 3, 4, 5 & 6.

[c] I. 4. 1. 3.

But, by the *Civil* Law, Theft may be committed ſeveral other Ways than by an actual removing and taking away that which belongs to another Man; for it may likewiſe ſubſiſt in every other kind of meddling with that which appertains to the Uſe and Poſſeſſion of another: As when a Creditor makes uſe of a Pawn, or the Depoſitary of the Thing depoſited with him; or when a *Commodatary* applies the Thing lent him to any other Uſe than that for which it was lent [d]. A Creditor ſelling a Pawn before the Time that he ought to do, commits Theft, if it be nor ſtipulated that he may ſell it [e]. If a Man makes a Gift of that which is not his own, it is a *Species* of Theft. But a Poſſeſſor *Malæ fidei*, by receiving the Fruits of my Eſtates, does not commit Theft, if ſuch Fruits are extant and forthcoming; yet if he waſtes and conſumes them, he does, and ſhall be liable to an Action: For a Poſſeſſor *Malæ fidei* is by a *real* Action, or by a Claim of the Thing, obliged to reſtore them, if they are extant; but if they are conſumed, he is liable to an Action *ex injuſtâ Cauſâ* [f]. *Titius* wrongfully poſſeſſed himſelf of my Eſtate, for that he made an unjuſt Entry thereon. I brought a *real* Action, and had a Sentence for me. In this Caſe I may have a *real* Action to recover the Fruits which he received, if they are extant. If a Perſon has purloined my Goods, and they periſh in his Hands, before he makes a Tender thereof, it is at the Coſt and Hazard of him who purloined them: For a Thief is in Delay, which is not purged and done away, unleſs he makes Reſtitution [g].

[d] D. 47. 2. 54.

[e] D. 47. 2. 75.

[f] C. 4. 3. 3.

[g] C. 4. 8. 2.

If there are ſeveral Men that ſteal and purloin the ſame Thing, I may have an Action againſt all or either of them *in Solidum*, and the Payment of one does not diſcharge the reſt from the Puniſhment of Theft, but only diſcharges him from a *condictio furtiva:* For in this *Condiction* or perſonal Action, if one makes Satisfaction, Satisfaction is made for all the reſt [h]. If a Man ſteals another's Goods, and afterwards the Owner dies, and by a Bequeſt of the Thing ſtollen the Property is alter'd, an Action of Theft accrues to the new Proprietor, *viz.* to the Heir, Legatary, or *Bonorum-Poſſeſſor* [i]. But a Thief cannot have an Action of Theft for the Thing which he has ſtollen, againſt him who takes it from him [k], for this would be to encourage Theft.

[h] C. 4. 8. 1.

[i] D. 47. 2. 48.

[k] D. 47. 2. 78.

Though thoſe Perſons that are in the Power of their Parents, do really and truly commit Theft, according to the proper Signification of the Word, if they purloin or privily take away any Thing from them, this being ſtiled *Domeſtick* Theft: Yet an Action of Theft does not lie againſt them by the *Civil* Law; becauſe by this Law an Action does not lie between a Parent and Children on any Account [l]. But, by the common Uſage in *Holland* and ſome other Countries, they may at this Day mutually oblige each other, according to *Groenwegen* [m]. Wherefore, now they may have a Civil Action for Damage, if their Children do unlawfully purloin any Thing; and the State is not forbidden to proſecute the ſame *ad publicam vindictam*.

[l] I. 4. 1. 12.

[m] De LL. Abr. I. 3. 20. 4.

vindictam. For though the *Civil* Law ſuffers not thoſe *Domeſtick* Thefts to be puniſhed, if they are of a mean and trifling Nature, in a publick Manner [n]; yet this does not obtain by the Laws of *Holland*, which publickly puniſh the *Domeſtick* Thefts of Servants and Hirelings with no leſs Severity than other Thefts [o], if they themſelves unto whom the Theft is done do inform againſt ſuch Thieves, and complaining of the Injury done, do demand Puniſhment according to the *Moſaick* Law [p] for the Offence committed. But in *France*, Domeſtick Thieves, by reaſon of a Breach of Truſt, and the Difficulty of proving ſuch Thefts, are puniſhed with more Severity, and oftentimes with Death itſelf. See *Charondas's Pandect of the Laws of* France.

[n] D. 48. 19. 11. 1.

[o] Vinn. in I. 4. 1. 12.

[p] Deut. xxi. 18 & 19.

By the ancient *Civil* Law, Theft was ſometimes puniſhed by a Reſtitution of two-fold, and ſometimes of four-fold, but never with Death: Yet afterwards, by a *Novel* Conſtitution [q], it came to be puniſhed in a corporal Manner, provided the Face was not thereby diſfigur'd by branding the ſame with Letters. By the *Lombard* Law, the Criminal was to loſe an Eye for the firſt Offence, to have his Noſe ſlit for the ſecond, and to ſuffer Death for the third Offence. And this is true, if the Proſecution be made in a Criminal Manner: But if the Perſon be proceeded againſt in a Civil Manner, then if he be a Male and a Freeman, and the Theft be manifeſt, he ſhall make Reſtitution, and pay a Fine of ſeventy Solids for his Offence. The Puniſhment of Theft, according to the known Cuſtom of *Germany*, is at this Day Hanging or Strangling, if the Value of the Thing ſtollen exceeds five Shillings or *Aurei*. But what theſe *Aurei* are, the Lawyers are at a loſs to know, but it is much diſputed by many Men: Some taking them for the *common*, others for the *Hungarian Aurei*. By the Electoral Conſtitutions of *Saxony* [r], Theft is puniſhed with Death, if the Value of the Thing ſtollen exceeds the Sum of five *Hungarian Aurei*, which ought to be always expreſſed in the Sentence. But this Puniſhment of Hanging does not ſeem to be introduced by the Emperor *Frederick*, but in later Times: But by the *Saxon* Law, which is much more ancient than the Conſtitution of *Frederick*, (which was never reduced to Writing,) the Puniſhment of Hanging is found to be enacted againſt Thieves; and from the *Saxons* probably we here in *England* derived it. But if Theft be committed in the Night-time to above the Value of three Shillings [s], it is puniſhed with Death in *Germany*: But being committed in the Day-time, it is only puniſhed with Fuſtigation or the Baſtinado, if it does not exceed three Shillings. So that there was anciently a Diſtinction made between a Day and a Night Thief; for a Man might kill the laſt by his own proper Authority [t].

[q] Nov. 134. c. 13.

[r] Nov. Conſt. par. 2. c. 14.

[s] Zobel. Art. 28. lib. 2.

[t] D. 48. 8. 9.

As I have hinted, that the Puniſhment of Theft, according to the *Civil* Law, is either two-fold or four-fold, and not Death, as by ſubſequent Laws in other Countries, many Perſons have from hence doubted, whether Death be a Puniſhment ſuitable to this Crime of Theft, becauſe the Holy Scripture ſeems to be of a contrary Opinion. For, *Firſt*, The Law of God does not puniſh Thieves with Death, but in four-fold [u]: Which Law is purely a Judicial Law, and being made to ſupport the Eighth Commandment of the Decalogue, is an Interpretation thereof. *Secondly*, They ſay, it well agrees with natural Equity, that he *qui ære deliquit, ære puniatur*. *Thirdly*, That by the Laws of *Moſes* Theft was never puniſhed with Death: Therefore, if the Puniſhment of four-fold or five-fold in the Times of *Moſes* was looked upon as a juſt Puniſhment for Theft, it follows *è contrario* that the modern Puniſhment, whereby a Thief loſes his Life, is an unlawful Puniſhment; For the two Oppoſites, as a Pecuniary and Capital Puniſhment of Theft, cannot be true *Secundum idem*. For if it was then juſt, it will alſo be now juſt to puniſh Theft in a Pecuniary Manner; for the Nature of Theft

[u] Exod. xxii.

Theft is entirely the ſame at this Day as it was heretofore, the Nature of Crimes being not changed with Times. Nor are theſe Laws of *Moſes*, which are purely Judicial, entirely now abrogated, but are cited and approved of by *Chriſt* himſelf in ſeveral Places of the *New Teſtament* [x]. But this is a Matter of dangerous Conſequence; and leſt I ſhould be ſuſpected of Novelty, I rather obey the Laws now made, than ſet up to make new Laws, which is not my Province.

[x] Mat. xv. 3. John viii. 3. Cor. x. 5.

But it muſt be confeſſed, that, according to ſome Mens Opinions, Theft is not an Offence of its own Nature, but is made ſuch by the Laws of Civil Society: For we read, there were ſome People, among whom it was lawful to ſteal with Impunity, as among the *Egyptians*, according to *Aul. Gellius* [y]. Among the *Lacedemonians* we find it a Matter of great Praiſe and Commendation to be able to ſteal, and not to be deprehended in the Fact: Which was the chief Exerciſe and Education of their Youth, in order to teach them more Caution and Diligence in the ordinary Buſineſs of Life. But Theft is forbidden by the Law of God, as well as by the *Civil* Law and the Law of Nations [z]: For by the Law of Nature there could be no ſuch Thing as Theft, all Things being in Common by that Law. The *Canon* Law looks upon Theft to be a more grievous Crime than the *Civil* Law does: For, in reſpect of other Crimes, they may be purged and done away by Repentance of the Mind; but the *Canoniſts* ſay, Theft cannot; becauſe Reſtitution of the Thing taken away is neceſſary hereunto [a].

[y] Lib. 12. c. 18.

[z] I. 4. 1. 1.

[a] VI. de Reg. Jur. c. 5.

Cujacius obſerves, That there are ſeveral Kinds of Thieves. Thoſe of a more wicked and atrocious Nature are in *Latin* ſtiled *Raptores*, or Robbers. For a *Raptor* and a *Thief* are diſtinguiſh'd by the *Civil* Law, after this manner: *viz.* The firſt is ſaid to be, when it appears, that he had a malicious Intent of taking away any Thing openly, and, as it were, by Force, though he finds no one in the Houſe, or be not deprehended in the Fact: And ſuch a one is an Offender againſt the Publick. Among theſe, we may reckon Houſebreakers, Highwaymen, Pyrates, *&c.* But a *Thief* is he who privately ſteals without Force, though he be ſometimes taken in the Fact: And this is an Offence of a leſs heinous Nature, and not a publick Crime. Theſe laſt commit their Offences in private, whereas the others commit them openly and in the Face of the Sun. And though *Juſtinian* will not have private Theft puniſh'd with the Loſs of Life or Member; yet he leaves Highwaymen, Houſebreakers, and Pyrates at Sea, to be chaſtiſed with Death [b]: For ſuch Acts as theſe are by the *Civil* Law accounted more atrocious than private Theft.

[b] Nov. 134. c. 13.

[The Law of *England* divides Theft into *Larceny* and *Robbery*. The firſt is taking away of a perſonal Chattel in the Abſence of the Poſſeſſor: And in reſpect of the Thing taken away, is called either Grand or Petit Larceny. The firſt is, when the Thing taken away amounts to the Value of Twelve Pence, or upwards; and the other is, when it comes under that Value. Robbery is, when any one takes away a Thing from a Perſon by Force, or (at leaſt) in the Preſence of the Poſſeſſor. All kind of Theft is, with us, a publick Crime. But, I think, it is left to the Diſcretion of the Perſon that loſes the Thing, whether he will proſecute it criminally or civilly, by a Fiction of Law, the Perſon ſuppoſing the Thing found by Chance, and detains it from him; and thus either recovers the Thing, or the Value thereof [c]. The *Normans* puniſh'd Theft in a gentler manner than the *Saxons*, *Angles*, and *Danes*, *viz.* by a Fine; and in caſe the Delinquent made Flight, the Pledge ſatisfy'd the Law for him. See *The Laws of the Conqueror* [d]. But in the later Times of *Henry* I. the Law was again reduced to the Puniſhment of Death, and ſo has continued ever ſince.]

[c] Flet. lib. 1. c. 38. pr. Bract. lib. 5. tract. 5. c. 31.

[d] Cap. 4.

A Thing ſtollen, and found upon the Thief, does not by the *Civil* Law go unto the *Exchequer*, as Felons Goods, but unto the Proprietor: But by the *Saxon* Law it is otherwiſe [e]. For, in ſome Places, the Judges or Magiſtrates are wont to claim unto themſelves the Property of Goods taken in the Thief's Cuſtody, on his being condemned to Die. But this Cuſtom ſeems to be entirely diſallow'd of by the *Civil* Law: For after Enemies are driven out of the Lands which they had poſſeſſed themſelves of, the Property

[e] Jus Sax. lib. 2. art. 37.

Property of ſuch Lands returns to the former Owners, and are not confiſcated. And thus, as the Proprietor has committed no Offence, he ought not to be deprived of his Eſtate, on the Crime of a Thief or Robber [f]. By the *Saxon* Law, the Judge may keep the Thing ſtollen for a Year and a Day, and then reſtore it to the Owner demanding the ſame. See the *Jus Saxonicum* [g]. A Perſon may, by the Permiſſion of the Judge, ſearch for ſtollen Goods in another's Houſe, if there are ſtrong Preſumptions againſt the Perſon whom he ſuſpects of ſtealing the Goods: But if no ſuch Preſumptions appear, the Judge cannot, (according to *Jul. Clarus*, in his Book of *Sentences*) grant Entrance into another Perſon's Houſe [h]. For want of Ability to make a pecuniary Reparation in ſimple Theft, *Juſtinian* will have all Thieves to be puniſh'd at the Judge's Diſcretion in a corporal manner, but not capitally [i].

[f] C. 4. 47. 22.

[g] Lib. 2. art. 31.

[h] Boer. Deciſ. 174.

[i] D. 47. 2. 92.

I have before remember'd, That the greateſt Puniſhment the *Romans* inflicted on *ſimple* or *manifeſt* Theft, was to pay four-fold, when the Thief was taken in the Act itſelf, or (at leaſt) ſeen and cry'd out upon before he could get out of Sight; or if otherwiſe the Theft was not ſo *manifeſt*, to pay double the Value of that which he ſtole; and the Reparation was only to the Party damnify'd. But an Action of Theft only accrues to him that has an Intereſt in the Thing ſtollen, by Virtue of an honeſt Title, and not to a Poſſeſſor *malæ Fidei*, leſt he ſhould obtain an Action by his own Diſhoneſty [k]. And it is granted to a Creditor for a Thing pawn'd to him, if it be ſtollen from him, in the ſame manner as granted to the Proprietor of the Thing; becauſe each Perſon has an Intereſt therein, though, properly ſpeaking, it be not the Goods of the Creditor [l]. But a Buyer has not this Action before the Thing ſold be deliver'd to him: And if the Buyer himſelf ſhall ſteal it, before he has paid the Purchaſe-money, he ſhall be liable to this Action, though 'tis otherwiſe after the Price paid [m]. If there were divers Perſons taken or diſcover'd to be Accomplices in one and the ſame Theft, they all underwent but one and the ſame pecuniary Penalty amongſt them; yet either of them might be ſued for the Whole.

[k] D. 47. 2. 10 & 11.

[l] D. 47. 2. 13.

[m] D. 47. 2. 14.

TIT. XXXII.

Of Rapine *or* Robbery, *how defined; and of the Action* de Vi Bonorum Raptorum, *againſt whom it lies, and to whom given*, &c.

RAPINE or *Robbery*, is defined to be, the Taking away from a Perſon ſome moveable or corporeal Thing with a malicious Intent of Mind, and by open Force and Violence [n]; and it is of a more atrocious and heinous Nature than that we call *ſimple* Theft *. For thoſe who ſteal in a clandeſtine manner, ſhew ſome Fear and Reverence for the Laws, but theſe Perſons bid Defiance to them. And hence it is, that the *Civil* Law has given ſeveral Actions againſt ſuch Perſons as do by open Violence ſeize and take away the Goods of other Men. For if the Robber be deprehended in the very Act of committing this Offence, he is liable to an Action of *manifeſt* Theft [o]: But if he ſhall not be taken therein, he ſhall only be liable to an Action *Furti non manifeſti* [p]. But the *Prætor* has,

[n] D. 47. 8. 2.

* I. 4. 2. 1. C. 9. 33. 2.

[o] D. 47. 2. 7. 1.

[p] D. 47. 8. 1 & 2.

has, on the ſcore of this Offence, introduced a proper and peculiar Action, ſtiled *Vi Bonorum Raptorum* [q], or *Damni in Turbâ illati* [r]. But of theſe I ſhall ſpeak by and by.

[q] I. 4. 2. pr.
[r] D. 47. 8. 4. pr.

In reſpect of *Robbery*, it is *Firſt* required, that there be a fraudulent or malicious Mind added thereunto. *Secondly*, 'Tis neceſſary, that the Thing taken away be a moveable Chattel: For Things immoveable cannot be the Object of an *ablative* Violence: And theſe laſt are properly ſaid to be *invaded* [s], and not ſeized or occupied. And it is alſo *Robbery*, if the Thing taken away be in Common, and the Partner, by way of Force, applies and converts it to any other Uſe than the Purpoſe intended, againſt the Will of his Partner. And, *Laſtly*, In reſpect of *Robbery*, there ought to be the Intervention of Force and Violence, in order to diſtinguiſh it from *ſimple* Theft, which is committed privately. And the Words, *with a malicious Intent of Mind*, are added; becauſe, if any one ſhall by Force take away that which belongs to another, through an erroneous Belief that it is his own, he is not liable to an Action *Vi Bonorum Raptorum*, nor is Rapine or Violence ſaid to be committed; becauſe, in this Caſe, there is no Malice or evil Deſign: Yet a Perſon committing even ſuch an Act of Force, ſhall have ſome Puniſhment inflicted on him.

[s] C. 8. 4. 7.

By an Action of Rapine, *Vi Bonorum*, &c. the Plaintiff ſues for fourfold Damage of the Thing taken away; in which Damage the Thing itſelf is included [t]; and if he brings an Action *Damni illati*, it ſhall only be in twofold. But both theſe Actions muſt be commenced within a Year from the Fact committed [u]: For after the Year he ſhall only have an Action for *ſimple* Damage [x]; and in this Reſpect the Action is not barr'd by any Limitation of Time. In an Action *Vi Bonorum*, &c. it is neceſſary to deſcribe and ſet forth in the Libel the Force and Violence made uſe of. But herein an Action of *Robbery* differs from an Action of *manifeſt Theft*; *viz.* that in this Damage of fourfold, the ſimple Value of the Thing is included; and thus the Puniſhment is only threefold: Whereas 'tis otherwiſe in *manifeſt* Theft, where the Puniſhment is entirely fourfold, as before ſhewn. Therefore, the Puniſhment of Robbery ſeems much lighter than that of *ſimple* Theft, wherein the meer Puniſhment is fourfold. Touching the Reaſon of this Diverſity, great Diſputes have happen'd between the Doctors: Of which, ſee *Accurſius*.

[t] I. 4. 2. 2. D. 47. 8. 4.
[u] I. 4. 2. pr.
[x] D. 47. 8. 4. 4.

Rapine may be committed two ſeveral Ways. 1*ſt*, in reſpect of Things: And, 2*dly*, in reſpect of Perſons. But this laſt is properly ſtiled Rape or *Raptus*; and the other is termed *Rapine*. If Rapine be committed on the Goods of the Church, it is called *Sacrilege*, and is by the Common Law regularly puniſh'd with Death [y]. They that are guilty of Robbery, are either Houſebreakers, in *Latin* ſtiled *Effractores* [z]; or ſuch as rob on the Highway, called *Latrones* and *Graſſatores*; or ſuch as attack Paſſengers in the dark and ſtrip them of their Cloaths, termed *Expilatores*; and, generally ſpeaking, all others that take Goods away by Force, according to the aforeſaid Limitation, (though they do not break open Houſes) are guilty of Rapine; among whom we may reckon Pyrates that rob on the Sea.

[y] D. 48. 13. 6.
[z] D. 47. 18. 1. 2.

The Puniſhment of Robbery is ſeverer than that of *ſimple* Theft, though the Thing taken away be of leſſer Value [a]: For the Audaciouſneſs of the Fact, and not the Value of the Thing, is to be conſider'd. Beſides the common Proſecution of Robbery, as above-related, the Guilty may alſo be puniſh'd *criminally*, as it is an Offence againſt the Publick; and the Perſon proſecuted may be puniſh'd in an arbitrary manner, according to the Circumſtances of the Fact. Houſebreakers in the Day-time, and ſuch as rob and ſtrip People of their Cloaths in the Night-time, may be condemned to Workhouſes [b]: But Houſebreakers by Night (after they have ſuffer'd

[a] I. 4. 2. pr.
[b] D. 47. 18. 1. 2. & l. 2.

the

the Baſtinado or Cudgelling) were uſually condemned to the Mines. Highwaymen, if they have been guilty and go armed, may be puniſh'd with Death [c], and hung up in Chains where they committed a Murder, or thrown to the wild Beaſts. The ſame Puniſhment may alſo be inflicted on notorious Pyrates. Thoſe that rob or violently take away any Thing whilſt a Houſe is on Fire, forfeit fourfold [d], within a Year's Proſecution; becauſe the Thief is, in ſuch a Caſe, the greater Villain, as the Caſe of the Sufferer is ſo much the more miſerable, Affliction being added to Affliction.

[c] D. 48.19.18.

[d] D. 47.9.1.

TIT. XXXIII.

Of Obligations *ariſing from* improper *Offences or Treſpaſſes.*

HAVING before diſcourſed of ſuch Obligations as ariſe from *proper* Offences; I ſhall here ſpeak of ſuch as ariſe from *improper* Offences or Treſpaſſes, call'd *Quaſi Delicta* [e], being the *Fourth Species* of Obligations. And hence it is, that a Perſon may be ſometimes obliged, without his own Privity, for the Fault or Act of another Perſon, and ſometimes on the account of his own Negligence and Unskilfulneſs in Buſineſs: For in *improper* Treſpaſſes a Perſon may offend through meer Neglect and Imprudence, without any Malice or ill Deſign; and theſe are made Offences only by Interpretation of Law. For as there are ſome Affairs tranſacted which are not *direct* and *proper* Contracts by Agreement, (which are therefore ſtiled *improper* or *indirect* Contracts); ſo there are ſome Treſpaſſes and Offences which are not *directly* and *properly* ſuch in themſelves; yet, becauſe they come nearer to the Nature of an Offence than to that of a Contract, they are called *improper* Treſpaſſes and Offences. Of theſe we have Seven Examples in our Law-books.

[e] I. 3.5. Rub.

The *Firſt* is, When a Judge does, through his Unskilfulneſs in the Law, pronounce an erroneous Sentence: For if there was Bribery and Deſign in the Judge, it becomes a *direct* Offence; and, in Civil Cauſes, he is puniſhable by a Condemnation to refund the whole Value of the Suit, with Coſts [f]. Beſides, he is render'd infamous *, and muſt pay treble the Value of what he received, or double of what was only promis'd him: But in Criminal Cauſes he is puniſh'd with Baniſhment, and Confiſcation of his Eſtate [g], as being guilty of Baratry. But if the Sentence was only given by Miſtake, then *Litem ſuam facit*; namely, he himſelf is made Party to the Action, and liable to the Payment of what ſhall be adjudged due for Damage. For, in this laſt Caſe, becauſe he acts without Fraud and Deſign, it is not a *proper* Offence, but only a kind of Miſdemeanor: For his Unskilfulneſs ſhall here be imputed to him as a Fault [h]; ſince every one that accepts of an Office, does, *eo ipſo*, aver himſelf to be ſufficiently qualify'd for it, according to the *Gloſs* on the Law here cited [i]. Wherefore, if he ſhall afterwards, through Ignorance, pronounce a wrong Judgment, he ſhall be liable, to the Party injured, in ſo much as the ſuperior Judge ſhall think meet; a due Regard being had to his Error and Unskilfulneſs [k]. In which Caſe it ought to be conſider'd, whether the Miſtake was in a common and eaſy Queſtion of Law, or in a Matter of Difficulty. For if a Judge pronounces a Sentence according to the common Opinion of

[f] D. 5.1.15.

* C. 7.49.2.

[g] C. 7.49. Auth. *Novo Juri*, & l. 2.

[h] D. 50.17. 132.

[i] D. 2.2.2.

[k] D. 45.1.5.4. D. 47.11.11. I. 4.5.pr.

of the Doctors, he does not make the Suit his own; ſince the common Opinion of the Lawyers ought to be follow'd, as well in pronouncing Sentence, as in giving Counſel, unleſs it be evidently falſe [l]. What I have here ſaid of an ordinary Judge making himſelf liable, may alſo be ſaid of a delegated Judge, according to the Doctors [m]; and likewiſe in reſpect of an Arbiter or Referee, who makes the Suit his own by an unjuſt Award [n]. But this Law concerning the Miſtakes of Judges is at this Day out of Uſe in ſeveral Countries, as *Groenwegen* [o] obſerves on the *Inſtitutes*; the Party injured having the Liberty to reverſe the ſame, by an Appeal to the ſuperior Judge.

[l] DD. in c. 1. X. 1. 2.

[m] In D. 6. D. 15. 13.

[n] Gloſſ. in L. ut ſupra.

[o] De LL. Abr. I. 4. 5.

Again: A Notary, who, through want of Skill, makes ſuch an Inſtrument as is of Detriment to the Party, is ſaid to commit an *improper* Offence, and ſhall be liable to make good the Damage which the Party ſuffers through his want of Skill; becauſe ſuch want of Skill in a Perſon that executes a publick Office, is a kind of Crime in him [p]: For a Notary is bound to know ſo much of the Law (at leaſt) as appertains to his Office, that he may keep himſelf from unlawful Contracts, *&c.* And what is here declared of a Judge and a Notary, may alſo be ſaid of a Judge's Aſſeſſor or Counſellor [q].

[p] C. 5. 75. 6.

[q] D. 2. 2. 2.

A *Second* Caſe, wherein a Perſon is bound by an *improper* Offence or Treſpaſs [r], is, When a Perſon throws down or pours any Thing from an Houſe, without a Deſign, which annoy or incommode another as he paſſes by in the Streets or Lanes, either in his Perſon, Goods, or Cloaths. The Inhabitant is, in this Caſe, liable to make good the Damage, whether he be Maſter of the Houſe as the Proprietor of it, or only as a Tenant [s]; and, whether it was either he himſelf, or any of his Family, that threw or poured it down [t]. Thus, a Husband is anſwerable for his Wife, a Father for his Children, a Hoſt for his Gueſts, and a Maſter for his Servants, if they offend [u]. And the Reaſon of this Law, is, that People may freely paſs along the Streets and publick Ways without Fear of Danger to themſelves [x]. But if the Proprietor has let out his Houſe, then the Tenant or Inhabitant, not the Owner, is liable. If a Traveller, who lodges in an Inn or Publick-houſe, ſhall thus pour or throw any Thing, the Libel ought to be againſt the Innholder [z]: But yet the Innholder may have an Action on the Caſe againſt his Gueſt, to recover what he has been compelled to pay by reaſon of his Gueſt's throwing Things into the Streets [a]. If a Law of this or that City forbids Perſons to wear Swords in the Streets, under a certain Penalty, and a Stranger comes into an Inn, and walks the Streets with his Sword by his Side, not knowing of ſuch a Law, the Hoſt or Innkeeper is liable to ſuch Penalty, for not acquainting his Gueſt with ſuch Prohibition [b]; and the Stranger himſelf is excuſed, as being ignorant of the Law. If there be ſeveral Perſons jointly and equally dwell in the ſame Houſe from whence any Thing is thrown out, as being one Family, then only the Perſon that throws it out is liable, if there be a *Conſtat* of the Perſon [c]: But if it does not appear who threw it out, then, in a doubtful Caſe, all are liable, and each Perſon *in Solidum* [d]. But if one pays the Damage, the reſt are diſcharged; only ſuch Perſon may recover from each of them their reſpective *Quota's* [e]. But though ſeveral Perſons dwell in the ſame Houſe; if they live in different Apartments, as one in the Garrets, and others on the firſt Floor, then each of them is liable according to the Diverſity of his Habitation [f].

[r] D. 9. 3. t. t.

[s] D. 41. 1. 5.

[t] I. 4. 5. 1

[u] D. 9. 3. 5.

[x] D. 9. 3. 1. 1.

[z] D. 9. 3. 1. fin.

[a] D. 9. 3. 5.

[b] D. 50. 9. 6.

[c] D. 9. 3. 2.

[d] D. 9. 3. 1, 2 & 3.

[e] D. 9. 3. 1 & 3.

[f] D. 9. 3. 5. pr.

In reſpect of the Penalty to which the Offender is liable, we are to diſtinguiſh. For either the Damage is done in reſpect of Things, as when dirty Water is thrown out, whereby a Man's Cloaths are ſpoil'd as he paſſes by; in which Caſe the Perſon pouring out is liable to pay double the Damage [g]: And this holds true, if any Thing be pour'd out or thrown

[g] I. 4. 5. 1.

thrown down in the Day-time, but not in the Night-time, unleſs it be ſuch a Place where Men uſually walk in the Night-time [h]. Or elſe the Damage is done to a Man's Perſon: Wherein we are likewiſe to diſtinguiſh again. For either a Freeman is killed in paſſing by, and then the Penalty is fifty *Aurei* or Crowns, whereby the Offender's Fault is puniſhed, leſt ſuch Offence ſhould paſs with Impunity, but not as an Amends for a Perſon killed, becauſe the Body of a Freeman is not to be valued at any Price [i]. But if ſuch Freeman be only wounded, then there is no expreſs Penalty allotted; but it is left to the Diſcretion of the Judge to condemn the Offender in the Expences laid out in the Cure, and to ſatisfy the Perſon for the Loſs of his Labour during ſuch Infirmity, and to pay other Damages [k]. But by the *Saxon* Law, Wounds cauſed have a certain Penalty annexed to them. See the *Jus Saxonicum*. A Man's Labour loſt is in this Caſe to be rated for an hundred Years, becauſe (poſſibly) he may live ſo long [l]. If a Man hangs up any Thing in the Way through which People travel, he is liable to ſuch Damage as may enſue by the falling down thereof; and for this an Action on the Caſe is granted, to compel the Offender to pay ten Crowns [m].

[h] D. 9. 3. 6.
[i] D. 9. 3. 7.
[k] D. 9. 3. 7.
[l] C. 1. 2. 26.
[m] D. 9. 3. 5. I. 4. 5. 1.

Another Inſtance of an Obligation ariſing from an *improper* Offence, is, what reſpects the Owner of a Ship, the Keeper of an Inn [n], and the Keeper of Stables who ſuffers Cattle to ſtable and feed with him, *viz.* when any Theft is committed in ſuch Inn, Ship, or Stable, by ſuch Perſons as are employ'd in ſuch Ship, Inn, or Stable: For theſe Perſons ſometimes making uſe of diſhoneſt and negligent Servants, are guilty of a Fault; and, conſequently, render themſelves liable through the Offence of others. But if the Maſter of the Ship himſelf, or the Innholder, commits Theft, then they are directly anſwerable for their own Offence, and it does not become an *improper* Treſpaſs [o]. Now the Perſon who lodges or entruſts Goods with either of theſe Perſons, has a threefold Action accruing to him for the Goods taken away: But if he makes uſe of one of theſe Actions, the others ceaſe [p].

[n] D. 4. 9. 5.
[o] I. 4. 5. 3.
[p] D 4. 9. 6.

The firſt is an Action on the Caſe granted by the *Prætor*, otherwiſe ſtiled a Bill in Equity; which gives double Damage to the Proſecutor for ſuch *improper* Offence [q]. It lies againſt the Maſter of a Ship, when any of the Ship's Crew rob the Paſſengers, and the like: For as People are obliged to commit their Goods to the Cuſtody of theſe Men, the Maſter of the Veſſel muſt be anſwerable for their Honeſty, otherwiſe the Maſter might conſpire with Thieves and Robbers, as elſewhere obſerved, againſt the Goods and Perſons of ſuch as they take into their Ship. This Law obtains, whether the Maſter knows of ſuch Goods being put on board or not: For the Maſter is *eo ipſo* ſaid to have taken Charge of them as ſoon as they are put on Shipboard, and they are deemed to be aſſign'd to him. For it would be of dangerous Conſequence, if the Hoſt of an Inn were not liable, unleſs the Goods were open'd and ſhewn to him; becauſe this might endanger the Lives of his Gueſts, and ſubject them to Highway-men, and the like, if the Hoſt were not an honeſt Man, but conſpired with them [r]. Again, this Law proceeds not only in reſpect of Theft, but of any other Damage that is committed on Perſons Goods, whether they are their own, or the Effects of other Men. But this is otherwiſe, if the Goods ſuffer by any fortuitous Caſe, as by Shipwreck, the Force of Pyrates, and the like [s]: For the Maſter then is not liable for the Damage. In reſpect of an Innholder, the Theft ought to be done in the Inn, and not out of it [t], unleſs he gives Intelligence unto Robbers; and the Goods ought to be committed to the Care of the Innholder or ſome of his Servants. See more touching *Innholder* under that Title [u]. The ſecond Action in this Caſe is an Action of Theft, which the Perſon has againſt the Maſter of the Ship or Inn,

[q] D. 47. 5. L. un.
[r] Arg. C. 10. 34. 2.
[s] D. 4. 9. 3 1.
[t] D. 4. 9. 7.
[u] Page 166.

whether his Goods are ſtollen by ſuch Maſter, his Family, or a Stranger: For the Maſter of the Ship or Inn is anſwerable for the Goods ſo long as
[x] D.4.9.6. they remain in the Ship or Inn [x]. The third is an Action in Equity, called an Action on the Caſe *de Recepto*, which lies againſt the Maſter *in Simplum* on the Proſecution of what is loſt or ſtollen, whether he himſelf, or any of his Family, or a Stranger has ſtollen it. For from the very Act of receiving Goods he is bound to the ſafe-keeping thereof [y]. And the Perſon who thus entruſts his Goods, has not only a ſpecial Action *de Recepto*, but alſo a general Action *ex Locato* or *Depoſito*. But in a ſpecial Action even the leaſt Fault is to be accounted for: But it is otherwiſe in a general
[z] D.4.9.3.1. Action *ex Depoſito* [z]: For in a general Action the Party only anſwers for Fraud, *&c.* This third Action differs from the firſt; becauſe it lies even when a Thing is taken away by a Stranger: But the firſt does not lie againſt a Stranger's Robbery. Again, this Action lies againſt an Heir, but the two former do not; becauſe, being Penal Actions, they do not lie againſt
[a] D.4.9.7.6. an Heir [a].

[y] D.4.9.1 & 2.

If a Gueſt ſhall deliver to an Innholder a Box or Portmanteau cloſed and ſealed up, and afterwards ſay, there are ſome Things taken out from thence: *Quære*, Whether Credit ought to be given to the Oath of ſuch Gueſt touching the Loſs of his Goods? Here we ought to diſtinguiſh in three Caſes, *viz. Firſt*, When the Portmanteau or Box is again reſtor'd ſealed and cloſe, as it was deliver'd to the Hoſt, the Seals being no-wiſe changed or alter'd to Appearance; and then, becauſe there is no Proof or Suſpicion of Fraud, Credit is not given to the Oath of the Gueſt affirming that there were ſuch and ſo many Things in the Portmanteau or Trunk. The *Second* Caſe, is, when the Portmanteau is return'd open and unſealed, and then the Oath of the Gueſt ſhall be admitted, and Credit given thereunto touching the Goods
[b] C.8.4.9. taken away [b]. The *Third* Caſe, is, when it is doubtful: As when I have depoſited a Portmanteau, *&c.* in the Hands of the Innkeeper well ſealed up, and he himſelf confeſſes this, or on his Denial I can prove the ſame by Witneſſes. But if the Innkeeper reſtor'd it to me unſealed, or denies that he unſealed it, and hereupon it becomes a Doubt whether he unſealed it or
[c] In L. un. D. 47.5. not; in this *Bartolus* [c] ſays, that Credit ſhall not be given to the Oath of the Gueſt touching the Loſs of his Goods, but the Perſon ought to prove there were ſuch Things in the Portmanteau, ſince all Frauds ought to be
[d] In L. 5. D. 12.3. proved: But in another Place *Bartolus* [d] contradicts himſelf, ſaying, That ſince the Innholder returned the Portmanteau unſealed, his Fraud is preſumed; and therefore Credit ſhall be given to the Oath of the Gueſt depo-
[e] In L. 5. D. 12.3. ſing touching the Loſs of his Goods, which (according to *Jaſon* [e]) is the more received Opinion. If a Hoſt or Innholder hangs up a Sign, or profeſſes to keep a publick Houſe for Travellers, he ſhall be obliged to receive ſuch Gueſts as come thither, if he has Room in his Houſe, and can enter-
[f] D.47.5.L.un. tain them [f], though it was in his choice at firſt whether he would keep ſuch Victualling-Houſe or not. For, regularly ſpeaking, no one can be compelled to keep a Houſe of Entertainment, unleſs it be in the caſe of
[g] C.12.41.1. Soldiers March, and the like [g].

A fourth *Species* of an Obligation which ariſes from an *improper* Treſpaſs or an Offence, is, that which reſpects a Man's Bondman, Cattle doing
[h] I.4.9.pr. D.9.1.1. Damage, *&c.* For by a Law of the twelve Tables [h], the Maſter was liable unto an Action, if his Bondman or Cattle had done any Damage, or elſe he was to deliver them up to the Sufferer: And this Delivery was called *Noxæ*
[i] I.4.8.2. *Dedilio* [i]; and the Damage which the Party ſuffer'd through the Fear, Wantonneſs or Fierceneſs of Cattle, *contrary* to the natural Cuſtom of their
[k] I.4.9.pr. Temper, was termed *Pauperies* [k]. As when a Dog bites a Man, or a Horſe kicks him, *&c.* In this Caſe, if the other deliver'd up the Beaſt to the injur'd Perſon, he was diſcharged from Damage. In *England* and the Empire,

Empire, the Owner only ſatisfies the Damage, and it will avail nothing to deliver up the Beaſt that did it. See *Groenwegen de LL. Abrogatis* [l]. [l] In I. 4. 9.

[The Word *Noxa* denotes Damage done without any Deſign of Injury in the Beaſt that did it; for that brute Animals are not capable of knowing that they have done an Injury. *Corn. Fronto de Differentiis Verb.* ſays, That the Penalty is called *Noxa*, and the Fault itſelf *Noxia*.]

I have here mention'd a Bondman, becauſe the *Romans* reckon'd their Bondmen among their Cattle or quick Stock, as we did here in *England* formerly. If a Freeman did an Injury, he was liable to the *Aquilian* Law touching Damage: But if it was a Bondman, then a *Noxal* Action lay againſt the Maſter, or elſe he was bound to deliver up his Bondman to atone for the Injury. If one Beaſt ſtirs up another which commits the Damage, the Maſter of *that only* which forced the other muſt pay the Damage [m]. If a Perſon ſtrokes a Horſe and is kick'd by him, the Owner muſt anſwer it, but not if the Horſe was provoked [n]. By the *Jewiſh* Law, he who knowingly keeps an Ox, (that Inſtance being put for all other Creatures of the like Nature,) which has been uſed to gore, and a Perſon is killed by him, the Owner ſhall ſuffer Death [o]. By the Laws of *England*, if any Beaſt, or moveable Thing inanimate, be the Cauſe of the Death of any Man without his own Fault, it is forfeited to the King as a *Deodand* [p]. [m] D. 1. 1. 8. [n] D. 9. 1. 1. 7. [o] Exod. xxi. 29. [p] Inſt. 57.

If two Bulls or Rams, belonging to different Owners, run at each other and fight, and one kills the other, no Action lies in this Caſe if the Aggreſſor is ſlain: But if he that gave no Provocation be ſlain, the Aggreſſor ought to be given up for Satisfaction, or elſe the Owner ought to pay for the Loſs [q]. What has been hitherto ſaid, ought to be underſtood of tame Beaſts, that do Miſchief *contrary* to their Natures. But if fierce Creatures, as Tygers, Lions, *&c.* do any Miſchief, whilſt they are under Cuſtody, the Owner ſhall likewiſe be obliged to make Recompence. But if the Beaſts have made their Eſcape out of the Owner's Cuſtody, and have recover'd their former Liberty, then the Owners are not accountable for any Miſchief committed after ſuch Eſcape. If Cattle of their own Accord, without the Direction of their Owner, eat up another Perſon's Corn, the Owner ought to pay the Damage, or deliver up the Beaſts. With us in *England*, the Cattle are impounded, till the Owner of them ſatisfies the Damage. If a Man ſhall come into another Perſon's Shop or Houſe in an unuſual Manner without the Maſter's Leave, and he is bitten by a Dog in the Houſe, he is without his Remedy againſt the Maſter [r], becauſe (perhaps) the Dog is kept for the Defence of the Houſe: But if he has Leave to enter, the Maſter muſt take Care of his Dog. The Action which lies for this kind of Damage, is ſtiled an Action *de Pauperie*, as I ſhall further remember in the ſecond Volume of this Work under the Title *Of Actions*. [q] D. 9. 1. 1. 11. [r] D. 9. 1. 2. fin.

[The Laws of *England* puniſh *improper* Offences in ſome particular Cauſes. As when an Under-Sheriff makes a falſe Return to any of the King's Courts, or offends in the Execution of any Judicial Proceſs; not he, but the Sheriff is puniſhable [s]. See *The Doctor and Student*. The Hundred alſo ſeems to be liable to the Puniſhment of an *improper* Offence, when it makes Compenſation for Robberies committed therein, unleſs it apprehends the Robber [t]. If a Servant ſhall, through his Negligence, burn his Maſter's Houſe, and a Houſe in the Neighbourhood by that Means, the Maſter is liable. And *Bracton* ſays [u], that heretofore, among the *Engliſh*, a Judge made the Suit his own, by giving an erroneous Judgment: But at this Day the Party injur'd, if it be in a Court of Record, has a Writ of Error [x], and removes the Cauſe to another Tribunal.] [s] Lib. 2. c. 24. [t] 13 E. I. St. 1. c. 45. [u] Lib. 5. Tract. 5. c. 15. [x] 27 Eliz. C. 8.

TIT.

TIT. XXXIV.

Of Injuries, *how they may be committed, and how many Kinds there are of them: An* Atrocious *Injury what, and how rated; what Perſons are anſwerable for Injuries done, and how puniſhed by the twelve Tables and the* Pretorian *Law: Of Defamation by Words, and by famous Libels, and what they are, and of Civil and Criminal Proſecutions for Injuries.*

A Third *Species* of a private Offence or Treſpaſs, is that which we term an *Injury:* And as this Word *Injury* is a Term of a large Signification, and made uſe of by the Lawyers in a Generical as well as in a Specifick Manner, (as many other Words are,) I will here firſt premiſe the ſeveral Acceptations of it. An *Injury* then, in the general Senſe and Meaning of the Word, is taken for that which is done *non jure* [y], or contrary to Law: And thus, as a *Genus*, it comprehends Theft, Rapine, Adultery, Murder, Damage, and whatever is done contrary to Law. But in a particular Senſe of the Word, an *Injury* is a Damage done through the Fault, or (as in the *Aquilian* Law) we ſay *damnum injuriâ datum:* And in this Acceptation thereof, we only mean ſuch an Injury as it inflicts a Contumely [z] on the Perſon that bears it; as when a Perſon is beaten, whipped, wounded, or affected with ſome enormous Wrong, which our *Engliſh* Lawyers call a *Mayhem* [a]. But an Injury may be inflicted without Force, as by reproachful and convicious Language, which leſſens the good Fame of a Man, or by famous Libels, unjuſt Impriſonment, and the like. *Dyer* in his Reports ſays [b], That thoſe Perſons alſo, who go under the Name of *Conſpirators*, according to our Law, do ſeem to commit an Injury, when they are *dolo contexto* guilty of any inſidious Machinations againſt the Life or Fortune of any Perſon. Therefore an Injury, as here underſtood, properly happens, when any one hurts the Body, Dignity, or good Name of a Freeman with an evil Deſign: For there muſt be an evil Deſign or Intention in the Doer, otherwiſe it is no Injury. For if any one ſhould hurt another without ſuch Deſign or Mind of doing him an Injury, it is not to be adjudged an Injury. As when I hurt another by a Joke, or at Play with him, and the like, I am not liable to an Action of Injury. And the ſame may be ſaid of a School-maſter, who by ſome Miſhap wounds his Scholar in the Diſcipline he gives him *docendi cauſâ*, and not with an Intent of injuring him: But yet the Defendant is bound to prove, that this Hurt was done without an ill Intent. By this Difference an Injury is diſtinguiſhed and exempted from the great Rigour of the *Aquilian* Law, which makes even the lighteſt Fault an Injury.

Now an Injury is ſaid to be committed four ſeveral Ways, *viz. Firſt*, by ſome Act done; *Secondly*, by Words; *Thirdly*, by Writing; and, *Fourthly*, by Geſture or Behaviour. The firſt happens whenever any one aſſaults or lays violent Hands on another, or offers any Kind of Injury of the like Nature: Which comes to paſs, when any one avers that he was beaten or wounded, or that his Houſe was enter'd by Force, and the like. A *verbal* Injury, is, when any Reproach or Defamation happens to a Man [c]; as

[y] I. 4. 4. pr.

[z] Ibid.

[a] Flet. lib. 4. c. 17.

[b] Fol. 85.

[c] I. 4. 4. 1.

as that he is called Thief, Robber, *&c.* A *written* Injury, or Injury by Writing, is, when any one ſhall write a Satire, Lampoon, or Hiſtory, appertaining to the Infamy and Diſparagement of another, called a *famous* Libel [d]; or cauſe the ſame to be written or compoſed. The laſt kind of Injury is that which is committed by Geſture; as when a Perſon mocks another in wearing his Apparel, or by uſing ſome Geſture or Motion of Body, in order to ridicule him, and the like. It is to be obſerved, that by the *Roman* Law, a Slave or Vaſſal cannot have an Injury done him, or (at leaſt) an Action for the ſame: For if any one ſhall kill or wound a Bondman, this kind of Action, by the *Aquilian* Law, only appertains to his Maſter, who is a Freeman. But becauſe there are ſeveral Words in our Books, which point out an Injury, and the Manner of doing it, I ſhall next ſay ſomething of them, before I proceed any further.

[d] I. 4. 4. 1.

Now, according to *Oſilius*, there is this Difference between the Meaning of the Words *Verberare* and *Pulſare*, *viz.* That the firſt is to beat a Man ſo as to make him ſmart, and the other to beat him without giving him Pain: And this Difference *Alciatus* well defends againſt *Valla*, who condemns the ſame. Yet many will have the Difference between theſe Words to be, that *Verberare* is to beat him with Rods and Scourges; and that the Word *Pulſare* is a more general Term, appertaining to any kind of Weapon or Inſtrument, whether Swords, Clubs, Stones, *&c.* The Term *Convicium* in the Text [e], which I in *Engliſh* call *Slander* or *Reproach*, is derived from the two *Latin* Words, *viz. Vocum* and *Concertatio*, that is to ſay, *quaſi Convocium*, according to *Labeo:* Which Opinion *Alciatus* maintains againſt *Valla*, ſaying, that *Convicium* ought to be wrote with the Letter *C*, and not with a *T*. And it is properly ſo called, whether the Words be utter'd by many Perſons, or there be only one Perſon that utters them; the Contumely being frequently repeated againſt any one. A *Contumely* in *Engliſh*, is derived from the *Latin* Word *Contemno*, and is the ſame with Ὕβρις in the *Greek*, having ſeveral Acceptations, as *Budæus* obſerves in his Commentary on the *Greek* Tongue; as Pride, Ignorance, or any other flagitious Offence.

[e] Ibid.

Ulpian notes, that an Injury may not only be done to a Man in his own Perſon, but alſo by the Means of his Wife and Children, being in his Power, and ſuch an Injury makes a greater Impreſſion on him: Wherefore, if you do an Injury to the Daughter of any one, that has married *Titius*, an Action of Injury not only lies againſt you in the Daughter's Name, but ſuch an Action alſo lies againſt you in the Father and Husband's Name: But on the contrary, if an Injury be done to the Husband, the Wife cannot have an Action of Injury thereupon; for it is fit, that Wives ſhould be defended by their Husbands, and not Husbands by their Wives. An Injury is ſaid to be done to a Man in his own Perſon, when it is *directly* inflicted on him as he is Maſter of a Family, and independent on any one elſe: And through the Perſons of other Folk, when it happens *conſequentially* to him, as to his Wife, Children, Bondmen, as before related. And as a Civil Action accrues to the Father as well as to the Son, for an Injury inflicted on the Son; ſo the Father may try the Cauſe in his own Name, and in that of his Son's: For though the Action accrues to the Son, in reſpect of the Injury to his Perſon; yet the Father commences and tries the Action, in reſpect of his Paternal Power.

I have ſaid, That an Injury may be committed four ſeveral Ways, according to the *Civil* Law [f]: But, in Effect, we may reduce theſe ſeveral Ways unto a *real* and a *verbal* Injury. *Real*, when one Man lays violent Hands on another, in ſuch a manner as to affect his Body with Blows [g]; which our Common Lawyers call a Battery, or a Treſpaſs *Vi & Armis*. A *verbal* Injury is committed two ways; *Firſt*, by Words, when one Man

[f] I. 4. 4. 1.

[g] I. 4. 4. 1. 8.

utters contumelious and defamatory Language to the Infamy of another: And, *Secondly*, by Letters, when one Man writes a Book, or the like, to the Ignominy of another [h]. And this proceeds, *First*, not only in a Person framing an infamous Book or Libel, but also in him who composes a Song, Poem, History, Lampoon, or other defamatory Writing: And, *Secondly*, according to *Faber* [i], likewise in him who only wrote it down, though he did not compose it. *Thirdly*, in him who, upon finding the same, reads it unto others, and does not destroy it, but publishes it with a malicious and evil Design [k]. *Fourthly*, This likewise proceeds, in him who advisedly buys or sells an infamous Libel, knowing it to be such [l]. *Fifthly*, The Law does not distinguish, whether the Person publish'd it in his own or another's Name [m]: Nor does it signify, whether the Name of the Person defamed be expressed therein, or not, provided he may be pointed out and known otherwise; because (perhaps) it says, There are some Persons in the City, that steal and imbezle the Publick Money. And, in this Case, if the Person's Meaning cannot easily be proved, in respect of the particular Person defamed, a publick Accusation accrues to any one of the People [n]. It is otherwise, (I think) by the Laws of *England*. But when the Name of the Person defamed is express'd, then he may have an Action Civilly and Criminally [o] at Pleasure; and when he brings the Action *Civilly*, he rates the Injury inflicted on him at a certain Sum of Money, which he desires may be given him: And in this Case the Person condemned in a Civil Action is render'd Intestate [p]; so that he can neither be a Witness [q], nor make a Will [r]. But when the Person defamed brings his Action *Criminally*, such Defamation is punish'd capitally, if the Person's Name be expressed [s]. Thus, an Injury is not only committed on the Body of a Man, as when one strikes another with his Fist, Staff, *&c.* but likewise when he defames or reproaches him either by Word of Mouth, or by writing any infamous Libel.

[h] I. 4. 1. 1.
[i] In §. 1 I. 4. 4.
[k] C. 1. 39. 1.
[l] D. 47. 10. 5. 10.
[m] D. 47. 10. 5. 9.
[n] D. 47. 10. 6.
[o] I. 4. 4. 10.
[p] D. 47. 10. 5. 9.
[q] D. 22. 5. 21.
[r] D. 28. 1. 18. 1.
[s] C. 9. 39 l. un.

An Injury is also committed, if any one shall attempt to assault the Chastity of a modest and vertuous Woman, by a fawning and wheedling Behaviour, or by frequenting her House in order to debauch her, after he has been once forbidden [t]. An Objection of Poverty unto a Merchant or rich Man, is an Injury done him; because Poverty sometimes sets him aside from his giving his Testimony [u], and draws other ill Consequences after it in Trade, *&c.* Wherefore, if a Person shall attempt to possess himself of the Goods of any one as his Debtor, knowing that he owes him nothing, he commits an Injury [x], even though this be done in a judicial manner; because he defames him hereby as an insolvent Person. But it is otherwise, if he was a real Debtor, and has enter'd on Possession by the Judge's Authority; for then he only pursues his own Right, without doing any Injury. But if a Man shall, by his own Authority, possess himself of his Debtor's Goods, he is not only liable to an Action of Injury [y], but he shall likewise lose the Debt [z]. Thus, in the like manner, he who refuses to admit an idoneous Surety, is not only liable to an Action of Injury in respect of him that offer'd such Surety, but likewise in respect of the Surety himself [a]; because his Condition is thereby disparaged.

[t] I. 4. 4. 1. D. 47. 10. 10.
[u] D. 22. 5. 3.
[x] I. 4. 4. 1.
[y] D. 47. 10. 20.
[z] D. 4. 2. 13.
[a] D. 2. 8. 5. 1.

Properly speaking, an Injury is not done to a Person that consents thereunto: For it is one Thing to damnify a Person, or to do an unjust Thing, and another to do an Injury. For I may do a Thing that is unjust, which I may think to be just: But an Injury is not done without an Intent of Hurting. Hence a Person may of his own Accord suffer Injustice; but no one can suffer an Injury, unless it be against his Will; an Injury being only done to a Person, when the Act is contrary to his Will, and to that Right which is due to him. And therefore, a formal Injury cannot be done to a Person, unless it be done actually and *de Facto* against his Will. And hence,

hence, no Man can ſuffer an Injury from himſelf. But it may be urged, That when a Man is wheedled with fair Promiſes, or compelled through Fear, or deceived through Ignorance or Imbecility of Mind, *&c.* an Injury may be done to him, even with his own Conſent; and therefore, a Perſon may ſuffer an Injury purſuant to his own Will. To which I anſwer, That this is an imperfect Will of him who is thus deceived; and he that thus endamages another, is liable to an Action of *Deceit*, though at the ſame time the other rather ſeems to ſuffer Damage than an Injury, becauſe he wittingly receives the ſame. And for this Reaſon, the Action is enter'd in a Cauſe of Injury and Damage; for if it be not an Injury, it may be a Damage. *Ariſtotle* puts a Queſtion, *viz.* Whether it be more grievous to ſuffer, or to do an Injury? and reſolves it for the latter; for this is joined with Injuſtice: But he who receives an Injury, is free from a Fault, and from Injuſtice. Let him that injures another, conſider this Saying of the Wiſe Man; *He that calumniates the Poor to increaſe his Riches, ſhall ſurely come to Want.*

A *verbal* Injury (as already related) is committed by Words alone, without the Intervention of Writing, when any one utters contumelious Words againſt another, which are contrary to good Manners, and which tend to the Infamy, Injury, and Slander of any one [b]. And, according to *Bartolus* [c], an injurious Word is ſaid to be that, whereby any Crime in general or ſpecial is objected to another; as, when any Perſon calls another Thief, Highwayman, Homicide, *&c.* though he does not deſcend to Particulars, by ſaying from whom he ſtole, or whom he killed. For, by ſuch Words, a Perſon is in ſome meaſure render'd infamous by an Infamy of Fact, ſince his Reputation is much injured among honeſt Men [d]. Nor is it of any Import, whether thoſe Words be pronounced in an Aſſembly of Men with a loud Voice, (which makes it a *Convicium*) or not [e]. Thus, to ſay, *You Lie*, (*ſaving your Honour*), is an injurious Speech, becauſe it betokens a Miſdemeanor: And this proceeds, ſays *Bartolus* [f], though the Perſon uſes this Proteſtation, *ſaving your Honour*; becauſe a Proteſtation contrary to the Act which is done, is not relevant [g]. But when a Man, in Defence of his Innocence, and for preſerving his Honour, ſays to another Perſon objecting a Crime to him, *You are a Liar*; he is not liable to an Action of Injury, as *Bartolus* [h] notes. Or if a Perſon, on Provocation, ſhall give ſuch an Anſwer, he is to be pardoned [i]. But it has been a Queſtion, Whether it be lawful to repel a verbal Injury with an Injury of the like Nature? As for Example: You call me Highwayman or Thief; and I, being thus provoked by you, call you Thief, or the like. Now the Queſtion is, Whether an Action of Injury accrues to either of us, ſo that we may accuſe each other? And it ſeems, it does not; becauſe the Life and Fame of each Perſon is equal [k]. Wherefore, as it is lawful, in Defence of a Man's Life, to repel Force with Force; ſo likewiſe, in Defence of a Man's Honour, which is compar'd unto Life, it ſeems to be permitted to retort an Injury with an Injury. Beſides, it is a known Rule in Law, That Offences of a like Nature are removed by mutual Compenſation [l]. I have ſaid, That a Man may, in Defence of his own Innocence, tell another, *that he is a Liar.* But *Speculator* holds, that each Perſon may have an Action for the Injury inflicted on him, though the Injury be equal; and for this Opinion, he cites the Laws in the Margin [m]. But this (I think) only holds true, when the Injury is reciprocal, and yet is not compenſated. But it is not lawful for me to ſtrike him who has ſtruck me, if I do it only for the ſake of Revenge, and not in Defence of my ſelf [n]. Hence ſome Men would, by a Parity of Reaſon, infer, that it is not lawful to inflict a verbal Injury on him who thus injures me; it being in no-wiſe lawful for a Man, by his own Authority, to revenge him-

[b] D. 47. 10. 15. 5.
[c] In L. 3. D. 28. 2. pr.
[d] D. Alex. in L. 3. D. 28. 2.
[e] D. 47. 10. 15. 7 & 11.
[f] In L. 17. D. 29. 2. pr.
[g] X. 2. 28. 54.
[h] In L. 25. D. 3. 3. 1.
[i] D. 38. 2. 14.
[k] D. 40. 2. 9. pr. Gloſſ.
[l] D. 24. 3. 39. X. 2. 24. 16. pr.
[m] D. 9. 1. 19. X. 2. 24. 16. pr.
[n] DD. in L. 3. D. 1. 1. & in L. 1. C. 8. 4.

[o] C. 3. 27. t. t. himſelf o. But to this I anſwer, That this Argument only holds good as to the Defence of a Man's Body, and proceeds not in Defence of his Honour, becauſe the Terms are not equal. For, in Defence of Life, a Man has a Remedy by an Action at Law, and may bind the Offender to his good Behaviour: But, in a verbal Injury, the Action is *de Vindictâ*. For if you offer me a verbal Injury, the Injury is already inflicted, and cannot be removed.

He who ſhall ſay that a Man is his Debtor, who is not ſo, is, by reaſon of ſuch Calumny, liable to an Action of Injury: And this holds good, not only if an Arreſt be unduly made by a private Perſon, but even if it be thus made by a Magiſtrate; becauſe it is not lawful for a Magiſtrate to do any injurious Act. For the invalid Precept of the Judge does not excuſe him from the Penalties of the Law; it being an injurious Thing for a Man to ſport ad divert himſelf at the hazard of another's Reputation, eſpecially if it be a Perſon of ſome Figure, Dignity and Character in the World, whoſe Integrity and Reputation is dearer to him than Life itſelf. If one Man ſhall ſay theſe Words to another, *viz. I am ſorry thou waſtn't condemned for Forgery*, &c. the Perſon uttering them is liable to an Action of Injury: For theſe Words are preſumed to be injurious of their own Nature, unleſs the contrary be proved: And ſo it is of other injurious Words of the like Nature. But if a Perſon utters injurious Words that are true, he may juſtify them, and he is not liable. It is an Injury, if one ſhall ſay to another, *Tu es bonus Homo*; which Words are commonly underſtood in the ſame Senſe, as if he ſhould ſay, *Thou art a Cuckold*: And thus, to call a Man Cuckold, will give an Action of Injury, as well as to call a Man Traitor, Uſurer, Baſtard, *&c.* for theſe are infamous and reproachful Names. An Injury is alſo committed by Words, when one Perſon menaces another, or ſays to him, that he produced a falſe Deed, Charter or Writing, or coined falſe Money, *&c.*

An Injury is committed by Deed, when one gives another a Blow on the Cheek, or on the Ear, or ſhall any way hurt him in Body, or ſhall chuck another under the Chin with an Intent of affronting him. An Injury done to a Man's Cloaths, is deemed to be done to his Perſon; for if one Man

[p] D. 47. 10. 9. pr. tears or any ways ſpoils another's Cloaths, it is an Injury done to him p. Thus an Injury may be done to a Prieſt wearing the Habit and Ornament of his Function; but not otherwiſe, though his Cloaths ſhould be torn or ſpoiled. It is an Injury both in the Judge and Plaintiff, to cite a Perſon into Court without a Cauſe alledged; becauſe he that orders or perſwades to

[q] D. 47. 10. 13. 3. an Injury, is liable to an Action q. An Injury is alſo committed, when the Plaintiff or Accuſer offers an infamous Libel, which he is not able to prove.

I have before hinted, That an Action does not lie for an Injury that is not done *Maliciouſly*, but only *Cauſâ Ludi*, or for Sport-ſake: But then the Defendant ought to prove, that he only did ſuch a Thing in a Jeſting manner. And, by the *Cornelian* Law, the Plaintiff may give an Oath unto the Defendant, to declare his Intention, whether he offer'd the Act *animo*

[r] D. 47. 10. 5. 8. *Injuriandi* r. Due Chaſtiſement or Correction does not carry an Injury along with it; for moderate Correction is granted to a Father over his Son, to the Maſter over his Scholar, to the Lord over his Bondman, and alſo to the Husband over his Wife, and he may beat her even *cum Flagellis* in a Cauſe wherein he may ſend a Divorce. Nor does the Execution of the Law carry any Injury along with it, at leaſt, it ought not ſo to do. An Action of Injury will not lie for obſtructing a Proſpect, becauſe the ſtopping up of a Proſpect is no Nuiſance; a Proſpect being only a Matter of Delight, and not of Neceſſity. And why may not a Man build his Houſe as high as he pleaſes, that another may not look over into his Yard,

Yard, provided he does not hinder the Light of another Man's Houſe? No Action of Injury will lie againſt a Judge for a wrongful Commitment, any more than for an erroneous Judgment or Sentence, unleſs evident Malice goes along with it.

An Injury is ſaid to be *atrocious*, either in reſpect of the Fact committed, as when a Perſon is wounded by another, or beaten with Clubs [s]. Or elſe in reſpect of the Place where it is done; as when it is done in the Theatre, Market-place, or in the Sight of the Judge, *&c.* or from the Perſon himſelf; as when a Magiſtrate ſuffers an Injury, or an Injury is done to a Senator by a Perſon of mean Condition, or to a Parent or Patron by their Children or Freedmen. For an Injury done to a Senator, Parent or Patron, is rated in another manner, than to a Stranger, or a Perſon of mean Condition. Sometimes the Place wherein the Wound or Blow is given, renders the Injury atrocious; as, when a Perſon ſtrikes another in the Eye or Face: For an Injury committed on the Face, is a high Aggravation thereof; becauſe a Man's Face, ſays the Law, is formed after the Likeneſs of a celeſtial Beauty. *Ariſtotle*, in his *Ethicks* [t], reckons up ſeven Circumſtances whereby an Injury becomes atrocious. In a Libel of Injury there ought to be a Deſignation of all theſe Circumſtances. And it ought likewiſe to be propounded in the Libel, That the Perſon did immediately reſent the Injury, and does ſtill reſent it, that it may appear the ſame is not forgotten or pardon'd by *Diſſimulation*: For if the Perſon ſmitten laughed at the Blow, or eat and drank immediately with the Perſon who ſtruck him, he cannot afterwards have an Action of Injury; becauſe an Action of Injury ariſes from the Affront and Contumely that is offer'd: But Laughter which follows a Contumely, or any other Sign of Friendſhip or Familiarity with the Perſon doing the Injury, ſeems to pardon ſuch Injury, and to go along with the Blow. And thus no Injury ſeems to be done, or is (at leaſt) by a Fiction of Law, remitted: For, *Volenti non fit injuria.* But if he only laugh'd after ſome Interval of Time, or did ſomething like it, with the Perſon that offer'd him the Injury, ſuch Action ſhall not be hereby adjudged to be remitted. Which brings me more particularly to conſider, how this Action may be remitted or pardoned by *Diſſimulation* [u].

[s] I. 4. 4. 9.

[t] Lib. 5. c. 5.

[u] I. 4. 4. 12.

For he who has forſaken an Injury by *Diſſimulation*, or does not immediately reſent it on ſuffering the ſame, cannot afterwards reaſſume the Injury which he ſeems to have remitted. Thus, ſhaking of Hands, when it is done among certain Perſons that have been at Enmity with each other, denotes a Reconciliation, and wipes away an Injury: For joining or ſhaking of Hands, is a Token of Peace and Agreement made between them, and a Remiſſion of the Injury committed. But he who either *tacitly* or *expreſly* remits an Injury to another, is not hereby underſtood to have remitted the Damage or Expences: For the Perſon remitting the Injury, ſhall (notwithſtanding ſuch Remiſſion) have an Action for Damage and Expences, whether the Remiſſion be *tacitly* or *expreſly* made; yea, though he has remitted all Injuries whatſoever. For, to the End that all theſe Things be remitted, there ought to be expreſs mention made, *viz.* That he remits all Injuries, Damages, Intereſts, Expences, *&c.* For there ariſes from an Injury a twofold Action; the one *ad Pœnam*, and the other *ad Damnum & Intereſſe*: And therefore, though one be taken away, yet the other ſtill remains. Thus, a Perſon wounded, and forgiving the Injury to the Perſon that wounded him, may (notwithſtanding he has received Money for the Injury) commence an Action for the Expences made in Curing the ſaid Wound: But ſome doubt hereof, if the Perſon has received Smart-money; ſaying, That this is not true, unleſs Expences are reſerved. An Injury is not only aboliſhed by Reconciliation or Remiſſion, but likewiſe

by a Recantation of the Delinquent, and alſo by the Death of the Party offending; and I may alſo add, either by a civil Penalty paid, or elſe by a criminal Puniſhment impoſed. Touching a civil Penalty, it is a general Rule in Law, That every Obligation is releaſed by the Payment of that which is due. Therefore, if Satisfaction be made to the Party injur'd, it is ſufficient, becauſe Satisfaction is like unto Payment, and then no other Payment ſhall be demanded for the Injury done.

The Criminal Puniſhment of an Injury, according to a Law of the Twelve Tables [x], was Retaliation for a Member broken or disfigur'd, and this was agreeable to the *Jewiſh* Law [y]: But afterwards, by the *Pretorian* Law, the Parties themſelves that ſuffer'd the Injury were permitted to rate and ſet a Value thereon upon Oath, and then the Judge might condemn the guilty Perſon in ſo much as the Sufferer had rated it at, or leſs, as he ſaw Occaſion [z]. And after this Law was eſtabliſh'd by the *Prætors* for reſtraining an Injury, the Puniſhment thereof, as introduced by the Twelve Tables, grew into Diſuſe. The Judge might leſſen or increaſe this Eſtimation of an Injury, according to the Dignity and Character of the Perſon, and the Circumſtances of his way of Living. The Plaintiff ought to ſet forth in his Libel, how he rates and values the Injury, and pray for a certain Sum, ſaving the Taxation of the Judge: For if the Plaintiff demands an immoderate Sum, the Judge may reduce it by a further Taxation [a]. If a Perſon has ſuffer'd ſeveral Injuries from the ſame Hand, they ought all to be propounded in one and the ſame Libel, and to be ſpecifically rated aſunder [b]. If a Perſon ſhall utter ſeveral reproachful Words at one and the ſame Heat, it is reckon'd but one Injury.

[x] I. 4. 4. 7.
[y] Exod. xxi. Lev. xxii.
[z] I. 4. 4. 7.
[a] D. 47. 10. 37. 1.
[b] D. 47. 10. 7. 5.

[By the Law of *England*, an Action on the Caſe lies for a verbal Injury; an Action of Treſpaſs *Vi & Armis*, for an Aſſault and Battery, if it be by ſome Fact done; or the Defendant may be proceeded againſt by an Indictment; and if it be committed by any infamous Libel, the Perſon ſuffering has likewiſe his Choice, whether he will proceed criminally or civilly. If the contumelious Language be utter'd againſt any of the Nobility, an Action of *Scandalum Magnatum* lies [c], and produces a greater Puniſhment, by reaſon of the Dignity of the Perſon injur'd. But the Common Law favours Words in the Conſtruction of them, much more than the *Civil* Law does, which often occaſions Duelling, and other ill Conſequences.]

[c] 3 E. I. 33. 2 R. II. 5. 12 R. II. 11.

The *Civil* Law puniſhes infamous Libels with much more Severity than it does verbal Injuries; becauſe *litera ſcripta manet*. For if a Perſon ſhall find a Libel compoſed to the Diſparagement of another, and ſhall not deſtroy the ſame, but ſhall publiſh it, he ſhall be puniſh'd capitally, according to the *Civil* Law [d], in the ſame manner as if he had compoſed it. But verbal Injuries it only puniſhes with publick Recantation, private Amends, *&c.* Yet, if any one has a mind to accuſe or charge a Perſon with a Crime, whoſe Fame may be hurt by a Libel, he ſhall be heard, if he inſcribes himſelf *ad Talionem*; and if he proves the Crime, he ſhall be rewarded: But if he does not, he ſhall be puniſh'd [e] according to the Law of Retaliation. And thus a Libel may be made againſt a private Man as well as againſt a publick Magiſtrate; and it matters not whether the Libel be true, or whether the Party be of good or ill Fame: For it incites all of the ſame Family, Kindred, or Society, to Revenge; and ſo oftentimes, in Conſequence, tends to the Effuſion of Blood.

[d] C. 9. 36. L. un.
[e] I. 9. 36. L. un.

[It was reſolved in the Star-Chamber, in *Hollywood*'s Caſe [f], That if a Perſon finds a Libel, and would keep himſelf out of Danger, if it be againſt a private Man, the Finder may either burn it, or preſently deliver it to a Magiſtrate: But if it concerns a Magiſtrate or publick Perſon, then he ought to give it to a Magiſtrate. A Libel may be as well by Pictures, or any other ignominious Signs, as by Songs or Writing; as by drawing a Gallows at a Man's Door, *&c.* The Puniſhment thereof, at the Common Law, is by Indictment [g].]

[f] 44 Eliz.
[g] Cok. Rep. 5. fol. 125.

But the Queſtion is among the *Civilians*, Whether he that publiſhes a *famous* Libel, may be puniſh'd, if he diſcovers the Author? And *Salycetus* [h] concludes,

[h] In L. un. C. 9. 36.

concludes, that both ſhall be puniſh'd, *viz.* as well the Author who compoſed it, as alſo the Publiſher. For the Publiſher ſhall be puniſh'd, as knowingly making uſe of a falſe Inſtrument, though there be a *conſtat* of the Author [i]. And it is the ſame Thing, if a Man be convened in an Action of Injury for Words; for it ſhall be no Advantage to him, though he ſhould ſay that he heard them from another, and points out the Author: And thus it has often been adjudged. But what I here ſay, only proceeds when the Perſon writing ſuch Libel, utters that which is falſe: But it is otherwiſe, if he ſays that which concerns the State to know; for then no Action lies, nor ſhall he be puniſh'd, according to the *Gloſs* [k]. For though the *Gloſs* on the *Digeſt* holds the contrary, *viz.* That he is liable, whether the Matter be true or falſe; yet the more received Opinion is, that he is not liable, if he ſpeaks the Truth, and the Publick is concern'd to know it. But it is otherwiſe, if he utters a Falſhood, or it be not the Intereſt of the Publick to know it [l].

[i] C. 9. 22. 8.

[k] In L. 1. I. 4. 4. v. *fioret.*

[l] D. 48 19. 24. DD. in L. 1. C. 9. 36.

TIT. XXXV.

Of Damage done, *what by the* Civil *and what by the* Aquilian *Law; how it is eſtimated, and whether Heirs are liable thereunto: What Action granted by the* Aquilian *Law, and when an Action on this Law concurs with an Action on the* Cornelian *Law for Damage.*

THE Word *Damage*, or *Damnum*, as uſed in our Books, ſignifies a Diminution of a Man's Eſtate, whether it conſiſts in Lands, Goods, or otherwiſe, as *Bartolus* obſerves [m]: And, according to *Paulus* in *the fifth Book of his Sentences* [n], it is ſo called from the Word *Diminutio*. *Alexander*, in his *Conſilia Juris*, will have *Damage* and *Expences* to denote the ſelf-ſame Thing; but (I think) he is much miſtaken herein. For Damage, according to *Socinus* [o] and others, is that Loſs which a Man ſuſtains againſt his Will; but Expences are thoſe Coſts which a Man conſents to make. See *Jaſon* [p]. The Word *Damage* may be taken in a twofold Senſe, *viz.* *Firſt*, In a large and general Acceptation of it, for any kind of Diminution which happens to a Man's Fortune or Eſtate [q]. And in this Senſe it comprehends Theft and Rapine; for a Thief and a Robber are both of them ſaid to commit Damage. *Secondly*, It is taken ſtrictly and properly, *viz.* for the ſpoiling or making any Thing worſe [r]; and in this Senſe it does not comprehend Theft and Robbery, becauſe theſe Offences are committed by taking a Thing away; but Damage, ſtrictly ſpeaking, is only done by ſpoiling or corrupting of it [s]. Hence the Doctors diſtinguiſh between an Action of Theft, and an Action on the *Aquilian* Law; becauſe an Action of Theft and Robbery lies, when the Thief or Robber takes my Goods away without my Leave; but if a Perſon kills or deſtroys that which belongs to me, an Action lies on the *Aquilian* Law, whereby I am relieved, who unjuſtly ſuffer Damage from others: And this is a *Species* of a private Offence or Treſpaſs.

[m] In L. 2. D. 39. 2.

[n] Tit. 10.

[o] Conſt. 4. Vol. 4.

[p] In L. 1. D. 2, 3, 4.

[q] D. 39. 2. 3.

[r] Gloſ. in L. 30. D. 9. 2.

[s] D. 9. 2. 27. 25.

Again, Damage, in the ſecond Senſe of the Word, may be conſider'd in a twofold Manner. *Firſt*, As *Damage done*, called *Damnum datum*; and, *Secondly*,

Secondly, As Damage *not yet done*, but what we fear will be done hereafter; and this is called *Damnum infectum* [t]. The firſt kind may be comprehended under an Injury already received; though every Injury is not a Damage, according to the ſtrict Acceptation of the Word *Injury*. For though every Damage be an Injury, yet every Injury is not a Damage, the Word *Injury* being taken in a larger Senſe, as being a general Term. Damage *done* is puniſh'd by the *Aquilian* Law: But where there is no Injury done, the *Aquilian* Law does not obtain. As when a Man hurts another upon Provocation in his own Defence, or in the Defence of his Goods [u]: But then the Perſon defending himſelf or his Goods, ought not, by any Means, to exceed the juſt Meaſure of his Defence; for whenever this Meaſure is exceeded, it carries Injury and Damage along with it [x]. Nor is it any Plea for the Perſon aſſaulting to ſay, that the Perſon aſſaulted gave occaſion of the Quarrel.

[t] D. 39. 2. 2.

[u] D. 9. 2, 3, 4, 5 & 45. 2.

[x] D. 9. 2. 45. 1.

D. 9. 2. 52. 1.

There are ſeveral Laws that have a reſpect unto Damage done; but the *Aquilian* Law ſeems to be derogatory to all Laws, which were enacted before it, touching the ſame, whether it were a Law of the Twelve Tables, or any other Law whatſoever [y]. Now the *Aquilian* Law is a Plebiſcite or Ordinance of the People, made at the Recommendation of their Tribune *Aquilius* [z]. Formerly it conſiſted of three Heads or Diviſions, but now of two, *viz.* the firſt and the third; for, the ſecond growing into diſuſe, the third ſucceeds in the Place of it. I ſhall here treat of the firſt, which provides, That he who *injuriouſly* kills another's Bondman or Cattle, ſhall pay the Lord or Owner for Damage, ſo much Money as he has made from the Service of his Cattle for the Year paſt: And an Action in two-fold lies againſt him who denies the ſame. But the Proof of the Fact ought to be made by Witneſſes; and not by the Oath of the Party, who may be too partial to himſelf, to the End that he ſhould recover double Damage. But this double Damage is now (I think) taken away by ſubſequent Laws. I ſay *injuriouſly*, or not according to Law: For it is not enough, that he kills them, but it ought to be done *cum injuriâ*, or not according to Law [a]. Wherefore, if a Perſon that has a Bondman, who lies in wait againſt me as a Ruffian or Robber, I may kill him with Impunity: For right Reaſon and the Law of Nations allows a Man to defend himſelf againſt Danger.

[y] D. 9. 2. 1.

[z] D. 9. 2. 1.

[a] D. 9. 2. 3.

By a Law of the Twelve Tables, a Man might kill a Night-Thief or Robber taken in the Night-time; but then he was to make an Outcry, that People might come to his Aſſiſtance: But if taken in the Day-time, he might not kill him, unleſs he defended himſelf with ſome Weapon, though he went away with the Goods, becauſe he might have his Action [b]. But if he killed him thus defending himſelf, it was ſtill to be with an Outcry [c]. In Tournaments or publick Conteſts, if one Soldier killed another, he was not liable to the *Aquilian* Law: For in this Caſe he was not liable, becauſe it was done for the ſake of proving and exerciſing his Courage [d]: But Bondmen were not wont to fight in this Manner, but only Gentlemen ſtiled *Ingenui*. That alſo is called a publick Conteſt or Combat, which happens for the ſake of publick Mirth or Rejoicing. Thus Duelling, (I think) in ſome Senſe, was not prohibited by the *Roman* Law. A Magiſtrate is liable to an Action on this Law, if he offers any Damage to a Perſon contrary to the known Rules of Law and Juſtice [e]; and ſo are all ſuch Perſons as obey his unlawful Decrees and Orders; but then (I think) they ought to be evidently ſo [f]. And as an Action lies againſt an unjuſt Judge; ſo likewiſe it does againſt an ignorant or unskilful Phyſician, by whoſe Ignorance a Patient ſuffers under his Hands [g], as I have noted elſewhere.

[b] D. 9. 2. 4.

[c] D. 48. 8. 9.

[d] D. 9. 2.

[e] D. 9. 2. 29.

[f] Bald. in L. 29. D. 9. 2.

[g] D. 9. 3. 1. 6.

D. 9. 3. 7.

When a Perſon has a Purpoſe and Will to ſet fire to my Houſe, and the like, and the Fire comes to my Neighbour's Houſe, and it is burnt, by the *Aquilian* Law he ſhall be liable unto my Neighbour [h]: For when a Fact

[h] D. 9. 2. 27. 4.

Fact exceeds the Will and Intent of the Perſon committing it, he ſhall be anſwerable for the whole Fact and Conſequence thereof, without any Regard had to his Purpoſe and Deſign. If a Baker's Servant ſhall fall aſleep at the Oven's Mouth, and the Houſe ſhall be burnt by his Negligence, the Maſter may be convened by the Landlord in an Action *ex Locato*, or in an Action of Damage, if another's Houſe be burnt by this Means, for being negligent in the Choice of his Servants. But what if another Perſon puts Fire into an Oven, ſhall he who puts in the Fire, or he who kept the Oven be anſwerable: For the Perſon who ſhould look after the Oven did nothing of Damage, and he who put in the Fire rightly as he ought to do, committed no Offence, and conſequently is not liable either to a *direct*, or to an Action in Equity on the *Aquilian* Law? In this Caſe it ought to be conſider'd, whether the Fire was put in without any Order, and then the Perſon who put it in ſhall be liable; but if he had Orders to do it either from the Maſter or his Servant, the Maſter ſhall be anſwerable for his Servant's Negligence in keeping it after it was put in. If a Maſter, as a Shoe-maker, and the like, ſhall wound or kill his Servant by giving him Correction or corporal Diſcipline, he ſhall be liable to the *Aquilian* Law, if ſuch Diſcipline and Correction was immoderate: But if it was gentle, and not immoderate, and the Perſon loſes an Eye thereupon by Chance, he ſhall not be liable; becauſe the Diſcipline was not with a Deſign of doing an Injury, but for the ſake of Admonition and Inſtruction.

An Action for Damage done, accrues to any Perſon as well as to him who ſuſtains the Damage, as to the Maſter of the Perſon injur'd. But a *Freeman* wounded has not a *direct* Action from hence, becauſe a Man cannot be called a Proprietor of his own Body, and ſay that his Eſtate is *directly* diminiſhed by ſuch Wound [i]. Yet by Equity and Interpretation of Law, he may be relieved here for the Loſs of his *Time*, and the Charge of his Cure, for by that Means his Eſtate has been impair'd. It is juſt alſo, that the Torment and Pain, which the Sufferer has underwent, ſhould be regarded, though it cannot be directly included under this Action. Regard ought alſo to be had to the Deformity brought upon the Body, (eſpecially in the Caſe of a young Virgin.) For, indirectly, one's Preferment in the World, in all Probability, may be hinder'd or leſſen'd by it, and a Man is made contemptible in Converſation upon this Account by Buffoons and petulant Perſons. In the Defence of my Houſe, I may pull down the Houſe of my Neighbour, which is on Fire, to preſerve my own [k]. The People aſſembled are Judges of this Neceſſity; for there may not be an Opportunity to conſult the Magiſtrate, but he that was the Occaſion ſhall anſwer the Damages [l].

[i] D. 9. 2. 13.

[k] D. 9. 2. 49. 1.

[l] D. 9. 2. 30. 3.

If Damage be inflicted or committed in a Matter that relates to ſeveral, each Perſon may (according to *Caſtrenſis* [m]) have an Action according to the reſpective Share of his Intereſt. Thus, if a Treſpaſs be committed in ſeveral Matters relating to one and the ſame Perſon, he may proſecute each of theſe Offences ſeverally, becauſe there are ſo many Offences as there are Things. If more Perſons than one were the Authors of the Damage, all are liable by this Law [n] to pay the whole Recompence; and if one pays the Whole, that does not diſcharge his Companion, for the Law is Penal and Particular. But *Quære*, whether this ſeems reaſonable as to the Recompence, though it may be allowed as to the Puniſhment? The Recompence muſt be certain, and not uncertain: For if I cut your Nets, I muſt not be anſwerable for all the Fiſh which poſſibly might be caught with them. The Heir of the Perſon wounded, or of him whoſe Goods have been impaired, may bring this Action [o]; but not againſt the Heir of him who did the Damage, for that was Perſonal, unleſs the Heir has been enriched by the Damage [p]. And this Action is given not only to the true

[m] Conſ. 424. lib. 1.

[n] D. 9. 2. 11. 2.

[o] D. 9. 2. 23. 8.

[p] C. 4. 17. 1.

Proprietor, but even to others that have a *Special* Poſſeſſion; except that
[q] D. 9. 2. 11. 9. Perſon who hath Poſſeſſion by *lending* [q].

[In *England*, and in other Countries, the Action under this Head of the *Aquilian* Law is now no more penal than the other; for the Aggreſſor only pays the Value of the Damage, and no
[r] Inſ. h. t. more. See *Groenw. de Legib. Abrog.* [r]. Yet in *England* there may be a Criminal Proſecution alſo by Way of Indictment, on an Aſſault *Vi & Armis*, and the Court will fine the Offender. If any one of Malice forethought, ſhall cut out or diſable the Tongue, put out the Eye, ſlit the Noſe, or cut off the Noſe or Lip, or cut off any Limb or Member of another, with an Intent
[s] 22 & 23 Car. II. to maim or diſfigure him, it is Death [s].]

Damage may be proved by the Oath of him who has ſuffer'd and under-
[t] C. 8. 4. 9. Jaſ. ib. gone the ſame [t]: And right Reaſon confirms this Truth from the Difficulty of the Proof ariſing thereupon, and likewiſe in Hatred of the Perſon that does the Damage. As for Example: If a Perſon expels or turns me out of a Houſe, where I had my Furniture or Houſhold-Goods, I cannot by Law prove this Damage (if I would) by Witneſſes that are of the
[u] In L. 5. D. 12. 3. Family, as *Baldus* obſerves [u], and much leſs can I prove this Matter by Strangers, becauſe they cannot ſay that the Things which were in the Houſe were mine, and thus the Proof of my Cauſe would be deficient: Wherefore, the Damage ſhall be proved by the Oath of the Party that ſuſtains the ſame; for in Aid of Proof where other Proof cannot be had,
[x] In L. 9. C. 8. 4. [y] In L. 4. C. 3. 35. we muſt abide by the Oath of the Party. See *Bartolus* [x] and *Baldus* [y]. And this is ſo far true, that by the *Civil* Law an Appeal does not lie from
[z] Jaſ. in L. 9. C. 8. 4. ſuch a Sentence, though it be otherwiſe by the *Canon* Law [z]. But to the End that an Oath ſhould be given to the Party againſt the Delinquent, two Things are jointly requir'd, *viz.* Difficulty of Proof, and that the
[a] Bart. in L. 5. D. 12. 3. Defendant was guilty of ſome Offence or Fraud [a]; and this holds good not only in Civil, but alſo in Criminal Matters. But though Damages and the Value of Things by Force taken away, may be proved by the Oath of the Party that ſuffers the ſame; yet a previous Taxation of the Judge
[b] C. 8. 4. 9. is held neceſſary hereunto [b]. Again, This holds true in every *emergent* Damage, as well as in reſpect of *expulſive* and *compulſive* Violence, as in regard to *ablative* and *turbative* Violence. *Anton. de Butrio* aſſerts, that the Eſtimation of Damage is only proved by Oath in *expulſive* and *ablative* Force.

TIT. XXXVI.

Of what the Law calls Nunciatio Novi Operis, *or of an Interdict and Injunction to hinder what is doing, or intended to be done againſt another's Right, or to another's Damage,* &c.

HAVING in the foregoing Title conſider'd Damage as already done, I ſhall here diſcourſe of it as it is now doing, or deſigned to be done: As when I ſee *Titius* building a Houſe, or any other Work on my Ground, and I think myſelf to have the only Right in that Soil, as becauſe (perhaps) it is mine, or that I have ſome other Right in it, whereby he cannot build againſt my Will, I may forbid him to proceed in that Work; and this is permitted by an Edict of the *Prætor* under the Title of *Novi*
[c] D. 39. 1. 20. pr. *Operis Nunciatio* [c]. For if he will proceed in ſuch Work, let him go before

before the Judge, and put in Caution or Security to deſtroy the ſaid Work, in caſe it ſhall appear that he erects it contrary to Juſtice; and then he may proceed in his Work without any Damage to himſelf. But this Edict only relates to ſuch Works as are juſt now begun and in hand, and not to ſuch as are made and finiſhed [d]: For if they are already finiſh'd, the Edict has no Place, but an Interdict *Quod vi aut elam* lies to demoliſh ſuch Works, or an Interdict *Nè quid in Sacro Loco*, if they are made in a Sacred Place [e].

[d] D. 39. 1. 1. 1.

[e] D. ut ſupra.

By the ancient Law, whenever any Perſon built on my Eſtate, or on an Eſtate of mine, I might, by my own Authority, pull down and deſtroy ſuch Building [f]; and this (according to ſome Mens Opinions) I may do ſtill: But if a Perſon built on his own Eſtate, and did me a Damage by ſuch Work or Building, I could only, by the Rules of that Law, ſue him in a Petitory Action; and in the mean while he could not be hinder'd from going on with his Work; nor was he obliged readily to ſubmit or give credit unto me, touching the Damage [g], but that he might act and do as he thought fit on his own Eſtate [h]. Hence my Condition became very hard, becauſe the Judges were wont to ſhew great Favour to Works or Buidings already begun [i]; it being the Publick Intereſt, that Buildings ſhould not be deſtroy'd; and becauſe if the Perſon who erected the ſame was inſolvent, or if he gave not juſt Credit to my Complaint; I ought, at my own Charge, to demoliſh that Building which he had thus raſhly ſet up.

[f] D. 39. 1. 5. 10.

[g] D. 2. 10. 1. 2.

[h] D. 43. 20. 7.

[i] D. 1. 4. 7. 3. 1.

Whereupon the *Prætor*, afterwards, to obviate this Inconvenience, did, by an Edict, decree, as aforeſaid, That no one ſhould, for the future, erect any new Edifice to the Prejudice of another, after a Prohibition or lawful Admonition given him to deſiſt from ſuch new Work, 'till the Right was determin'd, or Caution given to anſwer the Fact, though he ſhould have a juſt Cauſe or Title for ſo doing [k]: And this Prohibition or Admonition is in our Law-books ſtiled *Novi Operis Nunciatio*; for the Word *Nunciatio* here, according to the *Gloſs* [l], ſignifies the ſame as a Prohibition. A *New Work*, is here ſaid to be that which is joined to the Soil; and the Building of ſuch, ſeems to contain a New Work: And he alſo is ſaid to make a New Work, who changes the ancient Form or Face of a Work [m]. But if a Perſon cuts down Trees, prunes his Vineyard, or mows his Corn, though he does a Work, yet it has no relation thereto; becauſe this Edict only includes ſuch Works as are made or erected on the Soil [n]. Thus this Inhibition has only a reſpect to Structures, and ſuch Things as adhere and cleave to the Soil, and not to Moveables; to Things of profane Uſe, and not to Things religious; to future Works, and not to Works already finiſh'd or made [o]. For the *Prætor* introduced the *Jus Nunciandi* againſt the Proceeding of a Work to be done, as he did the Interdict *Quod vi aut elam* in reſpect of a Work already done [p].

[k] D. 39. 1. 1. Pr.

[l] In L. 17. D. 39. 1.

[m] D. 39. 1. 1. 11. D. 39. 1. 21. 3.

[n] D. 39. 1. 1. 12.

[o] D. 39. 1. 1. 1.

[p] D. ut ſupra.

This Prohibition may be made either to the Maſter, or to the Workmen [q]; and the Judge may interpoſe and examine the Matter, upon a Complaint made to him, and not otherwiſe. But if ſuch Prohibition be made to the Workmen without acquainting the Maſter with it, and they go on to build, in Contempt of ſuch Inhibition; the Maſter, though he be an Infant or Madman, ſhall be obliged to pull it down at his own Coſt and Charges [r]. *Secondly*, This Prohibition may be made by Words alone, which is then practiſed when a Neighbour builds upon his own Eſtate, but contrary to the Service which is due to him [s]: Or it may be made by the Caſt of a Stone [t]; or by the Judge's Order, on imploring his Office herein. It may be made either in our own Name, or by the Means of another Perſon, and upon any Day whatſoever; and it proceeds even againſt abſent Perſons [u]. *Bartolus* ſays, [x] That the Cauſe of this Inhibition ought to be inſerted and expreſs'd, if it be deſired: but if it be not demanded or deſir'd,

[q] D. 39. 1. 5. 3.

[r] Arg. D. 39. 1. 5. 3 & 4.

[s] D. 39. 1. 5. 10.

[t] D. 39. 1. 1. 2.

[u] D. 39. 1. 1. 2.

[x] Conſ. 64.

it

it need not be inſerted. Yet, in the Proſecution of the Suit, it ought to be deduced and ſet forth in the Libel, as the Matter is in other Libels. Nor is it any Objection hereunto, to ſay, That an Heir appointed may forego the Heirſhip without aſſigning a Reaſon [y]; becauſe, in ſuch a Caſe, the Legataries are not aggrieved, unleſs it be by a Loſs of the Lucre [z]. But the Perſon who ſues out this Injunction or Prohibition does a Damage to the Party who builds, if he does not therein aſſign a Cauſe [a]. But I think *Raphael's* to be the better Opinion; *viz.* That the Perſon who ſues forth this Inhibition or Injunction is not obliged to alledge any Cauſe extrajudicially, though it be requeſted; but 'tis enough to do it in the Proſecution of the Suit, when he ſhall exhibit a Libel *in Cauſâ Nunciationis* [b]. And ſo ſays *Bartolus.* A Libel is a judicial Act; but this Prohibition is an extrajudicial Act. A Libel is not given to the Party on a Holiday; but this Inhibition may be made or ſerved on any Holiday [c].

[y] D. 36. 1. 4.
[z] D. 26. 2. 9.
[a] D. 27. 9. 5. 8.
[b] D. 39. 1. 5. 14.
[c] D. 39. 1. 1. 18.

Now, to the End that this Prohibition ſhould be valid, it ought to be made on one of theſe three Accounts; *viz.* 1*ſt*, either on the account of preſerving my own Right; or elſe, 2*dly*, on the ſcore of diverting ſome Damage that may enſue; or, 3*dly*, for the ſake of defending the Right of the Publick [d]. Of the firſt I ſhall give two Examples: As, *firſt*, when you build upon my Ground, as aforeſaid. And, *ſecondly*, when you build on your own Soil, and owe a Service to me *de altius non tollendo.* For if I forbid a new Work in either of theſe Caſes, I am ſaid to forbid it, on the account of conſerving my own Right. Touching the *ſecond*, I ſhall alſo here give an Inſtance: As, when you build upon any publick or private Ground, and I fear that my Houſe will be ruined or endamaged by ſuch Building, as being in the Neighbourhood; for, in ſuch a Caſe, I may forbid you, unleſs you will give Caution or Security *de Damno infecto*, to make good the Damage that ſhall enſue. And, in this Senſe, I am ſaid to forbid a new Work, for the ſake of avoiding that Damage which I dread from you. Touching the *third* Reaſon, I ſhall give three Examples: As, 1*ſt*, when the Work is made contrary to the known Laws of the Land. 2*dly*, when it is made contrary to the Edicts or Proclamations of Princes. And, 3*dly*, when it is made in any religious, ſacred, or publick Place. But when a Perſon erects a new Work on the Sea-ſhore, I may not forbid or hinder him, unleſs I fear it will incommode or ruin my Houſe which is built there.

[d] D. 39. 1. 1. 16.

Touching the Perſons that may bring this Interdict, or make this Prohibition, it is to be obſerved, That if the Work be erected in any publick Place, any one of the People may do it: But if it be in a private Place, then only he who has an Intereſt therein can do it, as he who conceives himſelf to have a Right in the Soil whereon it is built, againſt whoſe Will ſuch Work cannot be made. *Sempronius* had an Uſufruct in an Eſtate belonging to *Titius*. *Cornelius*, a Stranger, began to build thereon. *Sempronius* had a mind to forbid him: *Quære*, whether he could do it, or not? And it was held, That, as a Proprietor, I cannot do it, as being a third Perſon, becauſe I am not the Proprietor; but becauſe my Intereſt is concerned, I may do it as a Proctor. And I have alſo another Way or Remedy to effect it; for I may do it in a *real* Action, by ſuing for the Uſufruct, which is affected thereby, by bringing this Action againſt the Perſon that erects ſuch Work or Building; and I ſhall have a Judgment not to have ſuch Work go forward. See *Accurſius* on the Law here cited [e].

[e] D. 39. 1. 1.

If I forbid you the carrying on of a new Work, and you, in Contempt of ſuch Prohibition, proceed (notwithſtanding) in the Work; whatever you do therein after ſuch Prohibition ſhall be deſtroy'd, though the Soil on which it is built be your own [f]: And if you build, though I know

[f] D. 39. 1. 1. 7.

I know not what your Deſign is, yet I may forbid you proceeding therein g. But if I have forbidden you to proceed in a new Work, and we afterwards come to an Agreement herein that you may proceed, or the Judge, to whom this Matter is referred by way of Arbitration, determines in favour thereof, you may from henceforward ſecurely proceed on the Work h. Whether you build *de novo* on the old Foundation, or only take away Earth to make a Ditch in any Ground, I may not forbid you this: For a Man may repair a ruinous Houſe, and not be hinder'd; becauſe this is not making a new Work, but only repairing an old one i.

This Edict of the *Pretor* is call'd a Prohibitory Interdict, foraſmuch as it gives Relief againſt Things which may happen, and is not extended to Things paſt or perfected: For againſt theſe laſt we may have Relief by an Interdict *Quod vi aut elàm*, or by ſome other Remedies k, as aforeſaid. But ſometimes this Interdict is not obligatory; as when it is made by a Pupil, and the like l. If the Perſon to whom ſuch Prohibition has been made, ſhall proceed in his Work, before the Prohibition is relaxed by giving Security, and ſhall afterwards plead that he ought not to be hinder'd, for that he has a Right thus to build; the Judge ought to deny his Action of a *Nè vis fiat*, (which he might otherwiſe have), and proceed to interdict him in his Work m.

g D. 39. 1. 1. 8.

h D. 39. 1. 1. 9 & 10.

i D. 39. 1. 1. 11.

k D. 39. 1. 1. 1.

l D. 39. 1. 5. pr.

m D. 39. 1. 1. 7.

TIT. XXXVII.

Of Damage not yet done, *but fear'd to be done, call'd* Damnum infectum: *And of Damage which may be done to Eſtates by diverting the Courſe of Water, either by cutting Trenches from navigable Rivers, or throwing up Dams whereby Rainwater may be prejudicial; and of an Interdict or Injunction hereupon,* &c.

IT ſometimes happens, that we have no Action accruing to us for Damage done, unleſs Caution or Security be put in before-hand, which we call Caution *de Damno infecto* n; or, in *Engliſh*, Caution for *Damage not yet done or received*, but that which we fear will happen at ſome Time hereafter. Therefore, when a Neighbour foreſees that he is threatned with ſome Damage from ſome work erected or made by another Neighbour, he may take Care of himſelf by a Remedy at Law, ſtiled an Action *Damni infecti*; to the End that this Work ſhall not be ſo effected by his Neighbour, as to injure or endamage him. As when a Wall that is common to us both, does, by ſome Act or other by you done, ſo lean and incline itſelf on my Houſe, as when you pull any Thing away, or alter the ſame, I am in Danger: In this Caſe, I may have an Action at Law to hinder you from pulling down or altering that Wall o. And hereunto is added a *Pretorial* Remedy, or Remedy in Equity, which, by reaſon of the great Diſpatch which it requires, is committed to Municipal Magiſtrates p, and is called an Interdict or Injunction *de Damno infecto*.

n D. 39. 2. 2.

o C. 8. 5. 14. 1.

p D. 39. 2. 1.

This Remedy or Action is an extraordinary Remedy; and therefore, it only lies when all other Actions fail q. As when a Perſon that rents an

q D. 39. 2 32. fin.

3

Houſe, cannot, with Safety to himſelf, dwell in the Houſe which he rents, by reaſon of ſome Damage or Danger threatned him; he may, in ſuch
[r] D. 39. 2. 13. a Caſe, have this Remedy, if he cannot bring an Action *ex Conducto* [r]. But this Action or Remedy *de Damno infecto* may concur with ſeveral Remedies, provided they tend to different Iſſues or Events. Thus, he who has a ruinous Houſe, ſhall be obliged to give Caution *de Damno infecto* unto his Neighbour; and if he ſhall refuſe to do it, his Neighbour ſhall have the Poſſeſſion of the Houſe, by virtue of a ſecond Decree from
[s] D. 39. 2. 7. the Judge [s]. And if he will not give Caution then, nor ſuffer his Neighbour to enter on Poſſeſſion at the Command of the Judge, or ſome other Magiſtrate, the Judge may give his Neighbour an Action on the Caſe, to recover all that which he might have obtained, in caſe he had given Caution
[t] D. 39. 2. *de Damno infecto* [t]. If a Work be made and erected on the Bank of a publick River, or in ſuch River which threatens Damage to ſuch Perſons as live near the Place, or that navigate on the River, he who ſets up the Work, ought to give Caution to make good the Damage which ſhall
[x] D. 39. 2. 15. 2. happen through the Fault or Means of ſuch Work, within ten Years [x].

The Perſon who prays Caution *de Damno infecto*, ought to take an Oath,
[y] D. 39. 2. 13. 3. That he does not this out of Malice or Contumely [y]; and if the Judge then denies him his Decree, he has a good Action on the Caſe againſt the
[z] D. 39. 2. 4. 7. Judge, for ſuch Refuſal [z], which is an Action not barr'd by any Limita-
[a] D. 39. 2. 17. 3. tion of Time [a]. The Judge ought to decree this Caution to the Neighbour himſelf, if he be the Proprietor of the Houſe or Thing thus in Danger: For the Proprietor, as well as the Uſufructuary ought to have this Caution given him. If Damage happens before any Caution be deſir'd, the Owner is not bound to give this Caution; nor ſhall a Perſon be obliged to take away the Rubbiſh of a fallen Houſe, if he will leave the ſame as
[b] D. 39. 2. 6. a Derelict [b]. But if otherwiſe he does not take care to carry off the Rubbiſh, and he who receiv'd Damage, wou'd have it taken away, he may have an Injunction *de Ruderibus tollendis*, to compel the Perſon to remove it, or to leave it as a Derelict. But if the Perſon, whoſe Houſe is fallen, and has damaged his Neighbour thereby, has a mind, before Caution is given, to remove the Rubbiſh; inſtead of giving Caution, he may do it, even contrary to the Perſon whom he had damaged; provided he does three Things, *viz. firſt*, remove the Rubbiſh; *ſecondly*, give Caution touching any future Damage that ſhall happen from removing the Rubbiſh; and, *thirdly*, give Caution touching the Damage already done from the Fall of the Houſe.

If a Perſon has a ruinous Houſe, he ought not only to give Caution to his Neighbour that has the full Property in an Houſe, but likewiſe to him that has the Uſufruct in any Houſe that is contiguous to it, or in
[c] D. 39. 2. 18. the Neighbourhood [c]. A Building becomes dangerous, either from the Fault of the Workmanſhip, or from the Badneſs of the Soil on which it is erected. If a River ſhall, by the Rapidity of its Courſe, carry what belongs to me into your Houſe, or on your Land, I may have an Interdict or Injunction againſt any Force that ſhall be offer'd me, being willing to carry away my own Effects; provided I give Caution *de Damno infecto*. And ſo, if a River ſhall carry a Cruſt of your Land on mine, you may claim the Liberty of taking it away, provided you give this kind of Caution: And this holds true, if the Cruſt of your Land does not cleave to
[d] D. 39. 2. 9. 1. mine, and thus becomè one with mine [d]. And the ſame may be ſaid of a Tree belonging to your Eſtate, if a River ſhall carry it on mine: For if the Tree has not taken Root, you may demand it, otherwiſe not.

If there are ſeveral Owners of Houſes, that ought to give this Caution, and one of them does not do it, the Perſon likely to ſuffer ſhall be admitted into Poſſeſſion of his Part, and not into the Part of him who gives Caution:

Caution: But if no one gives Caution, the Perſon ſhall be admitted into the Poſſeſſion of all of them; and if ſeveral Perſons pray to be admitted, they ſhall be admitted equally by virtue of the firſt Decree [e]. If two Perſons are at Law or Strife about the Property of a ruinous Houſe, he in Poſſeſſion ought to give this Caution, who, if he gives Caution, and be afterwards caſt in his Suit, ſhall recover the Caution given by Pledges from the true Proprietor: And if he refuſes to give Caution, the Poſſeſſion ſhall be transferr'd on him who prays Caution [f]. Sometimes only ſimple Caution by Promiſe, or by a Man's own perſonal Security, and ſometimes Security by Sureties, called *Satiſdation*, is given in this Caſe [g]. *Titius* had a ruinous Houſe near to mine, and gave Caution *de Damno infecto* for a certain Time, *viz.* for a Year: When the Year is almoſt expired, and the Houſe not yet fallen, or no Damage done, I may apply to the Judge, and deſire to have the Time prolonged, and it ought to be done on Cognizance had of the Cauſe. But if the Judge cannot have Knowledge of the Matter, unleſs he goes to the Houſe itſelf, and by a View conſiders within what Time the Houſe may fall, he may commit this Matter to ſome Municipal Magiſtrate of the Diſtrict, who lives near the Houſe [h]. If the Judge orders a Perſon to give this Caution within a certain Time, as ten Days, for Example, and he does not do it, the Perſon in danger may be admitted in Poſſeſſion of the whole Houſe, if it be entirely ruinous, or elſe into Part of it. And if he cannot have Poſſeſſion by virtue of this Order, he may have an Action on the Caſe (as aforeſaid) before the Magiſtrate for Damages [i]. An Action on the Caſe likewiſe lies againſt the Magiſtrate, if he ſhall not do as the Law directs herein, and the Perſon ſhall have Damages given him [k].

[e] D. 39. 2. 5. 1.
[f] D. 39. 2. 39. 1.
[g] D. 39. 2. 7.
[h] D. 39. 2. 4. pr.
[i] D. 39. 2. 4. 1.
[k] D. 39. 2. 4. 4.

I have before mention'd a ſecond Decree, becauſe by a firſt Decree the true Poſſeſſor is not ejected or ouſted of his Poſſeſſion: For this is not ſuch an Embargo or Arreſt on his Eſtate, but that he may go on and improve the ſame, and receive the Fruits thereof. But if the true Poſſeſſor neglects to give Caution on the firſt Decree, and continues in his Contumacy, he ſhall be thrown out of Poſſeſſion by a ſecond Decree [l]. But a ſecond Decree ought not to tread immediately on the Heels of a firſt Decree, but there ought to be ſome Interval of Time, that the adverſe Party may ſee whether the true Poſſeſſor be negligent or not: And the Perſon then ſeems to be negligent, when he has no juſt Impediment, and does not come to diſcharge the Arreſt or firſt Decree. Now this Interval of Time is to be left to the Diſcretion of the Judge [m]. If there are ſeveral Perſons admitted into Poſſeſſion by virtue of a firſt Decree, whether they be admitted jointly or ſeverally, they are all equally in Poſſeſſion, becauſe each Perſon is deemed to be admitted *in Solidum*, and not according to the Proportion of Damage which he fears: And therefore, they are Parties unto each other by a Concurrency. But if one Perſon firſt comes to a ſecond Decree, and another prays to have Caution given him, the ſecond is only in Poſſeſſion, and not the firſt, if Caution be not given him, *viz.* not he againſt whom Admiſſion was made by a firſt and ſecond Decree, leſt he ſhould interfere with the other [n]. The Effect of a firſt Decree is, that the Perſon admitted thereby has not the ſole Poſſeſſion of the Thing, but only detains the Poſſeſſion in concurrence with the true Poſſeſſor: And therefore, this kind of Poſſeſſion is called *Poſſeſſio tædiatatis*, becauſe it is irkſome to the adverſe Party, compelling him to admit the feigned Poſſeſſor to come to the Place whenever he pleaſes.

[l] D. 39. 2 15. 20.
[m] D. 39. 2. 15. 21.
[n] D. 39. 2. 13. 11.

I have ſaid, that Municipal Magiſtrates may order this Caution to be given, though it be a Matter *Mixti Imperii*, (and ſuch Matters as are Matters of *Imperium* do not belong to them, but only ſuch as are of ſimple Juriſdiction): Yet in this Caſe it is otherwiſe, by reaſon of the Danger there

there is in Delay; becauſe if the Houſe ſhould fall before Caution was given, the Proprietor would not be liable to repair the Damage. And therefore, it is not lawful in this Caſe to appeal from the Magiſtrate's Order, becauſe there is Danger in Delay. After the Magiſtrate has enjoined Caution, and the Perſon is contumacious in giving it, Caution is looked upon as given: And therefore, the Magiſtrate cannot preciſely compel the Perſon by an Arreſt, Mulct, *&c.* to give Caution; but he may proceed to a ſecond Decree. If a Municipal Magiſtrate ſhall neglect what he may and ought to do herein, an Action on the Caſe lies againſt him for the whole
[o] D. 39.2.47. Damage, and not a penal Action [o]. This Petition ought to be made to the
[p] D 39.2.4.8. Judge, when he is ſitting on the Bench in Court [p], but at any Time to the Municipal Magiſtrate.

Unto this Title I ſhall refer the Buſineſs or Damage which may be done to Eſtates by diverting the Courſe of Water, either by cutting Trenches from navigable Rivers, or throwing up Dams, whereby the Rain-water may be prejudicial to a Neighbour, though they make two diſtinct Titles in the *Digeſts*. For if a Perſon has made a Work on his Eſtate, whereby Rain-water endamages my Lands, I may have an Action *aquæ pluviæ arcendæ* againſt him, to compel him to turn or divert the Water from me: And this Action has Place, even though no Damage has yet actually happen'd, provided ſuch Work be made from whence I may apprehend or
[q] D.39.3.1.pr. fear Damage [q]. This Action lies, when you have made a Work, whereby Rain-water flows in a greater Abundance than otherwiſe it is naturally wont to do, and does me Damage, which it did not do before: For if I had the
[r] D.39.3.1.1. ſame Damage before ſuch Work made, this Action does not lie [r]. There was a Marſh Land between the Eſtates of *Titius* and *Flaccus*: The Water came on *Flaccus*'s Land, and this he bore with Patience for a long Time. But at length he made a ſtrong Dam or Bank on his Eſtate, and the Marſh thus increaſing from the Rain-water, the Water could not by this Means come on his Land as it was wont, but enter'd on the Eſtates of *Titius* and other Neighbours. In this Caſe it was held, That *Titius* and the other Neighbours might have an Action *aquæ pluviæ arcendæ* againſt *Flaccus*, whereby he might be compelled to deſtroy the Work which he had made, and to
[s] D. 39.3.1.2. reduce the Rain-water to its ancient Courſe or State [s]. My Neighbour made a Work on his Eſtate for the ſake of tilling his Land, by which Work the Rain-water did me Damage: *Quære*, Whether I may have an Action againſt him, to oblige him to deſtroy the ſame? And the Lawyer *Quint. Mutius* held, That for a Work done by a Plough or other Inſtrument,
[t] D. 39.3.1.3. for the ſake of tilling of Land, this Action does not lie [t]. For if a Man makes a Ditch or Trench for the ſake of draining his Land, and not on the Account of doing Damage, he may lawfully do it. I have ſaid, *when a Work is made by the Plough:* But then this is reſtrain'd to that Caſe, when a Perſon cannot ſow without ſuch Works; for if he can ſow without Water-Furrows, *&c.* then theſe Works come within this Action, and may be
[u] D. 39.3.1.2. deſtroyed [u].

The End of the FIRST VOLUME.

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MVSEVM BRITANNICVM